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English Ruling Cases
CITED "E. R. C."
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The Extra Annotations following this volume should invariably be examined. They give every citation of the cases reported in this volume of E.R.C. in the decisions of this country and Canada, also in the more important English decisions, indicating which citation the exact point involved and the disposition made by the Court. An additional feature is the analysis and citation of these cases in the leading text books and Annotated Reports.

English Ruling Cases

ARRANGED, ANNOTATED AND EDITED

BY

ROBERT CAMPBELL, M. A.
OF LINCOLN'S INN
ASSISTED BY OTHER MEMBERS OF THE BAR

WITH AMERICAN NOTES

BY

IRVING BROWNE

VOL X.

EASEMENT—ESTATE

EXTRA ANNOTATED EDITION
OF 1916

ROCHESTER, N. Y.
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PREFACE TO VOLUME X.

THE present volume marks an important stage.

The work has now progressed far enough to enable the Editor to furnish with advantage a long-felt *desideratum*, — a General Index. This Index will be published, together with consolidated Tables of English and American Cases, and ADDENDA up to date, as soon as possible after the issue of this volume. This General Index will not only serve as a guide to the matter contained in the ten volumes already published, but will also indicate the principal and subordinate titles under which the remaining topics of this work will be treated. The practitioner will thus — while having before him a survey of the entire work — have already in a collected form and easily accessible all the more important decisions now scattered through a number of text-books.

Some readers may, perhaps, think an apology due for the long excursion (pp. 803–821 of this volume) into the old law upon contingent remainders: Mr. Browne's notes, however, show that a full consideration of the topic is amply justified in America. The English notes, which are substantially Mr. Randall's, deal at some length with cases the practical importance of which, for England, has been

minimised by modern statutes. But where a well-settled rule of case law has been altered by modern statutes, however ingeniously framed to defeat the rule, it is impossible to say that cases will not arise where the old rule becomes of importance. At all events, an intelligent knowledge of the old cases is still part of a complete equipment for the real property lawyer.

R. CAMPBELL.

November, 1896.

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RULING CASES.

EASEMENT.

SECTION I. Nature of Easements.
SECTION II. Acquisition of Easements.
SECTION III. Particular Easements.
SECTION IV. Profits *à prendre*, and rights of common.
SECTION V. Extinction of Easements.
SECTION VI. Remedy for disturbance of Easements.

SECTION I. — *Nature of Easements.*

No. 1. — ACKROYD *v.* SMITH.

(C. P. 1850.)

RULE.

AN easement can be claimed only as accessory to and for the benefit of a tenement; and a vendor of land cannot annex as incident to the land a right in the nature of an easement, unconnected with the enjoyment or occupation of the land.

Ackroyd v. Smith.

19 L. J. C. P. 315–320 (s. c. 10 C. B. 164; 14 Jur. 1047).

Trespass. — Way in Gross. — Easement. — Right of Assignee of Land and Appurtenances. [315]

In an action of trespass the defendants justified under a right of way supposed to have been conveyed to them by J. S. The deed was set out on oyer by the plaintiff, and, in the description of the parcels conveyed, contained the following: — Together with all ways, &c., particularly the right and privilege to and for the owners and occupiers of, &c. (the premises conveyed) and all persons having occasion to resort thereto, of passing and repassing for all purposes in, over, along, and through a certain road, &c. (describing the *locus in quo*). The defendants in their plea, after stating the conveyance

No. 1. — Ackroyd v. Smith, 19 L. J. C. P. 315, 316.

to J. S. in the terms of the deed, and deducing their title from J. S. under a conveyance to them of the same "lands, tenements, hereditaments, premises, and appurtenances," as those conveyed to him by the above-mentioned deed, alleged that they being owners and occupiers of the premises, and having occasion for their own purposes to use the right and privilege granted by the conveyance to J. S., did on foot, &c. pass and repass for the purposes of them, the defendants, along the said road, &c. (the *locus in quo*).

Held, first, that the right granted by the conveyance to J. S. was not restricted to a user of the road for purposes connected with the enjoyment of the land conveyed to him by the same deed. Secondly, that the conveyance to the defendants of the land conveyed to J. S. and its appurtenances, could not give the defendants, as owners and occupiers of that land, a right of road over other land for purposes unconnected with the enjoyment of the land of which they were owners and occupiers, and therefore did not pass to them the rights which J. S. had over the *locus in quo*.

A vendor cannot create rights not connected with the enjoyment of the land and annex them to it; nor can the owner of land render it subject to a new species of burden, so as to bind it in the hands of an assignee.

Trespass for breaking and entering the plaintiff's close, in the parish of Bradford, in the county of York (describing it by abuttals), and with feet in walking, and with horses and carriages, damaging and spoiling the grass, &c.

Fifth plea, that long before and at the times of committing the trespasses in the declaration mentioned, and before and at the time of making the indenture of release and grant hereinafter next mentioned there was, and from thenceforth [* 316] *hitherto hath been and still is, in and upon the said close in which, &c., a certain road running between a certain other road called the Bradford and Thornton Turnpike Road, and a certain lane called Legram's Lane, and that long before any of the times of committing any of the trespasses, and before and at the time of making the indenture of release and grant hereinafter mentioned, to wit, on, &c., one E. C. Lister was seised in his demesne as of fee, as well of and in the soil of the road in this plea first mentioned, as of and in the close in which, &c.; and that before any of the times of committing any of the trespasses E. C. Lister was also seised in his demesne as of fee of and in the lands, tenements, hereditaments and premises in the hereinafter next mentioned indenture of release and grant mentioned, and being so seised by lease and release of the 26th and the 27th of September, 1837, conveyed to John Smith and his heirs a certain close and certain plots, pieces, or parcels of land or ground

in the indenture of release particularly described; and the said E. C. Lister did, in and by the last-mentioned indenture, grant to the said John Smith, his heirs and assigns, that he and they respectively being owners and occupiers for the time being of the said close, pieces or parcels of land so released as aforesaid, and all persons having occasion to resort thereto, should have the right and privilege of passing and repassing with or without horses, cattle, carts and carriages for all purposes in, over, along and through the said road in this plea first mentioned, or in, over and through some other road in the same direction to be formed by and at the expense of the plaintiff, his heirs or assigns, such other road nevertheless passing the southeast corner of a certain warehouse of the plaintiff, he, the said John Smith, his heirs and assigns, paying to the plaintiff, his heirs and assigns, a proportionate part of the expense of repairing the said road according to the use thereof by him or them, the said John Smith, his heirs and assigns, not exceeding the actual damage done to the road by the wear and tear thereof by the said John Smith, his heirs and assigns. (The plea then deduced a title in the defendant Samuel Smith to a life estate in one moiety "of the said lands, tenements, hereditaments, premises and appurtenances," and the defendant Thomas Smith to an estate in fee in the other moiety thereof, and alleged possession of both before and at the times when, &c.) And the said defendants being so seised and owners as aforesaid, and being in and having such possession and occupation as last aforesaid, and having occasion for their own purposes, to use the right and privilege in that behalf granted in and by the indenture of release and grant in this plea first mentioned, did, on foot and with their horses, &c., at the said several times, &c., pass and repass for the purposes of them, the defendants, in, over, along and through the road in this plea first mentioned, so being as aforesaid in and upon the said close in which, &c., as they lawfully might, &c.

The plaintiff craved oyer of the deed, which was set out. It was between the plaintiff of the first part, R. Tolson of the second part, E. C. Lister (to whom the plaintiff had mortgaged the premises) of the third part, Samuel Smith and Thomas Smith, the defendants, of the fourth part, and John Smith of the fifth part, and the plaintiff as well as Lister was made a conveying and granting party. In the description of the parcels conveyed were

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the following words: — "Together with all ways, paths, passages, particularly the right and privilege to and for the owners and occupiers for the time being of the said close, pieces or parcels of land" (the premises conveyed) "or any of them, and all persons having occasion to resort thereto, of passing and repassing with or without horses, &c., for all purposes, in, over, along and through a certain road" (describing the road on which the trespasses were committed set out in the fifth plea) "he, the said John Smith, his heirs and assigns, paying," &c. (as in the fifth plea) "to be determined in case of difference by two persons, one to be chosen by each party, and if they differ, by an umpire to be appointed by them, waters, watercourses, springs of water (particularly the right, privilege and enjoyment for the purposes of the trade of a dyer or otherwise, of all the water of the Crook adjoining, &c.), mines, minerals, quarries, rights, liberties, privileges, [* 317] easements, profits, * commodities, emoluments, hereditaments and appurtenances to the said close, pieces or parcels of land, or any part thereof belonging or in anywise appertaining or with the same or any of them or any part thereof, now or at any time heretofore held, occupied or enjoyed, or taken or known as part thereof or appurtenant thereto."

Special demurrer — assigning for causes (amongst others) that the defendants had not alleged that the trespasses were committed in passing and repassing to and from the land conveyed by the deed, but in passing and repassing for the purposes of the defendants generally, thereby claiming a more extensive right than that granted by the deed: also that the plea was ambiguous.

Joinder in demurrer.

Tomlinson, in support of the demurrer.[1] The right of way set up in the plea is more extensive than that granted by the deed, which is only a right to pass and repass to and from the land conveyed by it.

[Maule, J. Would not the defendants have a right to use it to go anywhere?]

No; only for purposes necessary for the enjoyment of the premises, with reference to the use to which they were intended to be put. *Cowling* v. *Higginson*, 4 M. & W. 245; 7 L. J. (N. S.) Ex. 265. The plea here is according to the letter, but not accord-

[1] June 1, before Maule, J., Cresswell, J., and Talfourd, J.

ing to the legal effect of the grant. The words "all persons having occasion to resort thereto" show that the grant is only for the purpose of going to and from the premises. Such an unlimited right of passage over another man's land is not only most improbable, but at variance with the law as laid down in *Staple* v. *Heydon*, 4 Mod. 3: "a man cannot claim a way over my ground from one part thereof to another." Com. Dig. tit. "Chim." D. 1.

[MAULE, J. Suppose I have a right of common in A.'s waste and also on A.'s other waste and the land between the two wastes is A.'s, may not A. grant me a way from the one waste to the other?]

Another objection to the plea is, that it states no termini, which must be stated in pleading a private right of way. "It is not good if he does not say *a quo termino ad quem* the way goes." Com. Dig. tit. "Chim." D. 2, *Rouse* v. *Bardin*, 1 H. Bl. 351, and *Simpson* v. *Lewthwaite*, 3 B. & Ad. 226, 1 L. J. (N. S.) K. B. 126.

[MAULE, J. The words "the said road" in the plea show what road is meant, so that the termini are in effect stated.]

Another principle is at variance with such an unlimited right of way as that claimed by this plea; for the Courts will always presume that the right is intended to be limited to the extent necessary for the occupation of the premises with which it is granted, and the right so limited cannot be enlarged by the act of the parties. Com. Dig. D. 5, *Lawton* v. *Ward*, 1 Ld. Raym. 75; *Howell* v. *King*, 1 Mod. 190; *Senhouse* v. *Christian*, 1 T. R. 560 (1 R. R. 300); *Dand* v. *Kingscote*, 6 M. & W. 174, 9 L. J. (N. S.) Ex. 279; and *Allan* v. *Gomme*, 11 Ad. & E. 759, 9 L. J. (N. S.) Q. B. 258.

Such a right of way as that granted by this deed is not assignable. "If license be granted me to walk in another man's garden, or to go through another man's land, I may not give or grant this to another." Shep. Touch. c. 12, p. 239. The same doctrine is laid down in 2 Black. Com. 35, and applies also to the case of a grant of common *sans nombre*. *Weekly* v. *Wildman*, 1 Ld. Raym. 405. But if it were assignable at all, the right of way here is not assigned. The deed only conveys the premises and the appurtenances. The word "appurtenances," if it can pass a right of way at all, passes such a way as is essential to the enjoyment of the land or house conveyed, not a way necessary

for the enjoyment of some other lands or houses. *Solme* v. *Bullock*, 3 Lev. 165. But it has been doubted whether a right of way can pass as appurtenant. 3 Salk. 40, and *Godley* v. *Frith*, Yelv. 159.

[* 318] *[Maule, J. Suppose a man has a close with a right of way from it to another's close, would not a grant of the close "with the way appurtenant thereto" pass the way?]

The way might then pass as an incident to the land granted, but the word "appurtenant" will not assist to pass a way not incidental to the enjoyment of the land itself. *Barlow* v. *Rhodes*, 1 Cr. & M. 439, 2 L. J. (N. S.) Ex. 91, and *Plant* v. *James*, 5 B. & Ad. 791, 3 L. J. (N. S.) K. B. 64. Lastly, the plea is ambiguous. It merely states that the defendants passed and repassed for their own purposes, not stating the facts from which such conclusion ought to be drawn, and not giving the plaintiff an opportunity of newly assigning. *Dovaston* v. *Payne*, 2 H. Bl. 528 (3 R. R. 497), shows that such rights should be shown by the pleading to have been strictly pursued.

T. F. Ellis, *contra*. The two questions for the decision of the Court are, first, what right did the original grantee take? secondly, if he took a right to use the way for all purposes, and not merely for the purpose of passing to and from the land conveyed, could he assign it over to one occupying the same land? As to the first point. The words are as general as possible It is a grant of a way for all purposes whatsoever over A.'s land made by A. to B. There is no rule of law preventing such a grant; and it is clear from the judgment of the Court of Exchequer in *Wood* v. *Leadbitter*, 13 M. & W. 838, 14 L. J. Ex. 161, that the Court there never doubted that such a grant would be good, though a license giving the same right would be revocable. It is not necessary to contend that all the formal requisites of pleading a right of way strictly so called are here complied with. There may be a right of passage over land, distinct from an ordinary right of way. This may be inferred from the judgment in *Wood* v. *Leadbitter*; and *Coble* v. *Allen*, Hut. 13, presents an example of such a right. In such a case it would not be necessary that any termini should be stated. In *Cowling* v. *Higginson* there was nothing corresponding with the words "for all purposes," on which the defendants here rely. The fact of a sum being payable, proportioned to the amount of enjoyment of the right, makes

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it more probable that such a right should be granted. The point cited from the case of *Staple* v. *Heydon* applies only to a way proper from A. to B., not to such a right as here contended for; so also do the cases cited as to a right not being enlarged by act of the parties.

Secondly, if an unrestricted right of passage was granted, can it be assigned? The word "assigns" being used shows clearly that it was intended to be assigned. In order to ascertain whether this right was incidental to the enjoyment of the premises, it must be considered what is the main nature of the grant of the premises, and whether the right claimed is a right of the same nature as the right to the premises with which it is claimed. It is contended that the right is not limited to the mere going to and from the door of the house, but that it resembles a right to walk about in a park near a house, or the right to a pew in a church to be enjoyed with a house, both of which might clearly be assigned with the house itself as part of the thing granted. The remarks on *Taylor* v. *Waters*, in the judgment in *Wood* v. *Leadbitter*, show that the Court there took it for granted that such a right as this was assignable. The doctrine of a right of way not passing as appurtenant to land applies only to a right of way proper, not to an easement over land such as the defendants claim. Lastly, there is no ambiguity in the plea, because no purpose can be conceived for which the defendants had not a right to pass and repass along the road in question. In *Dovaston* v. *Payne* other circumstances besides those pleaded might or might not have brought the case within the right claimed. Here there are no circumstances under which the defendants have not the right they claim, to pass and repass along this road.

Tomlinson, in reply. The principle of *noscitur a sociis* applies. This must be considered a way in the ordinary sense of
the word. It is claimed as such by the defendants, and [319]
comes under the class "ways used and enjoyed" in the deed under which the defendants claim. None of the cases cited shows that such a right is assignable. And if assignable, it is not assigned. The case of a pew is not analogous, because that is annexed to a house, and not to land. As to the ambiguity of the plea, it does not even state that the defendants used the way as occupiers.

Cur. adv. vult.

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Judgment was now delivered by —

Cresswell, J. [who after stating the pleadings as above, proceeded as follows]. In support of the demurrer, it was contended, first, that the road granted was only for purposes connected with the occupation of the land conveyed, and therefore was not sufficient to support the justification pleaded; and, secondly, that, if the grant was more ample, and gave to the grantee a right of using the road for all purposes, although they might not be in any way connected with the enjoyment of the land, it would not pass to an assignee of the land; and therefore the defendants could not claim it under a conveyance of the land with the appurtenances. On the other hand, it was contended that the right, created by deed, might be assigned by deed, together with the land, and was large enough to maintain the justification pleaded. Upon consideration, we have come to the conclusion, that the plaintiff is entitled to our judgment on the demurrer. If the right conferred by the deed set out was only to use the road in question for purposes connected with the occupation of the land conveyed, it does not justify the acts confessed by the plea. But if the grant was more ample and extended to using the road for purposes unconnected with the enjoyment of the land (and this we think is the true construction of it), it becomes necessary to decide whether the assignee of the land and appurtenances would be entitled to it. In the case of *Keppel* v. *Bailey*, 2 Myl. & K. 517, the subject of covenants running with the land was fully considered by Lord Chancellor Brougham, and the leading cases on the subject are collected in his judgment. He there says, in page 537, "The covenant (that is, such as will run with the land) must be of such a nature as to inhere in the land," to use the language of some cases, or "it must concern the demised premises and the mode of occupying them," as is laid down in others; "it must be *quodammodo* annexed and appurtenant to them" as one authority has it, or as another says "it must both concern the thing demised, and tend to support it, and support the reversioner's estate." Now, the privilege or right in question does not inhere in the land, does not concern the premises conveyed, or the mode of occupying them. A covenant therefore that such a right should be enjoyed would not run with the land. Upon the same principle it appears to us, that such a right, unconnected with the enjoyment or occupation of land, cannot be annexed as an incident to it, nor can

a way appendant to a house or land be granted away or made in gross; for no one can have such a way but he who has the land to which it is appendant. Bro. Abr. tit. "Graunt," pl. 130. "If a way is granted in gross, it is personal only, and cannot be assigned. . . . So common in gross *sans nombre* may be granted, but cannot be granted over," per Chief Justice TREBY, in *Weekly* v. *Wildman*. It is not in the power of a vendor to create any rights not connected with the use or enjoyment of the land, and annex them to it, nor can the owner of land render it subject to a new species of burden so as to bind it in the hands of an assignee. "Incidents of a novel kind cannot be devised and attached to property at the fancy or caprice of any owner," per Lord BROUGHAM in *Keppel* v. *Bailey*. This principle is sufficient to dispose of the present case. It would be a novel incident attached to land, that the owner and occupier should for purposes wholly unconnected with that land, and merely because he is the owner and occupier have a right of road over other land; and it seems to us that a grant of such a privilege or easement can no more be annexed so as to pass with the land than a covenant for any collateral matter. The defendants therefore, as assignees, cannot avail themselves *of the grant to John Smith, and our judgment [*320] must be for the plaintiff.

Judgment for the plaintiff.

ENGLISH NOTES.

Bailey v. *Stevens* (1862), 12 C. B. (N. S.) 91, 31 L. J. C. P. 226, 8 Jur. N. S. 1063, 6 L. T. 356, was an action of trespass for cutting down and carrying away trees growing in the close of the plaintiff. The defendant pleaded an immemorial enjoyment of a right in one A., the owner in fee of a close called Bloody Field, and all those whose estate he had, and his and their tenants to enter the close of the plaintiff, and to cut down and to convert to their own use the trees growing there, such right being claimed as appurtenant to the close of the said A., but the plea did not allege that the timber so taken was to be used in any way in or about the said close of A. The defendant averred that he was a tenant of A. and that he cut the trees in exercise of such right. Held, that the plea was bad, as the right claimed being a right in gross could not pass with the occupation of the land.

The plaintiff, owner of a house adjoining a place in which an ancient market was held, had exercised from time immemorial a right to erect stalls in front of his house on market days. Such a right was held

sufficiently connected with the enjoyment of the house to be claimed as appurtenant thereto: and, the presumption being that the right had been granted by the corporation who were owners of the market and lords of the manor, the corporation were not entitled, as against the plaintiff, to remove the market elsewhere, *Ellis* v. *Mayor of Bridgnorth* (1863), 15 C. B. (N. S.) 52, 32 L. J. C. P. 273, 9 Jur. N. S. 1078, 8 L. T. 668, 12 W. R. 56. In *Thorpe* v. *Brumfitt* (1873), L. R. 8 Ch. 650, P. was the owner of an inn, the yard of which was approached by a passage over the adjoining property. M., the owner of that property, and P. agreed to alter their boundary, and substitute a new passage for the old one. M. accordingly in 1854 conveyed to P. a small strip of land reaching across the end of the new passage where it entered the yard, and granted to P., his heirs and assigns, "rights of way at all times and for all purposes along a passage intended to run between the piece of land thereby conveyed and a street called the Tyrrells." By another deed P. released his rights of way over the old passage. The plaintiff and the defendant were lessees of P. and M. respectively. It was held that the right of way was not a right in gross, but was appurtenant to the property occupied by the plaintiff, so that his lease gave him a right to the enjoyment of it. The principal case was explained.

It will be convenient here to note the distinctions between easements and other classes of rights which are similar to but not on all fours with them.

Easements have been frequently confused with rights which have been termed natural rights. There is a difference both in the inception of the rights and in their legal consequences. Natural rights arise from the natural position of a tenement. They are attached by law to the tenement and are in their nature proprietory rights. Easements, on the other hand, arise by express or implied grant. Easements arising from implied grants require a certain period for their perfection; natural rights require no such extraneous help of time. Examples of what are termed natural rights are the right of support to land in its natural state (see discussion in *Dalton* v. *Angus*, No. 8, p. 98 *et seq. post*); the right of a riparian proprietor to the natural flow of running water, *Kensit* v. *Great Eastern Railway Co.* (1883), 23 Ch. D. 566, 52 L. J. Ch. 608.

Easements again must be distinguished from rights given by custom. See *Mounsey* v. *Ismay*, No. 1 of "Custom," 8 R. C. 275.

An easement must also be distinguished from a license. An easement can be expressly granted only by an instrument under seal; whereas a license need not be contained in such a solemn instrument. "A license properly passeth no interest, nor alters or transfers property

in anything, but only makes an action lawful, which without it had been unlawful." Per VAUGHAN, C. J., in *Thomas* v. *Sorrell*, Vaughan's Rep. 351.

Licenses are of two kinds, viz., simple or revocable, and coupled with a grant or irrevocable. Simple licenses are revocable at the will of the grantor, and are revoked *ipso facto* by the grantor conveying the land to another, *Wallis* v. *Harrison* (1839), 4 M. & W. 538, 8 L. J. Ex. 44; or by his doing any other act preventing the user, *Wood* v. *Leadbitter* (1845), 13 M. & W. 838, 14 L. J. Ex. 161, 9 Jur. 187. And although, if the revocation were contrary to an agreement, a Court of Equity might interfere so as to put the parties upon proper terms, that does not give the licensee an unqualified right to treat the license as unrevoked. *Hyde* v. *Graham* (1863), 1 H. & C. 593, 32 L. J. Ex. 27, 8 Jur. N. S. 1229, 7 L. T. 563, 11 W. R. 119.

A license is irrevocable when it is coupled with a grant, or when the licensee has, on the faith of the license, spent money in executing works of a permanent character on the land. Yet, such a license confers no estate in the land. For a deed which granted a liberty, license, power, and authority to dig for tin, and to dispose of the tin obtained, on certain terms for a period of 21 years, was described by ABBOTT, C. J., as granting an irrevocable license (for it conferred an interest in the ore), but not an estate in the land. *Doe* v. *Wood* (1819), 2 B. & Ald. 724, 738, 21 R. R. 469, 475; *Wood* v. *Manley* (1839), 11 A. & E. 34, 3 Per. & Dav. 5, 3 Jur. 1028; *Winter* v. *Brockwell* (1807), 8 East. 308, 9 R. R. 454.

Easements are distinguished from *profits à prendre* inasmuch as the latter entitle the dominant owner to take some profit out of the servient tenement. For further distinction, see cases Nos. 14 to 18 (*infra*). It may be mentioned here that a right to enter the land of another and to draw and take away water is an easement, and not a *profit à prendre*; for water, unless confined in a tank or vessel, is neither a part of the produce of the soil, nor the property of the owner of the land over which it flows or on which it stands. *Race* v. *Ward* (1855), 4 El. & Bl. 702, 24 L. J. Q. B. 153, 1 Jur. N. S. 704.

Lastly, easements must be distinguished from covenants entered into between owners of land, although negative or restrictive covenants may create in equity an effect very similar to an easement. *Tulk* v. *Moxhay* (1848), 2 Ph. 774, 18 L. J. Ch. 83. Such covenants will be considered hereafter under the titles "Land." It may here be said, generally, that their effect (when they do take effect) depends upon a privity of contract or of estate between the parties; whereas an easement is binding upon the owner or occupier of the servient tenement by whatsoever title he claims.

No. 1. — Ackroyd v. Smith. — Notes.

The two following cases, in which particular easements have been established, illustrate the principles on which the presumption of a legal origin may be ascribed to support a long continued user. In *Phillips* v. *Halliday* (H. L. 1891, appeal from *Halliday* v. *Phillips*, Q. B. & C. A. 1889), 1891, A. C. 228, 61 L. J. Q. B. 210, 64 L. T. 745, the action was for disturbance of the right to a pew in a church to which the right was claimed by the plaintiff as appurtenant to a certain mansion, of which the plaintiff was the freeholder. The old pew had been pulled down, and the claim was to the right to a pew on the site of the old one. There was evidence, as far as living memory could go, of occupation by the plaintiff and his predecessors in title in the mansion, of the pew; and there was some documentary evidence of exclusive occupation from a more remote period, and also evidence that at an early period the plaintiff's predecessors in title had repaired the pew. The House of Lords, affirming the decision of the Court of Appeal (which had reversed a judgment of Mr. Justice Day), gave judgment establishing the plaintiff's right. Lord Herschell, in moving judgment, said: — "Where there has been long continued possession in assertion of a right, it is a well-established principle of English law that the right should be presumed to have had a legal origin, if such a legal origin was possible, and that the Courts will presume that those acts were done and those circumstances existed which were necessary to the acquisition of a valid title." He cited the language of Mr. Justice Buller in *Stocks* v. *Booth* (1786), 1 T. R. 430, 1 R. R. 246: — "A pew may be annexed to a house by a faculty as well as by prescription, for the latter supposes a faculty," and of Sir William Scott (afterwards Lord Stowell) in *Gunner* v. *Drury*, 1 Hagg. Cons. 314 — "A person claiming a pew must show either a faculty or prescription which will suppose a faculty, but mere presumption is not sufficient without some evidence on which a faculty may reasonably be presumed. . . . The possession must be ancient and going beyond memory; and though on this subject I do not mean the high legal memory, it must be larger than appears in the circumstances of this case." He then observed that in the opinion of Lord Stowell the evidence required, beyond that of mere user, would be furnished by evidence of acts of repair going beyond the period of living memory. This was supplied in the present case, and a faculty might be presumed. The other lords present, Lords Watson, Macnaghten, Morris, and Hannen, entirely concurred with this reasoning.

In *Simpson* v. *Corporation of Godmanchester* (C. A. 1895), 1896, 1 Ch. 214, 65 L. J. Ch. 154, 73 L. T. 423, 44 W. R. 149, the plaintiff who was the owner of locks on the river Ouse brought his action to restrain the corporation from entering upon the locks and opening the

gates. The corporation claimed the right of opening the locks in times of flood for the protection of lands occupied by the corporation or their tenants, and they based their claim upon various charters dating from the time of King John and upon certain Acts of Parliament. There was evidence of user from time immemorial of the right to open the gates, but the evidence did not show that the right was claimed in respect of any particular tenants. The Court of Appeal, affirming the judgment of WRIGHT, J., held that, independently of the deeds produced in the case under which the right of the corporation was claimed, the user which had been proved could be supported by the presumption of a legal origin in a lost grant. Lord HERSCHELL cited the principle as laid down by him in *Phillips* v. *Halliday*.

Here mention may be made of the 62d section of the Conveyancing Act of 1881 (44 & 45 Vict. c. 41), which enacts that "A conveyance (made after the commencement of the Act) of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege in or over or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly."

The object (apparently) of this enactment is merely to simplify the mode of creating an easement, by extending the statute of uses so that easements as well as estates might be raised by way of use. Formerly where it was intended to convey property to A., subject to an easement in favour of B., this had to be done by two deeds, first a conveyance of the land to A. with a reservation therein to the conveying party, of the particular easement; and, secondly, a grant of the easement to B. All this may now by the extension of the Statute of Uses be effected by one conveyance.

It is observed by Mr. Wolstenholme (Conveyancing, &c., Acts, *in loco* under sect. 62): "'Deriving title' means by and according to law, consequently this section does not confer any new power of transmitting title, nor enable the creation of any new kind of easement, or make assignable that which before this Act was not by law assignable." And he refers to the above principal case.

AMERICAN NOTES.

The principal case is much cited by Washburn on Easements, and by Judge BENNETT in his edition of Goddard on Easements. The latter says (p. 10): "In America this doctrine of *Ackroyd* v. *Smith* has not been universally approved, and here it has frequently been held that an easement may be severed

from the land with which it is originally connected or used; and if the terms of the grant do not forbid, may be made a right in gross and assignable, or descendible to the heirs of the original grantee, quite disconnected from any particular estate. Thus when P. conveyed to B. a tract of land with a spring on it, reserving to himself, his heirs and assigns, the right of taking water therefrom forever through a pipe, and a right to enter and repair the pipe, when necessary, upon payment of damages therefor, but without any limitation as to the time or place when such right should be enjoyed, it was held that such right was assignable by P. to G., although G. had no interest in the land of P. to which the right was annexed, but used it in connection with other land obtained from other parties." Citing *Goodrich* v. *Burbank*, 12 Allen (Mass.), 459; 90 Am. Dec. 161, citing and denying the doctrine of the principal case, and observing: "We are aware of no case which denies that the right to an aqueduct may be so created as to exist independently of any particular parcel of land owned by the grantee thereof, and be enjoyed by him and his heirs on any estate which he or they may own or acquire, and be capable of assignment or conveyance in gross." The water itself may not be the subject of property, but the right to take it, and to have pipes laid in the soil of another for that purpose, and to enter upon the land of another to lay, repair, and renew such pipes, is an interest in the realty, assignable, descendible, and devisable." This has been always followed in Massachusetts: *Amidon* v. *Harris*, 113 Massachusetts, 59, and in *Bank* v. *Miller*, 6 Federal Reporter, 550; *Poull* v. *Mockley*, 33 Wisconsin, 482, disapproving the principal case. See *Bissell* v. *Grant*, 35 Connecticut, 288; *Reise* v. *Enos*, 76 Wisconsin, 634; 8 Lawyers' Rep. Annotated, 617; *Chappell* v. *N. Y. &c. R. Co.*, 62 Connecticut, 195; 17 Lawyers' Rep. Annotated, 420.

Under a reservation of a well and water-works for the purpose of supplying a tannery with water, the grantor may use the water for any purpose, and the right passes to a grantee of a part of his land as appurtenant. *Borst* v. *Empie*, 5 New York, 33.

In *Reise* v. *Enos*, *supra*, it was held that a right of way across a lot given by a conveyance of an adjoining lot to be used in common with the grantors and the owners and occupants of the former lot, is a right appurtenant to the lot conveyed, and the grantee, after he has conveyed the lot, cannot claim to be still entitled to use the way in connection with any other lot subsequently acquired.

The principal case was cited and followed in *Garrison* v. *Rudd*, 19 Illinois, 558, the case of a reservation of the use of an alley to the grantor, and his subsequent conveyance of the right to that use to another. The same ruling is found in *Wagner* v. *Hanna*, 38 California, 111. See also *Tinicum Fishing Co.* v. *Carter*, 61 Pennsylvania State, 32; 100 Am. Dec. 597; *Louisville, &c. R. Co.* v. *Koelle*, 104 Illinois, 455. The principal case is also cited with approval in *Boatman* v. *Lasley*, 23 Ohio State, 614. The last two are cases of right of way over another's land. See also *Fisher* v. *Fair*, 34 South Carolina, 203; 14 Lawyers' Rep. Annotated, 333, holding that where a right of way through a private alley, laid out entirely on the grantor's land, is granted to the owner of adjacent land fronting on a public street, and to his heirs and assigns for-

ever, it does not become appurtenant to such property but is a right of way in gross.

Mr. Washburn essays to reconcile the cases by adopting Chancellor Walworth's reasoning in *Post* v. *Pearsall*, 22 Wendell (New York), 425, that if the easement is one of profit *à prendre* it is an inheritance, but if an easement proper, such as a right of way, it is merely personal. This distinction is also made in *Goodrich* v. *Burbank*, *supra*.

A right of way to a store in favour of the storekeeper is extinguished by his assignment for the benefit of creditors. *Hall* v. *Armstrong*, 53 Connecticut, 554.

In *Cadwalader* v. *Bailey*, 17 Rhode Island, 495; 14 Lawyers' Rep. Annotated, 300, it was held that a negative easement appurtenant, such as a restriction on building so as to obstruct a view of the sea from certain premises, cannot be reserved on conveyance of such premises, but is extinguished if severed therefrom by an attempted reservation. The principal case is cited. The Court refer to the Massachusetts cases and Mr. Washburn's attempt to reconcile them with others, and observe: "We think the greater weight of the authorities supports the doctrine announced, that easements in gross, properly so called, are not assignable or inheritable." "But however this may be, the easement being a negative easement appurtenant to the land conveyed, was extinguished by operation of law by being severed therefrom, and hence is no longer in existence. The easement being appurtenant to the land cannot stand alone. It has no standing apart from the dominant estate to which it was attached." Citing *Hall* v. *Lawrence*, 2 Rhode Island, 218; 57 Am. Dec. 715.

A deed of a lot between which and the river front are other lands of the grantor, with the use of the river front for shipping purposes, creates an easement to all the river front appurtenant to that lot, but the grantee cannot claim a like easement upon other lands after the lot and intervening land have been washed away by encroachment of the river. *Weis* v. *Meyer*, 55 Arkansas, 18.

A riparian owner on a navigable stream cannot confer on another the right to quarry stone in the bed of the river, independently of a conveyance of his land. *Steele* v. *Sanchez*, 72 Iowa, 65; 2 Am. St. Rep. 233; *Lake Superior L. Co.* v. *Emerson*, 38 Minnesota, 406; 8 Am. St. Rep. 679.

See *The Redemptorists* v. *Wenig*, 79 Maryland, 348.

No. 2. — POMFRET *v.* RICROFT.

(K. B. 1681.)

No. 3. — MASON *v.* SHREWSBURY AND HEREFORD RAILWAY COMPANY.

(Q. B. 1871.)

RULE.

THE owner of the dominant tenement is not bound to continue an easement for the benefit of the servient tenement; nor is the owner of the servient tenement under an obligation to repair the subject of the easement.

Pomfret v. Ricroft.

1 Saunders, 321–323 (s. c. 1 Ventr. 26, 44; 1 Sid. 429; 2 Keb. 505, 543, 569).

Easement. — Right and liability as to repair.

[321] If a lease be made of a house and piece of land, except the land on which a pump stands, with the use of the pump, the lessee may repair the pump, but no action of covenant lies against the lessor for not repairing it.

Covenant: the plaintiff declares that, by indenture made between them, the defendant had demised and granted to the plaintiff a messuage and piece of land containing so many feet, save and except a small piece of land lying on the southwest corner thereof, upon which a pump was standing, in the parish of St. Leonard Shoreditch in Middlesex, and all ways, passages, &c., together with the use and occupation of the pump in common with the other tenants of the defendant there; to have for 31 years. And the plaintiff assigns the breach, that the defendant during the said term did not repair the pump; but the defendant afterwards, and before the end of the term, to wit, on the 29th day of September in the 16th year of the now king, did permit the pump to be in decay, broken, ruinous, prostrate, and totally spoiled, and did also permit the fountain and water of the pump to be filled, choaked, and spoiled with earth, mud, and rubbish, for want of repairing thereof by the defendant, and did suffer the pump to remain so in decay, broken, ruinous, prostrate, and spoiled, and the fountain and water of the pump so filled, choaked, and spoiled,

from the said 29th day of September in the said 16th year of the now king hitherto, and the same are not repaired, maintained, or amended, whereby the plaintiff, could not, nor yet can, have the use and occupation of the pump, according to the form and effect of the said indenture; but the plaintiff by reason thereof hath, during the whole time aforesaid, totally lost and been deprived of the whole use, benefit and advantage of the pump; and so the plaintiff said that the defendant had broken his covenant, to the damage, &c.; on which declaration the defendant demurred in law.

And after argument by Simpson for the defendant, and Jones for the plaintiff, KELYNGE, Chief Justice, RAINSFORD and MORTON, Justices, gave judgment for the plaintiff, that the action well lay on this ground, namely, that when the use of a thing is demised, and the thing falls to decay, so that the lessee cannot have the use and benefit of it, he shall have his action of covenant therefore on the word *demisit*, which raises a covenant in law. And their reasons were, because the lessee himself cannot repair it, not having any interest either in the pump, or in the land [322] upon which it stands; for it appears that the land where the pump stands was specially excepted out of the lease, so that no interest therein passed to the lessee who is the plaintiff. If then the lessor will not repair it, he not only avoids his own grant, but the lessee will also be deprived of the benefit which he ought to have, and which perhaps induced him to give a greater fine or rent for a lease of his house; and yet he cannot help himself, but will be wholly without remedy unless this action of covenant lies. And they put the case, that if a man grants by deed a watercourse, now if the grantor stops it, the grantee shall have an action of covenant against him. So if a lease be made of a house and estovers, and the lessor destroy all the wood out of which the estovers were to be taken, the lessee shall have an action of covenant against the lessor. So, by RAINSFORD, if a man demise by deed a middle room in a house, and afterwards will not repair the roof, whereby the lessee cannot enjoy the middle room, an action of covenant lies for him against his lessor.[1] Wherefore they held that the plaintiff should have judgment.

[1] It should seem from the principle of this case, that the lessor is not bound to repair the roof, nor subject to an action for not doing so, without an agreement by him for that purpose. Neither does it follow that this nonfeasance will prevent the lessee from occupying the room; for he may repair the roof himself as incident

Twysden, Justice, *contra totis viribus*, and that the action here does not lie. But he agreed to the cases above put, that where a man grants a watercourse and afterwards stops it, or demises a house and estovers and afterwards destroys the wood, in such cases the party grieved shall have his remedy by action of covenant; for these are wilful acts of the lessor or grantor, and it is a misfeasance in him to annul or avoid his own grant.[1] But in this case there is no misfeasance, but only a nonfeasance, for which no action lies. As in the case where I grant a way over my land, I shall not be bound to repair it, but if I voluntarily stop it, an action lies against me for the misfeasance; but for the bare nonfeasance, viz., in not repairing it when it is out of repair, no action at all lies.[2] But if any action had been maintainable,[3]

to the demise. In all probability, Rainsford, J., had in his mind a case in Keilw. 98 b, which is reported as a doubtful one, but said to have been the opinion of Fairfax, C. J., and Brudnell, J., in K. B. that if a man who has the upper chamber of a house, neglect to repair the roof to the damage of him who has the under chamber, an action upon the case will lie: so if he who has the under chamber does not underpin and support it. And the same thing is mentioned doubtfully in *Anon.* 11 Mod. 7, 8. In F. N. B. 127 b, there is a writ commanding the mayor and sheriff of a town to summon one before them for not repairing the lower room of a house to the damage of him who has the upper room, which by the custom of the said town he was bound to repair. It is difficult to say upon what other ground than custom such an action can be supported. It does not seem to fall within the maxim of "*sic utere tuo ut alienum non laedas*;" for that maxim almost always applies to some act which is done by one man to the prejudice of another. And in *Tenant* v. *Goldwin*, 6 Mod. 314, 1 Salk. 361, the court of K. B. doubted the case in Keilway, and said that the writ in F. N. B. 127 b is grounded upon the custom.

[1] For this is equivalent to an eviction in other cases of a demise. As where a lessee is ousted either by the lessor himself, or another person who has a prior title, an action of covenant lies against the lessor on the implied covenant in law upon the word demise. *Nokes's* case, 4 Co. Rep. 80 b. S. C. Cro. Eliz. 674. Dyer, 257 a, pl. 13. 1 Rol. Abr. 519, F. pl. 1. *Andrew's* case, 2 Leon. 104. *Style* v. *Hearing*, Cro. Jac. 73. But it is not necessary, in order to support this action, that the lessee should be actually evicted. For the word demise implies a power to lease. Therefore, where a man demises lands to which he has not any title, an action of covenant will lie against him, although the lessee never entered; for he is not bound to commit a trespass. *Holder* v. *Taylor*, Hob. 12.

[2] This principle is recognised in *Taylor* v. *Whitehead*, Doug. 745, 748, 3d ed., where it is held that a person who has a private way cannot justify going upon the adjoining land, because the way was impassable. For by the common law, he who has the use of a thing, as in this case the grantee of a way, ought to repair it, although Blackstone, J., in his Commentaries, 2 Black. 36, ed. 1765, and Comyns, C. B., in his Digest, Chemin (D. 6), seem to express an opinion that the right of going on the adjoining land, when a road is out of repair, extends to private as well as public ways. But on looking into the authorities cited in support of this opinion, viz., Sir W. Jones, 296, 297, by Comyns, and 1 Ld. Raym. 725, 1 Brownl. 212. 2 Show. 28, by Blackstone, it will be found that they do not warrant it, for they all seem to relate to public ways only. How-

[3] But it seems certain that no action whatever will lie.

No. 2. — Pomfret v. Ricroft, 1 Saund. 322, 323.

he said, that it would be rather an action upon the case than action of covenant. As if the lessor enter upon the lands leased, and cut down the timber trees and carry them away, whereby the lessee will lose the loppings and shade of them, he cannot have covenant, though he may have an action of trespass, or upon the case, for his special damage.[1] And he further said, that covenant does not lie but for an actual ouster of the land demised, and in such action the possession shall be recovered as in an ejectment. Fitz. Covenant, 23. Judgment, 177. And he further held that in this case the plaintiff himself being the lessee might have repaired the pump; for although neither the soil itself nor the pump be granted to him, yet by the grant of * the use of [* 323] the pump the law has given to him this liberty; for when the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use. As if a man gives me a license to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me.[2]

ever, the grantor of a private way may be bound either by express stipulation or prescription to repair it. But in an action upon the case against him for neglecting to do so, it is sufficient to allege generally in the declaration, that he, by reason of his possession of the close, in which the way is, ought to repair it; and the special matter of the obligation shall be given in evidence on the general issue. *Rider* v. *Smith*, 3 T. R. 766. See 2 Saund. 113 a, note (1).

[1] This must be understood of a lease for life or years in which there is not any exception of the trees. *Herlakenden's* case, 4 Co. Rep. 62 b. For in that case the lessee has by his lease a particular interest in the trees, such as the mast and fruit of them and shade for his cattle, and may lop them if the body of the trees receive no injury by it; therefore if the lessor fells them, the lessee may maintain an action of trespass against him, and will be entitled to recover damages adequate to the loss of his particular interest, and also for the entry into his land. But the interest of the body of the trees remains in the lessor as parcel of his inheritance, who may punish the lessee in an action of waste, if he fells or damages any of them. So that both the lessor and lessee have an interest in the trees. Therefore, if a stranger cuts them down, each of them shall have an action against him to recover his respective loss. Harg. & Butl. Co. Litt. 57 a, note (2). *Biddlesford* v. *Onslow*, 3 Lev. 209. But where the trees are excepted in the lease, the lessee has no manner of interest whatever in them, and the lessor may have an action of trespass against him, if he either fells or damages them. *Ashmead* v. *Ranger*, 1 Ld. Raym. 552. In many cases the reversioner may bring an action as well as the tenant. As in *Jeffer* v. *Gifford*, 4 Burr. 2141, an action by the reversioner for erecting a wall, whereby his light was obstructed, was held maintainable. The question in all cases of this kind seems to be whether the injury complained of is not a damage to the inheritance as well as to the lessee, so that, if the reversioner wanted to sell the reversion, the injury would lessen the value of it. The lessor has also a power by law, as incident to the exception, to enter into the land in order to fell and take away the trees, though this power for the greater caution is often expressly reserved to him. *Liford's* case, 11 Co. Rep. 48 a, b; *Foster* v. *Spooner*, Cro. Eliz. 18; *Sir John Talbot* v. *Woodhouse*, 2 Lutw. 1480; *Ashmead* v. *Ranger*, 1 Ld. Raym. 552.

[2] S. P. 9 Edw. 4, 35 a. Bro. Incidents, 8. Nusans, 14. Fitz. Action sur le Case,

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But notwithstanding his opinion, which was much the better one, as I thought, judgment was given for the plaintiff as above,

18. *Guy* v. *Browne*, Moor, 644. Perk. Graunts, s. 110, 111. *Liford's* case, 11 Co. Rep. 52 a; *Lord Darcy* v. *Askwith*, Hob. 234, the maxim being "*quando aliquis aliquid concedit, concedere videtur et id, sine quo res uti non potest.*" As in the instance just mentioned, where the trees are excepted. So where a man leases his land and all mines, where there are no open ones, the lessee may dig for them. *Saunder's* case, 5 Co. Rep. 12 a. Co. Litt. 54 b. 2 Rol. Abr. 816, pl. 32. So where a man, having a close surrounded with his own land, grants the close to another in fee, for life or years, the grantee shall have a way to the close over the grantor's land as incident to the grant; for without it he cannot derive any benefit from the grant. So it is where he grants the lands and reserves the close to himself. *Clarke* v. *Cogge*, 2 Rol. Abr. 60, pl. 17, 18 S. C. Cro. Jac. 170. *Jorden* v. *Atwood*, Owen, 122. *Staple* v. *Heydon*, 6 Mod. 3. *Howton* v. *Frearson*, 8 T. R. 50 (4 R. R. 581). Willes's Rep. 72, 73, note (6). This principle seems to be the foundation of that species of way, which is usually called a way of necessity. It is so in a partial sense, because the way is a necessary incident to the grant. But it appears to be a term rather too comprehensive. For it is not at all improbable that the general signification of this word it is which has thrown some degree of confusion upon this subject, and been the occasion of an erroneous notion which, for the want of attention sometimes prevails, that in all cases, whenever a man has a close surrounded by the land of another, he is therefore entitled to a way over the land for necessity. Thus in practice it is not an uncommon thing to plead a way of necessity in general terms, without specifying the manner whereby the land over which the way is claimed became charged with the burden. So in *Staple* v. *Heydon*, 6 Mod. 3, it is said that if A. have a close surrounded by the land of another, A. for necessity has a way over a convenient part of the land to his own close, as a necessary incident to his close. As if a self-created necessity could be, either in law or reason, any justification of a trespass committed on another's land. But not to mention that in the report of this case in 2 Ld. Raym. 923, there is nothing of the sort noticed, and on the contrary, Holt, C. J., expressly says that the defendant ought to have pleaded the way of necessity in a manner which precisely corresponds with the definition of it now attempted to be given, a little consideration will satisfy us of the error of this opinion. It is said that there are three sorts of private ways: 1. by grant; 2. prescription; and 3. of necessity. There seems to be no doubt that whoever justifies under either of the two former titles must set forth the particular ground of his title; as if it be by grant, he must show it. Now a way of necessity, when the nature of it is considered, will be found to be nothing else but a way by grant. It derives its origin from a grant. For there seems to be no difference where a thing is granted by express words, and where by operation of law it passes as incident to the grant. In the latter case it would be a superfluous and inoperative clause in the deed to convey the incident by express words of grant, being only *expressio eorum quæ tacite insunt.* Therefore in both cases the grant is the foundation of the title. And of course it is as necessary to set forth the title to a way of necessity as it is to a way by grant. *Dutton* v. *Taylor*, 2 Lutw. 1487. It seems to follow, therefore, that there cannot exist in point of law such a general way of necessity as is above stated, and is often supposed to exist. S. P. per Lord Kenyon, in *Large* v. *Pitt*, Gloucester Summer Assize, 1797. If the origin of a way of necessity cannot any longer be traced, but the way has been used without interruption, it must then be claimed as a way either by grant or prescription, according to the circumstances of the case. Where the fact is that there existed at one period an unity of possession, it must then be claimed as a way by grant. And the uninterrupted use of it for a long time is evidence from which the jury may presume a grant. In which case, in order to dispense with the necessity of pleading the grant with a profert, which is generally required, it must be pleaded as a non-existing grant. Otherwise, the case would be attended with an insurmountable difficulty where the claim-

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&c. And afterwards, namely, Hil. 22 & 23 Car. 2, the judgment was reversed in the Exchequer Chamber by VAUGHAN, Chief Justice of the Bench, HALE, Chief Baron, TURNER, ARCHER, WYLD and LITTLETON, *una voce*, for the matter in law only, for the reasons of TWYSDEN above mentioned.[1] And HALE said, that if I lend a piece of plate, and covenant by deed that the party to whom it is lent shall have the use of it, yet if the plate be worn out by ordinary use and wearing without my fault, no action of covenant lies against me.

ant is to set out his right in a plea to an action of trespass. Ante, 9 a, note. 2 Saund. 175 b. But where there has not been an unity of possession, and the way has been used immemorially, it must then be claimed as a way by prescription. *Keymer* v. *Summers*, Bull. N. P. 74. S. C. cited in *Read* v. *Brookman*, 3 T. R. 157. These observations may also serve to explain the rule that a way of necessity is not extinguished by unity of possession. For unity of possession appears to be the foundation of the right. It must be stated that the same person was seised in fee of both closes *simul et semel*, and being so seised, he granted one of them.

There are other ways of necessity which depend upon the same principle; as where the law gives anything, it also gives everything which is necessary to the enjoyment of it. As a rector, for instance, may enter into a close to carry away the tithes over the usual way, as incident to his right to the tithes, and the like. See 2 N. R. See the form of the plea in Herne, 803. Winch, 1103. 2 Lutw. 1314. — But the maxim is to be understood of things incident and directly necessary. As if a man grants to another the fish in his ponds, the grantee cannot cut the banks to lay the water dry; for he may take the fish with nets or other engines. Perk. Graunts, s. 110. *Lord Darcy* v. *Askwith*, Hob. 234.

[1] For the same reason the law is that if a man leases a house to another for life or years, either by deed or by parol, the lessor is not bound to repair it without an agreement for that purpose; but the lessee, who had the use of it, ought to do so; though he was not subject to an action at the common law for not repairing it. *Countess of Shrewsbury's* case, 5 Co. Rep. 13 b. But now by the statute of Gloucester, 6 Edw. 1, c. 5, the lessor may have an action of waste, or upon the case in the nature of waste, against the lessee, if he permits the house to be out of repair, unless it was ruinous at the time of the lease. Co. Litt. 54 b. For that statute extends to permissive as well as voluntary waste. 2 Inst. 145. Co. Litt. 53 a. 2 Rol. Abr. 816. It is held that a tenant at will is not punishable for permissive waste. Litt. s. 71. Co. Litt. 57 a. *Countess of Salop's* case, 5 Co. Rep. 13 b. S. C. Cro. Eliz. 777, 784. 3 Lev. 359. *Panton* v. *Isham*. But this means a tenant at will in the strict sense of the word, and not tenant from year to year; for he is within the statute. 2 Inst. 302. Co. Litt. 54 b. Therefore, after the statute, an action of waste might be brought against tenant for life, or years, or even half a year, if his house was accidentally burnt by fire, this being a species of negligent or permissive waste. And this continued until the statute of 6 Ann. c. 31, s. 6. enacted that no action shall be brought against any person in whose house any fire shall accidentally begin; but by s. 7, the act is not to annul any agreement between landlord and tenant. And therefore, notwithstanding this act, if a lessee covenants to repair generally, he is liable to an action of covenant if the house be burnt down by fire. *Earl of Chesterfield* v. *Duke of Bolton*, Com. Rep. 627, which has been lately recognised in *Bullock* v. *Dommitt*, 6 T. R. 650 (3 R. R. 300). See *Walton* v. *Waterhouse*, 2 Saund. 422, note (2). [As to later cases relating to tenants from year to year, see Nos. 4 & 5 of DILAPIDATIONS, and notes, 9 R. C. 460 *et seq.*]

No. 3. — Mason v. Shrewsbury and Hereford Ry. Co., L. R., 6 Q. B. 578, 579.

Mason v. Shrewsbury and Hereford Railway Company.

L. R. 6 Q. B. 578–589 (s. c. 40 L. J. Q. B. 293; 25 L. T. 239; 20 W. R. 14).

[578] *Easement. — Watercourse. — Prescription Act (2 & 3 Wm. 4, c. 71), s. 2 — Enjoyment, as of right.*

Before 1800, a canal company, under powers of an Act of Parliament, diverted for the purposes of the canal a considerable part of the water from a brook which flowed through the plaintiff's land, at a point above the plaintiff's land, the rest of the water continuing to flow in its natural channel. In 1847 an Act was passed authorizing the defendants, a railway company, to purchase the canal, to discontinue the use of it, and to fill it up, and sell such parts as were not used for the railway. Under these powers the use of the canal was discontinued in 1853; and in 1864 the defendants made a cut by which they restored to the brook at a point above the plaintiff's land the water which had been diverted from it. In 1865 the defendants conveyed the part of the canal on which they had made the cut to a purchaser in fee. The bed of the stream, owing to the diminished scour of the water from 1800 to 1853, had been silted up, so as to be insufficient to carry off the water coming down in extraordinary floods. In 1866 such a flood occurred; the water overflowed the plaintiff's land and damaged his crops; upon which he brought an action against the defendants: —

Held, that, there being no obligation imposed upon the canal company to continue the diversion, the plaintiff had no right of action: —

By Blackburn and Hannen, JJ.: On the ground that, though the claim to have the water, which would otherwise have come down to the plaintiff's land, diverted over other land was a claim to a watercourse within the Prescription Act (2 & 3 Wm. 4, c. 71), s. 2, yet the enjoyment was not as of right, and therefore, though for more than forty years, conferred no right on the plaintiff.

By Cockburn, C.J.: On the ground that the plaintiff, the owner of the servient tenement, could acquire, by the mere existence of the easement, no right as against the owner of the dominant tenement to the continuance of the diversion.

Action, commenced in 1868, to recover damages for injuries done to plaintiff by defendants having caused certain lands in occupation of plaintiff to be flooded; and for disturbance of an easement claimed by plaintiff of having the water of a brook, called Ashton Brook, conveyed away from his lands along a canal of defendants.

[* 579] * Pleas, inter alia, not guilty; a justification under certain local Acts; and an easement of diverting waters from defendants' canal into the brook.

At the trial before Keating, J., at the Hereford Spring Assizes, 1869, a verdict was taken for the plaintiff, subject to a case.

No. 3. — Mason v. Shrewsbury and Hereford Ry. Co., L. R., 6 Q. B. 579, 580.

The case was very voluminous, but the material facts and reference to the sections of the local statutes are given in the judgment of BLACKBURN, J.

The question for the Court was whether the defendants had committed any actionable wrong for which the plaintiff could maintain this action, and which is not justified by the defendants.

April 21. Harington, for the plaintiff, cited *Magor* v. *Chadwick*, 11 Ad. & E. 571; *Arkwright* v. *Gell*, 5 M. & W. 203, 8 L. J. Ex. 201 (No. 12 p. 219 *post*); *Sutcliffe* v. *Booth*, 32 L. J. Q. B. 136; *Ivimey* v. *Stocker*, L. R. 1 Ch. Ap. 396; *Lawrence* v. *Great Northern Ry. Co.*, 16 Q. B. 643; *Roswell* v. *Prior*, 12 Mod. 635; *Thompson* v. *Gibson*, 7 M. & W. 456; *Backhouse* v. *Bonomi*, 9 H. L. C. 503, 34 L. J. Q. B. 181.

Manisty, Q. C. (J. O. Griffits with him), for the defendants, cited *Gaved* v. *Martyn*, 19 C. B. (N. S.) 732, 34 L. J. C. P. 353; *National Manure Co.* v. *Donald*, 4 H. & N. 8, 28 L. J. Ex. 185; *Staffordshire Canal Co.* v. *Birmingham Canal Co.*, L. R. 1 H. L. 254; *Gandy* v. *Jubber*, 5 B. & S. 485.

The arguments are sufficiently noticed in the judgments.

Cur. adv. vult.

July 6. The following judgments were delivered: —

BLACKBURN, J. This is a special case. The substance of it is that the plaintiff is the occupier of lands lying beside a natural watercourse called the Ashton Brook. The Leominster canal was formed by a company under the provisions of an Act of Parliament 31 Geo. III., c. lxix. It crossed the Ashton Brook above the lands now in the occupation of the plaintiff. The canal company having the powers usually conferred for that purpose in Canal * Acts,[1] diverted the greater part of the waters [* 580] of the Ashton Brook at a point still higher up its course into a feeder, by which they supplied their canal, and the water thus brought into the canal passed over it, and never came to the land now the plaintiff's. The residue of the waters of the Ashton Brook passed down the watercourse and under the canal to the plaintiff's land, but the quantity of the water was much diminished.

All this was done before the year 1800, and this state of things continued until the year 1847, when the statute 10 & 11 Vict. c.

[1] See 31 Geo. 3, c. lxix. s. 1.

cclxvi. was passed, authorizing (s. 4) the sale of the canal to the Shrewsbury and Hereford Railway Company, the now defendants;[1] and by ss. 14 and 15, giving the railway company, after the purchase, power to discontinue the use of the canal as a canal, to fill it or any part of it up, and to sell any part of it. These powers were permissive only, not obligatory.

In the year 1853 the use of the canal as a canal was discontinued. This was more than forty years after the waters of the Ashton Brook were diverted as above stated, and less than twenty years before the commencement of the present action.

The railway company then proceeded to fill up and sell various parts of the canal; and, in 1864, made a cut in the canal, so as to let the waters out of the canal into the ancient course of the Ashton Brook above the plaintiff's land. The effect of this was, that the portion of the waters of the Ashton Brook which, since 1800, had flowed down the feeder into the canal, and thence passed away without coming to the plaintiff's land, now flowed down the feeder into what had been the canal, and along it into the natural watercourse above the plaintiff's land. And thus the same waters which, before the canal was made, flowed down to the plaintiff's land, now again flowed down to it after passing through a circuitous course above it; and, as far as the plaintiff was concerned, the same effect was produced as if the dam by which the waters were diverted into the feeder had been removed, and the waters of the brook allowed to flow as they had done before the canal was made. Some additional water was [*581] brought into the brook in consequence *of the drainage along the canal; but this additional water, as is stated in pars. 51 and 62 of the case, was not considerable, and did not occasion any damage; and may therefore be disregarded.

There are a great many unnecessary details stated in the case, and marked upon the plan, but I believe that what I have above stated is all that is material.

The railway company having made this cut, sold the portion of the canal where it was with the cut upon it, and in December, 1865, conveyed it to the purchaser in fee.

No mischief, or at least no mischief that was complained of, occurred till 1866, after the conveyance by the defendants, when a

[1] By s. 10, All the powers, rights, privileges, provisions, &c., vested in the canal company under the former Act are to vest in the defendants.

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flood injured the plaintiff's crops. It was then discovered that the watercourse below the plaintiff's land had, during the long period in which the waters were diminished, become by natural causes silted up so as to be no longer adequate to carry off the flood-water of the Ashton Brook in its old natural state; and that this had occasioned the damage to the plaintiff.

Two points were made on behalf of the defendants. First, that there had been no wrong at all committed against the plaintiff, inasmuch as he had never acquired any legal right to have any part of the waters of the Ashton Brook kept diverted so as not to flow down to his land as it used to do before the canal was made. Secondly, that the action, if any, should have been brought against the persons who were owners and occupiers of the cut at the time the flood occurred, and not against the defendants. The first is the more important of the two.

The occupiers of the land lower down the Ashton Brook than the canal would naturally suppose things were going to remain in the state in which they had been for so many years, and can in no way be blamed for not anticipating that the canal would be disused, and the waters which had been diverted again turned into the brook; and after that state of things had continued for more than forty years, one would wish to find some legal ground for saying that they had acquired a legal right to prevent this long continued state of things from being altered to their prejudice. But I feel obliged to come to the conclusion that there is no ground on which such a right can be supported.

Before the canal was made, the person whose estate the plaintiff *now has had the ordinary rights and liabilities [* 582] of a riparian owner on the banks of a natural stream. He was entitled to have the water flow to him in its natural state, so far as that was a benefit, as, for instance, to turn his mill or water his cattle; and he was bound to submit to receive the water, so far as it was a nuisance, as by its tendency to flood his lands. The Canal Act to some extent interfered with this state of things. It gave (by s. 1) the canal company power to take water from all brooks, &c., within 200 yards of the canal for supplying the canal with water, and for that purpose to make feeders, set up engines, &c. And there are clauses (Sects. 13, 15, 16) under which they are compelled to make compensation for so taking the water, so far as it was a beneficial property. But there is nothing in the

Act to authorise them to take water for any but canal purposes. Neither is there anything that I can find in the Act which can be construed as imposing an obligation on the canal company to continue to take the water which they had diverted any longer than they found it convenient so to do. In the case which the Act contemplates, of their erecting an engine to pump up the water from a brook, it would require very clear language to make me believe that the legislature intended to oblige them to continue using that engine for the benefit of the persons on the banks of the brook below, after they had discovered that they could get their water cheaper somewhere else. And it seems to me that the same reason applies, though not so obviously, against implying any obligation on them to keep up a dam and a feeder for the purpose of continuing the diversion of the water into the canal when it was no longer required for canal purposes. It would rather seem to follow, from the decision in *National Manure Co.* v. *Donald*, 4 H. & N. 8; 28 L. J. Ex. 185, that as soon as the canal company ceased to use the waters for the purposes authorised by their Act, the riparian owners below had a right to insist that the water should be allowed to flow in its old natural course for their benefit; but however that may be, it seems to me clear that (at least at any time within twenty years after the water was diverted) the canal company might discontinue taking it, if they got a sufficient supply from another source, for there is nothing in the Canal Act to compel them to continue taking it. Then comes the question, whether the enjoyment [* 583] de facto of the * relief from this water for more than forty years gives a legal right to the continuation of that relief. That is a question depending on the construction of the Prescription Act, 2 & 3 W. 4, c. 71. The 2nd section of that Act provides that no claim which may be lawfully made at the common law inter alia by "grant" inter alia "to any watercourse or the use of any water" over the lands of another, where such matter "shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years," shall be destroyed only by showing its commencement; "and where such way or other matter shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

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I think the present claim to have the water which would otherwise have flowed down to the plaintiff's land diverted over other land, so as no longer to come to it, is a claim to a watercourse, and that it is one which might be created by a grant, if the owner of the servient tenement was a common person. A doubt is raised by the *National Manure Co.* v. *Donald*, whether a canal company incorporated by Act of Parliament for a particular purpose is capable of either giving or accepting a grant, except for the statutable purposes, and consequently whether there can be a title acquired under the Prescription Act against such a company. If it were necessary to decide either way upon that point, I should desire further time for consideration. The reason why I think that in the present case no right is acquired under the Prescription Act is, that I think the watercourse cannot be properly said to have been enjoyed by a person claiming right thereto within the meaning of that Act. I do not think the Canal Act can properly be used as showing that the enjoyment was by "consent or agreement expressly given or made for that purpose by deed or writing," for though the statute is undoubtedly in writing, I think it would be straining language to say that the obedience compelled by the legislature was consent or agreement. But I think the Canal Act does conclusively show what was the nature of the user, and if that * is not such as to amount [* 584] to an enjoyment as of right, the claim cannot be supported under the Prescription Act. The judgment of the Court of Exchequer in *Wood* v. *Waud*, 3 Ex. 748, 18 L. J. Ex. 305 (No. 13, p. 226, *post*) seems to me to lay down the principle applicable to this case. There were several questions there brought before the Court. One was, whether the plaintiffs had a cause of action against the defendants for diverting the waters of two artificial watercourses. The facts appeared to be that those watercourses had been formed for the purpose of draining some coal pits. The water had continued to flow for more than sixty years across part of the defendant's land, and then across the plaintiff's; and there seems no doubt that the colliery owners had acquired a right to discharge the water on the defendant's land as long as they pleased, and the defendants had also acquired a right to discharge the water thus brought on their land on to the plaintiff's. But the Court of Exchequer decided, following their previous decision in *Arkwright* v. *Gell*, 5 M. & W. 203, 231 (No. 12, p. 219, *post*), that

inasmuch as it was obvious that the coal owners only discharged the waters for the purpose of getting rid of it, and therefore only for a temporary purpose, there was no enjoyment as a matter of right in that water as against the coal owners. And they followed this up much further, for they held that, inasmuch as a proprietor of land below had acquired no right to require the coal owners to continue to allow the water to flow for his benefit, so he had acquired no right as against the owners of the intermediate land to continue to allow the water which in fact flowed from the coal pits to flow as it had done. "He has no right," they say, "to compel the owners above to permit the water to flow through their land for his benefit; and consequently has no right of action if they refuse to do so." (3 Ex. at p. 779, 18 L. J. Ex. at p. 314).

I think this is in effect a decision that an active enjoyment in fact for more than the statutable period is not an enjoyment as of right, if during the period it is known that it is only permitted so long as some particular purpose was served. It is in exact conformity with the Civil Law, the enjoyment must be "nec clam, nec vi, nec precario." In that case the nature of the sough showed that though the water in fact had flowed for sixty [* 585] years, yet from * the beginning it was only intended to flow so long as the coal owners did not think fit otherwise to drain their mines, and so was precarious. In this case the provisions of the Canal Act show that, though the water has been in fact diverted for more than forty years, yet from the beginning it was only diverted so long as it might be wanted for the purposes of the canal, and so was precarious.

I have based my reasoning principally upon the provisions of the Canal Act, which seem to me to leave the company at liberty to change their sources of supply whilst they still keep up the canal; but I think also that the possibility that the canal itself might be discontinued is by no means to be lost sight of. It is true that, if the canal company had discontinued it without the authority of Parliament, there might have been steps taken on behalf of the public to compel them to keep it up. I do not mean to express any opinion as to whether those steps would have been successful or not. But I take it to be clear that no steps could have been taken by the plaintiff as a riparian proprietor for such a purpose. He would but be one of the general public having no peculiar locus standi. And though an Act to enable a statutable

corporation to give up business is not a thing that occurs often, I think the riparian proprietors ought to have known it was possible.

As to the second question, it is not necessary, in my view, to form an opinion. I must own, however, that I do not see how to distinguish the present case from *Roswell* v. *Prior*, 12 Mod. 635.

HANNEN, J. I concur in the judgment which has been delivered by my Brother BLACKBURN, with an unimportant exception. I do not think that the possibility that the canal might be discontinued ought to be considered. The discontinuance could only be by legislative authority, and I think that the riparian owners had a right to assume, and to act upon the supposition, that the canal would be maintained. This consideration, however, does not affect the judgment, but I think it right to express my opinion upon that particular point.

COCKBURN, C. J. The facts of this case are so fully and clearly set forth in the judgment just read by my Brother BLACKBURN that * it appears to me unnecessary to go over them [*586] again in detail; the more so, as, for the purpose of my own judgment, they may be stated in a few words.

The plaintiff is the owner of lands to which a stream called the "Ashton Brook" flows in its natural course. Shortly before the commencement of the present century a canal company obtained power by an Act of Parliament to divert, and under that power did in fact divert, at a point in the course of the stream above the plaintiff's land, the greater part of the water, while the rest continued to flow in its natural channel. In 1847 the defendants, a railway company, being empowered by Act of Parliament, purchased the canal; and being likewise authorized by the Act to discontinue the use of the canal, and to fill up and sell the bed, they, in 1853, exercised the power thus given, discontinued the use of the canal, discharged the water into the Ashton Brook, and adopted measures whereby the water diverted from the brook was again returned to it at a point above the plaintiff's land. The effect of this was to restore the flow of the water, so far as the plaintiff was concerned, to its pristine condition, with one important exception, — the bed of the stream had, owing to the diminished scour of the water during so many years, become partially silted up, so as to be insufficient to carry off, not indeed the water ordinarily flowing down it, but the water coming down in times

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of extraordinary flood. In 1866 such a flood occurred; the water overflowed the plaintiff's land, and did damage to his crops; and in respect of the damage thus done this action is brought.

The question is, whether, under these circumstances, the plaintiff is entitled to recover. I agree with my learned Brothers in thinking that he is not. I differ from them in thinking that the question, whether the plaintiff has acquired any right as against the defendants, turns on the Prescription Act (2 & 3 Wm. 4, c. 71) alone. It appears to me to depend on a principle of the law relating to easements, which would have been equally applicable if the Act in question had never been passed.

The right of diverting water which in its natural course would flow over or along the land of a riparian owner, and of conveying it to the land of the party diverting it, the *servitus aquæ ducendæ* of the civilians, is an easement well known to the law of this as of every other country. Ordinarily such an easement can be created, according to the law of England, only by grant, or by long continued enjoyment, from which the existence of a former grant may be reasonably presumed. But such a right may, like any other right, be created in derogation of a prior right by the action of the legislature. It was thus created in the present instance. But, however it may be called into existence, the right is essentially the same. The legal incidents connected with it are the same, whether the easement is created by grant or by statutory enactment. Now, it is of the essence of such an easement that it exists for the benefit of the dominant tenement alone. Being in its very nature a right created for the benefit of the dominant owner, its exercise by him cannot operate to create a new right for the benefit of the servient owner. Like any other right, its exercise may be discontinued, if it becomes onerous, or ceases to be beneficial, to the party entitled. An easement like the present, while it subjects the owner of the servient tenement to disadvantage by taking from him the use of the water, for the watering of his cattle, the irrigation of his land, the turning of his mill, or other beneficial use to which water may be applied, may, on the other hand, no doubt, be attended incidentally with equal or greater advantage to him, as, for instance, by rendering him safe from the danger of inundation. But this will give him no right to insist on the exercise of the easement on the part of the dominant owner, if the latter

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finds it expedient to abandon his right. In like manner, where the easement consists in the right to discharge water over the land of another, though the water may be advantageous to the servient tenement, the owner of the latter cannot acquire a right to have it discharged on to his land, if the dominant owner chooses to send the water elsewhere, or to apply it to another purpose. And upon this principle, as it appears to me, might the case of *Wood* v. *Waud*, 3 Ex. 748, 18 L. J. Ex. 305, have been decided without reference to the Prescription Act (2 & 3 Wm. 4, c. 71), or to the question as to whether there had been an enjoyment "as of right," so as to satisfy that statute. I prefer to rest my judgment on the principle — as it appears to me, a fundamental one — that an easement exists for the benefit of the dominant owner alone, and that the servient owner acquires *no right to [*588] insist on its continuance, or to ask for damages on its abandonment.

I am far from saying that the grant of an easement might not be accompanied by stipulations on the part of the grantor; as, for instance, that the easement should not be discontinued without his consent, or that on its discontinuance certain things should be done. I am far from saying that such a stipulation would not give a right of action. My observations are intended to apply to a case in which nothing appears beyond the existence of an easement. In such a case, it appears to me beyond doubt that the servient owner acquires no right to the continuance of the easement and the incidental advantages arising to him from it, if the dominant owner thinks proper to abandon it.

If, in the present case, the Canal Act had made it incumbent on the company to continue the use of the canal, or had attached any specific obligations to the contingency of its disuse, the case would have been different. But nothing of the sort is to be found in the Act. The powers conferred by it are permissive; no conditions are attached to the discontinuance of the canal; the company acquire the right to take the water, without more. The exercise of the right is not compulsory. The company may abandon its exercise if they choose. I am at a loss to see how, under such circumstances, the plaintiff, in derogation of whose prior right the right of the company was given, can be said to have acquired a right to insist on the continuance of the easement.

The defendants, having been authorized to abandon the use of

the canal and having in fact abandoned it, had, as it seems to me, no alternative but to allow the water to flow, undiminished in quantity, down the brook, in its natural course to the plaintiff's land. Their right to take the water being limited to taking it for the use of the canal, they could not have taken it for a different purpose, or so as to allow it to run to waste. So soon as they discontinued the use of the canal, their right to take the water ceased, and the plaintiff and the riparian owners lower down the stream again became entitled to have the whole of the water descend to them in its natural course; and, if the defendants had continued to divert the water, would have had legal ground of complaint and action; while the defendants could not [* 589] have justified, inasmuch as they could * not have alleged that the water was taken for the purpose of feeding and maintaining the canal. It appears to me, therefore, quite clear that the defendants were right in restoring the water to its natural quantity before it reached the land of the plaintiff.

It is true that the proximate cause of the damage complained of, namely, the silting up of the channel, so as to render it less capable of carrying off the water at a time of flood, was brought about by the act of the defendants in diverting the water of the brook. But as this was the natural and necessary consequence of the diversion of the water, as authorized by Act of Parliament, it follows that this result cannot be imputed to the defendants as wrongful. If it be said that, having brought about this result, it was incumbent on them to have recourse to some engineering contrivance to prevent any damage in times of flood, or to restore the channel of the stream to its original condition, the general reasoning I have before set forth in respect of the obligations of a dominant owner apply, as showing that no such duty was cast on the defendants either by the local Act or by implication of law. In addition to which, as regards the restoration of the channel, it may be further observed that the defendants could not have entered on to the plaintiff's land, for the purpose either of ascertaining the condition of the channel or of restoring it, except by the leave and licence of the plaintiff. No such leave and licence was ever given. Far from calling on the defendants to repair the bed of the stream, the plaintiff acquiesced in the existing state of things from the year 1853, when the change took place, till 1866, when an extraordinary flood caused the overflow of the stream.

Till that time neither he nor any one else appears to have entertained any doubt of the capacity of the channel to carry off the water at all times. The defendants, therefore, were not only not called upon to do anything to the channel, but would not have been justified in doing so.

The result is that the plaintiff is not entitle to recover, and that our judgment must be for the defendants.

Judgment for the defendants.

ENGLISH NOTES.

A ruling similar to that in the principal case of *Mason* v. *Shrewsbury and Hereford Railway Co.* was given in *Arkwright* v. *Gell* (1839), 5 M. & W. 203, 8 L. J. Ex. 201 (No. 12, p. 219, *post*). There it was laid down that a mine owner who in exercise of his right makes a drain into his neighbour's land, and has used it for more than twenty years, is not bound to continue the drain for the benefit of those into whose land it runs.

Other early cases illustrating the rule in the principal case of *Pomfret* v. *Ricroft* are *Taylor* v. *Whitehead* (1781), 2 Doug. 745; and *Bullard* v. *Harrison* (1815), 4 M. & S. 387, 16 R. R. 493. In *Colebeck* v. *The Girdlers' Co.* (1876), 1 Q. B. D. 243, 45 L. J. Q. B. 225, it was held that if a right of support to a house exists by means of an ancient adjoining building, the servient owner is not bound to repair the building giving the means of support, but the dominant owner may; and he may for that purpose enter on the servient tenement. A similar rule was laid down in *The Highway Board of the Highway District of the Stockport and Hyde Division of the Hundred of Macclesfield* v. *Grant* (1882), 51 L. J. Q. B. 357.

The dominant owner may enter the servient tenement and put the subject of the easement into a proper condition for the exercise and full enjoyment of his right. So in *Senhouse* v. *Christian* (1787), 1 T. R. 560, 1 R. R. 300, it was held that under a grant of a free and convenient way for carrying (*inter alia*) coals, the grantee had a right to lay down a framed waggon-way. So the owner of the dominant tenement, having a right of way for all purposes, may lay down stones or other material to make a carriage-way sufficiently hard and durable to support a carriage and render it fit for the traffic, even though it was not at the time of the grant and has never been in that state before. *Newcomen* v. *Coulson* (C. A. 1877), 5 Ch. D. 133, 46 L. J. Ch. 459.

A similar rule prevails as to the repair of highways. *Hamilton* v. *St. George's Vestry, Hanover Square* (1874), L. R. 9 Q. B. 42, 43 L. J. M. C. 41, 29 L. T. 428, 22 W. R. 86. There, the flagstones of a foot

pavement which constituted the roof of a cellar fell out of repair, owing to the public walking over them. The vestry, and not the owner of the cellar, were held bound to repair them.

The right of the dominant owner to enter the servient tenement carries with it the right to prevent the servient owner from doing anything which would hinder him from repairing it. For instance, if the owner of a house has an easement of getting the supply of water through a pipe under his neighbour's land, he can restrain the neighbour from building on the land so that it would be impracticable for him to get at the pipe for repairs. *Goodhart* v. *Hyett* (1884), 25 Ch. D. 182, 53 L. J. Ch. 219, 50 L. T. 95, 32 W. R. 165.

AMERICAN NOTES.

The principles of the Rule are laid down in Washburn on Easements, p. 730, citing the *Pomfret case*, and *Prescott* v. *White*, 21 Pickering, 341; 32 Am. Dec. 266, and other Massachusetts cases. In that case it is said: "It must also be taken as an inference of law, in the absence of a grant or contract, that the party who enjoys the benefit of the easement is to keep it in repair." Citing the *Pomfret case*, and *Taylor* v. *Whitehead*, Doug. 744. So in *Williams* v. *Safford*, 7 Barbour (New York Supr. Ct.), 309, it was held that "the grantee of a private way is himself bound to keep it in repair," and cannot justify going *extra viam* if it becomes founderous. Approved in *McMillan* v. *Cronin*, 75 New York, 477. A grant of a privilege to grind corn does not bind the grantor to keep the mill in repair. *Bartlett* v. *Peaslee*, 20 New Hampshire, 547; 51 Am. Dec. 242.

In *Ballard* v. *Butler*, 30 Maine, 94, it was held that an easement, created by a reservation in a deed, of a right to take water from a well, imposed no obligation on the owner of the servient estate to keep the well in repair. This was founded on *Doane* v. *Badger*, 12 Massachusetts, 65, an exactly similar case, and *Brondage* v. *Warner*, 2 Hill (New York), 145.

In *Whittenton Mnfg. Co.* v. *Staples*, 164 Massachusetts, 319; 29 Lawyers' Rep. Annotated, 500, it was held that a servitude by prescription, charging property with the payment of a portion of the expense of repairs to a dam from which a water power is furnished to the premises, is created, where for more than fifty years an annual contribution by the owner of the servient estate has been paid as a duty and collected by the other party as a right. On this somewhat novel point the Court observe: "The duty is of the same character as that which is created by the provision in the deed to Richmond, binding him and his assigns to pay one fifth of the sum paid for flowing. Its connection with the estate and rights granted is equally close. A covenant to make the payments would run with the land. A duty imposed on the grantee and his assigns by stipulation in the deed would be enforced in equity against the land. We see no reason why the same duty may not be established by prescription. In *Doane* v. *Badger*, 12 Massachusetts, 65, it was recognized, though not expressly decided, that, where the owner of a close had an ancient right to take water from a well and pump situated on another

close, he might be bound by prescription to keep the well and pump in repair. It is well established that there may be a prescriptive duty to maintain fences (*Bronson* v. *Coffin*, 108 Massachusetts, 175, 185, 11 Am. Rep. 335, and cases cited); also ways (*Middlefield* v. *Church Mills Knitting Co.* 160 Massachusetts, 267). See also *Lynn* v. *Turner*, Cowp. 86; *Anonymous*, Lofft, 556, where it was held that there may be a prescriptive duty of keeping the bed or banks of a stream in order. So where a reservoir dam is maintained for the benefit of several estates, the duty of repairs in whole or in a specified proportion may be established by prescription as a charge against one of the estates in interest. The duty of paying one fifth of the reasonable compensation for drawing water rests on the same grounds. For these reasons, in the opinion of a majority of the Court, the payment of the whole sum claimed may be enforced against the land of the defendant." Three judges, however, including Holmes, J., dissented.

Section II. — *Acquisition of Easements.*

No. 4. — PINNINGTON *v.* GALLAND.

(1853).

No. 5. — HALL *v.* LUND.

(1863).

RULE.

Grant of an easement may be implied from surrounding circumstances, for instance, from the fact that it is necessary to the enjoyment of a tenement, or that it is necessary for the purposes for which the dominant tenement was granted.

Pinnington v. Galland.

9. Ex. 1–13 (s. c. 22 L. J. Ex. 349).

Easement. — Implied grant. — Way of Necessity.

[1] In an action for a disturbance of a right of way, it appeared that, in the year 1839, A., being the owner of five closes, two of which, called the Holme closes were separated by two of the others from the only available highway, sold the entire property in three lots. M. purchased the Holme closes, N. one of the other closes, and D. the remaining closes. Over the latter, the tenants of A., from the year 1823, had used a way for the occupation of the Holme closes. The deeds of conveyance to the three purchasers were all exe-

No. 4. — Pinnington v. Galland, 9 Ex. 1–3.

cuted on the same day, but it could not be ascertained in what order of priority they were executed. No special grant or reservation of any particular way was contained in any of them; but in the conveyance to M. were the usual words, "together with all ways, roads, &c., to the said closes belonging or appertaining." For several years after the execution of the conveyances, the plaintiff, who occupied the Holme closes as tenant of M., had used the way in question; but, in 1843, the defendant, who had purchased D.'s closes, disputed the plaintiff's right and obstructed the way: — *Held*, first, that, assuming that the conveyance to M. was executed before that to D., the plaintiff was clearly entitled to the way, for where a person having a close surrounded by his land grants the close to another, the grantee has a way over the grantor's land as incident to the grant. Secondly, assuming that the conveyance to D. was executed before that to M., the plaintiff was nevertheless entitled to the way, for while the property in the Holme closes remained in A. he had that way of necessity, as being the most convenient mode of access to his premises, and it passed by his conveyance to M. under the words "all ways to the closes belonging or appertaining."

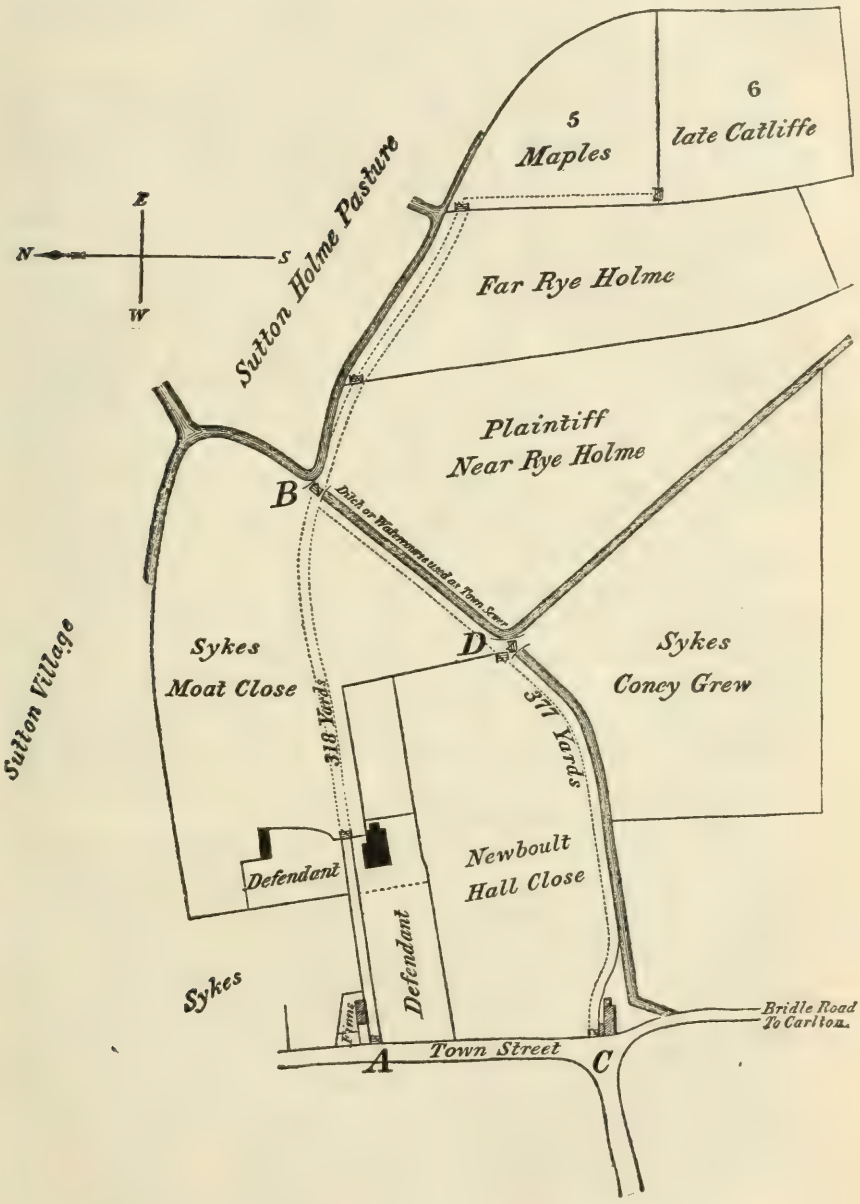
This was an action on the case for the disturbance of a right of way, which came on to be tried before COLERIDGE, J., at Nottingham Summer Assizes, 1852, when a verdict was found for the plaintiff, damages 40*s*., subject to the following special case: —

The declaration claimed the right of way in question over the defendant's land in respect of two closes called the Near and Far Rye Holme closes, of which the plaintiff was the occupier. There was a plea in denial of the alleged right of way. The subjoined plan shows the plaintiff's and defendant's lands, and the neighbouring closes particularly referred to in the subsequent part of the case.

[*3] *The right of way claimed by the plaintiff was from the Town-street of Sutton-upon-Trent, through the defendant's lands on the north side of his house, and through part of the moat close, in the line marked A——B. The defendant denied the plaintiff's right to proceed in that direction, and contended that, if the plaintiff was entitled to any way from the Town-street to his closes, it was not over the defendant's lands, but over the close called in the plan the Hall close, along the hedge bounding the south side of that close, in the line marked C——B.

The plaintiff's closes and the defendant's house and land, as well as the Moat close and the Hall close, Coney Grew close, Maples close No. 5, and Catliffe's close No. 6, formerly all belonged to one owner, and the claim and dispute as to the way in question arose in consequence of the subdivision and sale of the

No. 4. — Pinnington v. Galland, 9 Ex. 3.



estate as hereinafter mentioned, the plaintiff claiming the way A——B, as a way arising from necessity or by implied grant from Mr. Dickinson on such subdivision and sale.

Sometime before 1814, the whole property belonged to and was in the occupation of a Mr. Millus, and in his time the way actually used to get from the Town-street to the closes now occupied by the plaintiff, and the closes No. 5 and No. 6, was in the line A——B. In 1814 Mr. Dickinson, who had then become the owner of the whole estate, divided it into several lots with a view to a sale by auction, on which occasion the close No. 5 formed one lot, and the close No. 6 another. An auction accordingly took place during that year, when the closes No. 5 and No. 6 alone were sold, the former to a person named Maples, the latter to a person named Catliffe. Both the purchasers entered into possession of their respective lots in 1815. The conveyance to Catliffe contained a special grant to him of a road from the Town-street in the line C——B, and from thence through and [* 4] along the north side of the two * closes, now the plaintiff's, and through and along the west side of No. 5, and which road had been so set out with a view to the said sale. The conveyance to Maples contained no special grant of any road, but reserved so much of the road granted to Catliffe as passed through No. 5. From the time that Maples and Catliffe entered into possession of their respective closes, they used the road mentioned in the conveyance to Catliffe, and no other road, until the arrangement made with Wilmot hereinafter mentioned.

In 1818, Mr. John Wilmot became, and continued till 1823, tenant to Mr. Dickinson of all the unsold portion of the estate, excepting the house and land now the defendant's and the moat close; and during all that time the only road used by him was the road C——B. In 1823, Wilmot became yearly tenant of the whole of the unsold estate, and shortly afterwards, by arrangement between Wilmot, Maples, and Catliffe, the use of a road in the line A——B was substituted for the road in the line C——B, and Wilmot then removed the gate between the Moat close and Hall close, and made up the fence in its stead. The use of the road C——B was then discontinued, and the substituted road A——B alone was used from thence until and after the sale in 1839, hereinafter mentioned, during all which time it was the only open road, in consequence of the obstruction C——B. There

was no evidence that Mr. Dickinson ever became aware of this arrangement.

In the latter end of 1839, the remainder of the estate was sold by auction in separate lots, and in the month of April, 1840, conveyed by Mr. Dickinson to the respective purchasers. The two closes now occupied by the plaintiff were conveyed to Mr. Moss by deeds dated the 6th and 7th of April, 1840. The house and premises (now the defendant's), together with the Moat close and Coney Grew close, were conveyed to Mr. Dearle by deeds dated the 3rd and 4th of April, 1840. Mr. Dearle, as the largest purchaser, * entered into covenants for the production of the [* 5] title-deeds to the other purchasers, which title-deeds were accordingly handed over to him. The Hall close was conveyed to John Newboult by deeds dated the 6th and 7th of April, 1840. These deeds of conveyance to the several purchasers from Mr. Dickinson, though bearing different dates, were in fact all executed on one day, viz., the 8th of April, 1840; and it cannot be ascertained in what order of priority they were executed.

Dearle, after his own purchase, sold and conveyed the Moat close and Coney Grew close to James Sykes, and the house and premises (now the defendant's) to William Wilmot, who in 1842 sold and conveyed the same to the defendant. The conveyance from Dearle to Wilmot is dated the 6th and 7th of April, 1840, and the conveyance from Wilmot to the defendant is dated the 2nd of February, 1842.

No special grant or reservation of any particular way is contained or mentioned in any of the deeds of conveyance from Mr. Dickinson of 1840. The conveyance of the two closes now occupied by the plaintiff contains the usual general words, "together with" (*inter alia*) "all ways, roads, paths, passages, rights, easements, advantages, and appurtenances whatsoever to the said closes belonging or in anywise appertaining."

None of the conveyances contained any exception or mention of the special right of way granted to Catliffe, nor was there any evidence that the existence of such grant, or of the previous user of the way so specially granted, or of the circumstances under which the substitution took place, was known to any of the purchasers in 1840, except Mr. Wilmot.

Upon the completion of the purchases in April, 1840, the several purchasers or their tenants were put into possession and

occupation of the different closes, and the plaintiff then [* 6] began to occupy the Rye Holme closes under * Mr. Moss, and has remained in possession up to the present time. Wilmot continued to occupy as owner the house and land (now defendant's) till 1842, when he sold it to the defendant; and during this time the use of the road A——B, on the north side of the house, continued as before, both by the plaintiff as tenant of the Rye Holme closes, and by the tenants of Maples and Catliffe in respect of their closes. In 1846 the defendant obstructed the road A——B, and made it unpassable, by digging a trench and planting trees across one part of it. The plaintiff gave him notice to remove the obstruction, which he refused, and after attempts at an arrangement, which failed, the present action was brought to try the right of the plaintiff to the last-mentioned road. There is not, nor was it proved that there ever was, any mode of access to the plaintiff's closes (without committing trespasses on adjoining owners) except by one or other of the roads in question.

The question for the opinion of the Court is, whether, under the above circumstances, the plaintiff, as the occupier of the Rye Holme closes, is entitled to the use of the road A——B over the defendant's land. If the Court consider that he is, the verdict is to stand, if not, to be entered for the defendant.

Hayes argued for the plaintiff (June 8): Upon the subdivision of the property there was an implied reservation of the way in question, which passed by the conveyance of the Rye Holme closes, under the words " all ways thereto appertaining." It is a maxim of law, that when a person grants anything, he impliedly grants all that is indispensable for the full enjoyment of the thing granted. That is the principle on which a way of necessity is founded. In the note to *Pomfret* v. *Ricroft*, 1 Wms. Saund. [* 7] 323, (p. 20, *ante*), the learned editor, after * adverting to the above maxim, says: " So, where a man, having a close surrounded with his own land, grants the close to another in fee, for life or years, the grantee shall have a way to the close over the grantor's land as incident to the grant; for without it he cannot derive any benefit from the grant. So it is where he grants the land and reserves the close to himself." Those positions are supported by numerous authorities. In *Clarke* v. *Cogge*, Cro. Jac. 170, " the case was, the one sells land, and afterwards the vendee, by reason thereof, claims a way over part of the plaintiff's land,

there being no other convenient way adjoining; and whether this was a lawful claim was the question: and it was resolved, without argument, that the way remained, and that he might well justify the using thereof, because it is a thing of necessity, for otherwise he could not have any profit of his land: *et e converso*, if a man hath four closes lying together, and sells three of them, reserving the middle close, and hath not any way thereto but through one of those which he sold, although he reserved not any way, yet he shall have it as reserved unto him by the law." Also, in 2 Roll. Abr. tit. "Graunt" Z. p. 17, it is said, "If I have a field, inclosed by my own land on all sides, and I aliene this close to another, he shall have a way to this close over my land as incident to the grant, for otherwise he cannot have any benefit by the grant." [PLATT, B. The law is stated in similar terms in Selw. N. P. 1338, 10th ed.] In *Staple* v. *Heydon*, 6 Mod. 1, it was held, that "a stranger may have a way over another's soil three manner of ways, viz., for necessity, by grant, and by prescription. For necessity, as if A. has an acre of ground surrounded by ground of B., A. for necessity has a way over a convenient part of B.'s ground to his own soil, as a necessary incident to his ground. So, if A. grant a piece of land which is surrounded by land of the vendor, * he grants a [* 8] way as a necessary incident therewith." In *Packer* v. *Welsted*, 2 Sid. 39, 111, there was a special verdict, finding "that there were three parcels of land, and the necessary and private way was out of the first parcel to the second, and out of the two first parcels to the third parcel. J. S. purchased all these parcels, and afterwards aliened the two first to J. N., and the question was if he shall have a way over the two first parcels to his third parcel. The jurors also found that the alienation was by feoffment, and that there was no other way to come to the land not aliened but over the other land." After two arguments, the Court adjudged "that the defendant might take a convenient way without the consent of the plaintiff, and the law would then adjudge whether the way was convenient and sufficient, or otherwise." GLYN, C. J., observed, that it could not properly be called a way, because it was over a man's own land; but the jurors having found the way to be of necessity, it would remain, for it is not only a private inconvenience, but also to the prejudice of the public weal, that the land should be fresh and unoccupied. In

Dutton v. *Taylor*, 2 Lutw. 1487, which was an action of trespass *quare clausum fregit*, the defendant justified as tenant to one Cleadon, who was at one time seised in fee of the close in which &c., and also of another close, the only road to the latter from an ancient highway being over the close in which &c. Cleadon sold that close, but still continued to use the way across it, although there was no reservation of it in the conveyance. It was argued that the law would not imply any reservation, *sed non allocatur;* for it is made apparent by the plea that it is a way of necessity, and it is *pro bono publico* that the land should not be unoccupied although some other way exists; if the way claimed is the most convenient and reasonable mode of access it is a way of neces-
[*9] sity. [PARKE, B., referred to * *Pheysey* v. *Vicary*, 16 M. & W. 484.] In *Howton* v. *Frearson*, 8 T. R. 50, (4 R. R. 581), the general doctrine as to a way of necessity was extended to the case of a grant by a trustee. A way of necessity is not a mere easement, but something appurtenant to the land; for it is not extinguishable by unity of possession: *Packer* v. *Welsted*, *Clarke* v. *Cogge*; and it will pass under a conveyance of land with all ways thereto belonging and appertaining: *Morris* v. *Edgington*, 3 Taunt. 24 (12 R. R. 579), *James* v. *Plant*, 4 Ad. & E. 749, *Barlow* v. *Rhodes*, 1 C. & M. 439.

Hugh Hill, for the defendant. Since it cannot now be ascertained in what order of priority the conveyances were executed, presumption must determine it: *Taylor* v. *Horde*, 1 Burr. 75. It may reasonably be presumed that the conveyance to Dearle was first executed; and, assuming that to be the case, it is difficult to understand how Dickinson, remaining the owner of the Rye Holme closes, but having conveyed away the fee in the surrounding land, could have a right of way over it in derogation of his own grant. There is no intelligible legal reason for such a right of way. If the grantee does not execute the conveyance, there can be no implied grant from him, neither can there be any implied exception or reservation of it by the grantor, since a right of way cannot be made the subject either of the one or the other, inasmuch as it is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, and the latter to a reservation: 1 Wms. Saund. 323 c. note. *Barlow* v. *Rhodes* is an express authority, that the words in a conveyance, " with all ways thereto belonging or in anywise apper-

taining," will not pass a way not strictly appurtenant, unless the parties appear to have intended * to use those [* 10] words in a sense larger than their ordinary legal sense. *Harding* v. *Wilson*, 2 B. & C. 96 (26 R. R. 287), is an authority to the same effect. There is no other case in which the word "appertaining" has received the extended construction put upon it in *Morris* v. *Edgington*. In *James* v. *Plant*, the conveyance contained the additional words "or therewith usually held, used, occupied, or enjoyed." But, at all events, a way of necessity is limited by the necessity which created it, and ceases, if at any subsequent period the party entitled to it has another mode of approach to his land: *Holmes* v. *Goring*, 2 Bing. 76. Here the road in question was not used prior to the year 1823, when it was substituted for the old road by arrangement between the tenants, without the consent or knowledge of the owner of the property. He also referred to Gale on Easements, p. 71, 2nd ed.

Hayes replied. *Cur. adv. vult.*

The judgment of the Court was now delivered by

MARTIN, B. This is a special case, which was argued before us during the last term; and the question is, whether the plaintiff, as occupier of two closes called the Rye Holme closes, is entitled to a right of way over certain lands of the defendant.

The material circumstances are these: In the year 1839 a property consisting of five closes belonged to a Mr. Dickinson. Two of them were the Rye Holme closes, and they were separated by two of the others from the only available highway, the Town-street of Sutton-upon-Trent. From the year 1823 the road over which the plaintiff now claims the right of way was that which was * used by Mr. Dickinson's tenant for the occu- [* 11] pation of the Rye Holme closes. From a plan, which forms part of the case, the road appears to be the shortest and most direct access from the highway to the closes; and it having been used for so many years by the tenant who occupied the entire property, we think we may safely conclude that it was, and is, the most convenient road.

In 1839 the property was sold by Mr. Dickinson in three lots. A Mr. Moss purchased the Rye Holme closes, a Mr. Newboult purchased one of the other closes, and a Mr. Dearle purchased the remainder of the property, which includes that now belonging to

the defendant, and over which the way in question goes. The deeds of conveyance to the three purchasers, although bearing different dates, were all executed on the same day, the 8th of April, 1840, and it cannot now be ascertained in what order of priority they were executed. No special grant or reservation of any particular way is contained in any of them; but in the conveyance to Mr. Moss, whose tenant the plaintiff is, there is comprised the usual words, "together with (*inter alia*) all ways, roads, paths, passages, rights, easements, advantages, and appurtenances whatsoever to the said closes belonging, or in any way appertaining." Mr. Dearle executed the deed of conveyance to him.

For several years after the execution of the conveyances, the occupier of the Rye Holme closes continued to use the road in question; but in 1843 the defendant, who had purchased from Mr. Dearle part of the land conveyed thus by Mr. Dickinson, and over which the way in question goes, disputed the plaintiff's right to use it. Attempts were made for arrangement, which failed, and we are now required to decide the point; and we are of opinion that the plaintiff, as occupier of the Rye Holme closes, is entitled to the right of way claimed.

[*12] It is impossible to ascertain the priority of the execution of the two conveyances (that to the third *purchaser may be put out of consideration), and the plaintiff, having to establish his right, is bound to show that, whichever was the first executed, he nevertheless is entitled to the right of way.

First, assume that the conveyance to Mr. Moss was executed before that to Mr. Dearle. In this case there would clearly be the right of way. It is the very case put by Mr. Serjt. Williams in his note to *Pomfret* v. *Ricroft*, viz. "Where a man, having a close surrounded with his land, grants the close to another in fee, for life, or for years, the grantee shall have a way over the grantor's land, as incident to the grant, for without it he cannot have any benefit from the grant," and the way would be the most direct and convenient, which we think we may properly assume the one in question in the present case to be. This is founded upon the legal maxim, "Quando aliquis aliquid concedit, concedere videtur et id sine quo res concessa uti non potest," which, though it be clearly bad Latin, is, we think, good law.

Secondly, assume that the conveyance to Mr. Dearle was executed the first. In this case the Rye Holme closes were for a

short period of time the property of Mr. Dickinson, after the property in the land conveyed to Mr. Dearle had passed out of him. There is no doubt, apparently, a greater difficulty in holding the right of way to exist in this case than in the other; but, according to the same very great authority, the law is the same, for the note proceeds thus: "So it is when he grants the land and reserves the close to himself;" and he cites several authorities which fully bear him out: *Clarke* v. *Cogge*, *Staple* v. *Heydon*, *Chichester* v. *Lethbridge*, Willes, 72, note. It no doubt seems extraordinary that a man should have a right which certainly derogates from his own grant; but *the law is dis- [*13] tinctly laid down to be so, and probably for the reason given in *Dutton* v. *Taylor*, that it was for the public good, as otherwise the close surrounded would not be capable of cultivation.

According to this law, therefore, the right of way would accrue to Mr. Dickinson upon the execution of the conveyance to Mr. Dearle, and it would clearly pass to Mr. Moss under his conveyance, for it would be a way appurtenant to the Rye Holme closes, and would pass under the words "all ways to the closes belonging or appertaining," and, indeed, probably without them. The plaintiff has vested in him, as Mr. Moss's tenant, all his rights of way; and, for the above reason, we think that he is entitled to the judgment of the Court.

There is a statement in the case respecting another road described in the plan as from C to D, which the defendant contends was the plaintiff's proper way. But it is perfectly clear, that, whatever may be the rights of the occupiers or owners of the two closes further to the east, called Maples and Catliffe closes, and which were sold and conveyed by Mr. Dickinson before the sales to Mr. Moss and Mr. Dearle, Mr. Moss or the plaintiff his tenant, upon the statement in the present case, has no right to the use of it; and, except by one or other of the roads, the case states that the plaintiff could not get to the Rye Holme closes without being a trespasser upon land other than Mr. Dickinson's.

Judgment for the plaintiff.

No. 5. — Hall v. Lund, 1 Hurl. & Colt. 676.

Hall v. Lund.

1 Hurl. & Colt. 676–686 (s. c. 9 Jur. N. S. 205; 11 W. R. 271).

Easement. — Grant implied by Circumstances.

[676] In 1855, S., the owner in fee of two mills, leased one to P., who carried on therein the business of a bleacher. The refuse from his works was discharged through a drain, partly open and partly covered, into a natural stream or watercourse, 300 or 400 yards distant, and upon which the other mill was situate. This discharge of the refuse took place about seven times a fortnight and polluted the stream. In 1858, P. surrendered his lease, and S. granted a new lease to the defendant. In this lease the defendant was described as a "bleacher," and the demise was of the premises "late in the occupation of P." There was a clause that all buildings erected by the defendant for the purpose of bleaching should, at the end of the term, become the property of S. In 1858 the plaintiff purchased both mills. The defendant discharged the refuse from his works through the drain into the stream in the same manner that P. had formerly done. The plaintiff, who carried on in the other mill the business of a paper maker, brought an action against the defendant for polluting the stream. — *Held*, that the lease might be explained by the state of the premises at the time it was granted, and the mode in which they had been previously enjoyed; and that, thus explained, there was an implied grant by S. to the defendant to use the stream for the purpose of his business of bleaching, and therefore the plaintiff, who was in the position of S., could maintain no action against the defendant.

The declaration stated, that the plaintiff was possessed of a mill and premises, called "Yew Tree Mill," situate at Diggle, in the county of York, and therein carried on the trade and business of a paper manufacturer, and by reason of his possession thereof the plaintiff was entitled to the flow of a stream or watercourse to, into, and through his said mill and premises, for the use and enjoyment of the same, and for the carrying on of his said trade and business thereon, without such fouling and pollution of the said stream or watercourse as hereinafter mentioned: Yet the defendant on divers days and times wrongfully and injuriously caused the said stream or watercourse to be fouled and polluted with fibrous matters, pulp, refuse, drugs, and other noxious materials, liquids, and fluids; and by reason thereof the said stream or watercourse ran and flowed to, into, and through the said mill and premises of the plaintiff in such foul and polluted state as aforesaid, whereby the plaintiff was greatly damaged in the use and enjoyment of his said mill and premises, &c.

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Sixth plea. That long before any of the said times, when, &c., and before the plaintiff had any estate, right, or title to the said mill and premises or any part thereof, to wit, on the 28th day of September, 1858, one Hugh Shaw, then being seised or possessed of the land whereon the said mill and *premises [*677] have since been erected, with the appurtenances, for an estate not yet determined but still in force and existence, and being also then seised or possessed of a certain other mill, situate higher up the said stream or watercourse (hereinafter called the mill of the defendant), with the appurtenances, for an estate not yet determined but still in full force and existence, by deed demised and granted to the defendant the said mill of the defendant with the appurtenances, including a right to use the said stream or watercourse for the purposes of the said mill of the defendant and for carrying on there his, the defendant's trade and business of a bleacher, for a certain term of years which has not yet elapsed, but which is still in full force and existence. And the defendant under and by virtue of that deed, before any of the said times, when, &c., entered and became and was possessed of the said mill of the defendant with the appurtenances, and continued so thereof possessed until and at the said several times, when, &c. : that the grievances complained of were uses by the defendant of the rights, easements, and privileges so granted to him as aforesaid : that all the estate, right and title of the plaintiff of, in, and to the land upon which the said mill and premises in the declaration mentioned were erected, were derived by the plaintiff under or by virtue of a grant or conveyance thereof from the said Hugh Shaw to the plaintiff, made after the execution of the said deed hereinbefore mentioned, and after the said entry by the defendant hereinbefore mentioned, and that the said mill in the declaration mentioned was erected by the plaintiff on the said land after such grant and conveyance as last aforesaid. Issue thereon.

At the trial, before WILDE, B., at the last Yorkshire Summer Assizes, it appeared that the plaintiff, who was a paper maker, carried on his business at a mill, called "Yew Tree Mill," which was situate on a natural stream or *watercourse. [*678] The defendant, who was a bleacher, carried on his business at a mill, called "Ridge Mill," which was not situate on the stream but about 300 or 400 yards from it; and the water which

he used in his business was not taken from the stream, but from another and independent source. After the water thus taken had been fouled by the process of bleaching, it was discharged into the stream, a little above the plaintiffs' premises, by means of an artificial drain, partly open but covered up for several yards from the defendant's premises. This discharge of refuse water took place about seven times a fortnight, and caused the fouling of the stream of which the plaintiff complained.

On the part of the defendant it was proved that one Hugh Shaw was formerly the owner in fee of both the plaintiff's and the defendant's mill, and that in the year 1855 Shaw leased the defendant's mill to one Matthew Pullan, who carried on therein the business of a bleacher. In the year 1858, the defendant agreed to take from Pullan his business and premises, and, Shaw having assented to the arrangement, in the September of that year Pullan surrendered his lease to Shaw, and Shaw granted a new lease to the defendant.

By this lease, which was dated the 28th September, 1858, Shaw demised to the defendant (who was described as a bleacher), "all that messuage or tenement, with the garden, outbuildings, and closes or parcels of land therewith occupied, containing, with the said garden and land on which the said buildings are erected, nine acres one rood, late in the occupation of Matthew Pullan and his undertenants, &c., with the appurtenances:" habendum, "all and singular the before described premises, with the appurtenances, for the term of eleven years from the first of January then next. The lease contained a covenant by the defendant to repair and keep in repair all the interior of the said messuage, edifices, and buildings, &c., and also "all and singular the gates, [* 679] * stiles, posts, rails, locks, goits, weirs, sluices, water-banks, dams, and reservoirs for water, hedges, ditches, mounds, ponds, trenches, and fences of and belonging to the said premises." The last clause in the lease was as follows: "And lastly, it is expressly understood and agreed by and between the parties hereto, that all improvements, buildings, and erections made and built by the said lessee, his executors, &c., for the purpose of carrying on the business of bleaching, are at the end of the said term to become and be the property of the lessor, his heirs and assigns, although expressly erected for the said business."

In the following November, the defendant entered upon the

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premises under the lease, and carried on his business there in the same manner as Pullan had previously done. At the time Pullan quitted the mill, the premises, including the drain, were in precisely the same state as at the time this action was brought.

On the 4th of October, 1859, the plaintiff purchased of Shaw the fee simple in possession of the Yew Tree Mill, and the reversion in fee of the defendant's mill. In the year 1860, the plaintiff converted the Yew Tree Mill, which was formerly a silk mill, into a paper mill.

It was submitted, on behalf of the defendant, that the lease of the 28th September, 1858, contained an implied grant of a right to use the stream or watercourse for carrying on the business of a bleacher; and the learned Judge, being of that opinion, directed a verdict for the defendant on the sixth plea, reserving leave to the plaintiff to move to enter a verdict with 1*s.*, damages; the defendant to be at liberty to amend the plea, if necessary, and the Court to have power to draw inferences of fact.

Monk, in last Michaelmas Term, obtained a rule *nisi* accordingly, on the ground that neither the lease to the defendant, nor the facts proved, supported the plea; against which

* Bliss and W. R. Cole now showed cause. The plain- [* 680] tiff cannot be in a better position than Shaw, under whom he claims; and by the lease of the 28th of September, 1858, Shaw granted to the defendant a right to use the stream or watercourse for carrying on his business of a bleacher. A way appurtenant to land will pass with the land without any express grant: *Beaudeley* v. *Brook*, Cro. Jac. 189. So a conduit to a house over the land of the grantor will pass by a grant of the house *cum pertinentiis: Nicholas* v. *Chamberlain*, Cro. Jac. 121. Again, in *Pyer* v. *Carter*, 1 H. & N. 916, it was held that where the owner of two or more adjoining houses sells and conveys one of them to a purchaser, such house is entitled to the benefit and is subject to the burthen of all existing drains communicating with the other house, without any express reservation or grant for that purpose. In order to ascertain what passed to the defendant under the lease, regard must be had to the state of the premises at the time the lease was granted: *Hinchliffe* v. *The Earl of Kinnoul*, 5 Bing. N. C. 1; *Roberts* v. *Karr*, 1 Taunt. 495 (10 R. R. 592). In *Blackesley* v. *Whieldon*, 1 Hare, 176, 180, Sir J. WIGRAM, V. C., said: "The general principle of law, that where a person makes a

grant of any given thing, he impliedly grants that also which is necessary to make the grant of the principal subject effectual, does not admit of dispute (see Co. Lit. 56 *a*, 163 *a*; 3 Com. Dig., 'Grant' (E. 10); 3 Burge Com. 416): *Pomfret* v. *Ricroft*, 1 Saund. 320, and notes (p. 16, *ante*). And this principle is carried to the extent, that the implied grant entitles the lessee to whatever is necessary to the full enjoyment of the subject of the grant: *Senhouse* v. *Christian*:" 1 T. R. 560 (1 R. R. 300). Here there is a demise of the premises "late in the occupation of Matthew Pullan," and therefore all rights passed which Pullan enjoyed: Vin. Abridg., tit. Grant (Q).

[*681] *Monk, Mellish, and Kemplay, in support of the rule. There is no implied grant of a right to foul the stream. The defendant does not claim an easement or a mere right to use the water, but to pollute it. [Martin, B. It is not, strictly speaking, an easement, but a right to use the stream in the manner in which it was enjoyed at the time the lease was granted.] Such a right can only be claimed where the user has been apparent and continuous: Gale on Easements, p. 85, 3rd ed. [Channell, B. In *Ewart* v. *Cochrane*, 4 Macq. Sc. App. 117, the House of Lords confirmed the principle of the decision in *Pyer* v. *Carter*.] In those cases the question was not, as here, whether the occupier of one tenement had a right to foul a stream so as to create a nuisance to his neighbour, but whether the one could deprive the other of a servitude which was essential to the enjoyment of his property. In both those cases the easement upon the servient tenement was apparent and continuous, and a great deal turned on what evidence was admissible for the purpose of showing a grant. Here nothing can be looked at except the terms of the lease and the apparent state of the premises at the time it was granted, and it is not competent to inquire how they have been used. [Martin, B. In ascertaining what passed by a conveyance evidence may be given of the state of the property at the time it was conveyed, and of the mode in which it had been enjoyed. Here the lessee sees a drain, and he naturally assumes that some use has been made of it; the refuse must be got rid of, and surely evidence may be given that the drain was reasonably necessary and had been used for that purpose.] Whatever inference may be drawn from an inspection of the premises may be made; but the easement must be apparent on the face of the

premises. [POLLOCK, C. B. In *Ewart* v. *Cochrane*, Lord CAMPBELL, C., said: "But the ground on which I proceed is this, that this is a *servitude which the grant implies. [*682] I cannot entertain the slightest doubt upon that. I mean the grant accompanied with the enjoyment which existed at the time the grant was made." MARTIN, B. In Phear on the Rights of Water, p. 73, it is laid down that "whenever the owner of land divides his property into two parts, granting away one of them, he is taken, by implication, to include in his grant all such easements over the remaining part as are necessary for the reasonable enjoyment of the part which he grants, in the form which it assumes at the time he transfers it. If the grantor has already treated this portion as separate property, the mode in which he enjoyed it, or allowed it to be enjoyed, affords a very proper indication of what rights over his remaining land he intends to pass as accessory to it."] In Gale on Easements, p. 85, 5th ed., it is said, that by apparent easement must be understood "not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject." That observation was cited and approved by the Court in *Pyer* v. *Carter*, 1 H. & N. 922. There was no evidence that Shaw was aware of the mode in which Pullan had used the stream. General words in a lease, such as "appertaining" "belonging," will not, upon a severance of a tenement, pass such a right as that now claimed: *Dodd* v. *Burchell*, 1 H. & C. 113; Gale on Easements, p. 77, 5th ed. In *Wardle* v. *Brocklehurst*, 1 E. & E. 1058, 1065, the farm was conveyed together with "all waters, watercourses, easements, and appurtenances belonging to, or held, used, occupied, or enjoyed therewith." Here there is no implied grant by Shaw to the defendant to pollute the water.

POLLOCK, C. B. I am of opinion that the rule ought to be discharged. The question is, what rights passed to [*683] the defendant under the lease granted to him. Pullan, the previous lessee, had carried on the business of a bleacher upon the premises in question, and when he surrendered his lease a new lease was granted to the defendant of the same works and premises for the purpose of bleaching. I cannot conceive why there should be any difference, either on technical or common sense grounds, between an assignment of a lease by a lessee with

the concurrence of the lessor, and a surrender of a lease by a lessee and grant by the lessor of a new lease of the same premises. If Pullan had assigned his lease to the defendant, it is clear that all rights would have passed to him which Pullan possessed under that lease, and it seems to me that there is no distinction between that case and the surrender of the lease and the grant of a new lease to the defendant.

It has been argued that no apparent easement was granted by the lease, and that the previous mode of user of the premises cannot be inquired into; but I think that we are at liberty to ascertain the mode in which the premises had been enjoyed by the former lessee; their enjoyment as bleaching works being the object intended by the lessor in granting the lease. It is conceded that the former lessee used this stream for the purpose of carrying off his refuse, and I cannot see any difference between that case and taking water from a stream, and returning it in a foul condition. It is said that it is turning a watercourse into a drain, but in one sense all watercourses operate as drains. But, however that may be, the lessor, with full knowledge of the mode in which the premises had been used by the former lessee, grants to the defendant a new lease of the premises for the same purpose; and the plaintiff, who purchased the reversion, stands in the same position as the lessor, and cannot derogate from his own grant.

[* 684] * Martin, B. I am of the same opinion. Shaw could grant to the plaintiff no more right than remained to him after his lease to the defendant; therefore it is necessary to ascertain what Shaw granted to the defendant. As a general rule, in considering what is granted by a lease, the parties have a right to prove all the circumstances connected with the state of the property at the time of the demise. Therefore I think that it was competent to the defendant to show that these premises were leased to him for the purpose of bleaching, and that the refuse had been usually carried away by means of this stream. If, as suggested by Mr. Kemplay, there had been some concealed mode whereby the former lessee got the use and benefit of the stream without the knowledge of the lessor, the case might assume a different complexion; but the circumstance that the lessor allowed the former lessee to discharge his refuse into the stream is a fact to be proved, and, that being proved, there is no doubt as to what

was granted by the lease. Mr. Bliss pointed out that the demise was of the premises as in the occupation of Pullan. That might carry the case a little further; but I desire to rest my judgment on the decision of the House of Lords in *Ewart* v. *Cochrane*, that where there is a demise of premises with which certain rights have been usually enjoyed, it must be taken that the lessor has granted those rights. It is not necessary to consider what is appurtenant or what is not appurtenant, — there is the decision of the House of Lords to the effect which I have stated. This may not be an easement in the strict sense of the term, but it is in point of fact a grant of a right, for that which Shaw granted to the defendant was the premises and bleaching works as they existed at the time Pullan surrendered his lease. I therefore think that our decision is both consistent with good sense and justice, and fully borne out by *Ewart* v. *Cochrane*.

* Channell, B. I am also of opinion that this rule [* 685] ought to be discharged. The right claimed by the defendant is not strictly speaking an easement, but a right founded on a particular grant; and therefore, in order to ascertain what was granted, we must look at the mode in which the premises were enjoyed at the time of the grant. If this had been a secret use of the stream of which the lessor had no knowledge whatever, that might have altered the case, as my brother Martin observed, but there is nothing to lead to that conclusion; and I found my judgment on the fact that Shaw knew of the discharge of the refuse water into the stream.

It is said that there was no continuous user of the stream, but I cannot attach any weight to that argument. In order to be continuous, the user need not be on every day in the week; and there was clearly a continuous user when the refuse was discharged into the stream, on an average, seven times a fortnight. I should have come to the same conclusion independently of authority, but the case of *Pyer* v. *Carter*, which was confirmed and its principle explained by the House of Lords in *Ewart* v. *Cochrane*, compels me to come to this conclusion.

Wilde, B. I agree with the rest of the Court; but I by no means mean to say that in every case of a new demise the premises may be used with all the liberties and privileges enjoyed by the former lessee. It seems to me that, in cases of implied grant, the implication must be confined to a reasonable use of the

premises for the purpose for which, according to the obvious intention of the parties, they are demised. Some uses are obvious enough. A demise of a brewery would carry with it the right to use the premises for brewing; although that might be a nuisance to the lessor or his assigns. So, if a mill were demised [*686] the *lessee would have a right to grind there, although the noise might annoy the lessor or his assigns. If so, why, in the case of a demise of bleaching premises, may there not be an implied grant that they may be used, as they have been theretofore used, for the purpose of bleaching? Each case must depend on its own circumstances and the intention of the parties, to be ascertained from the character, state, and use of the premises at the time of the grant, and in this case there is no doubt of the intention of the parties to be derived from the existing circumstances. *Rule discharged.*

ENGLISH NOTES.

An easement of necessity, *i. e.*, a right to use in respect of one's land another person's land in some particular way, without which right the former land would be useless to its owner, arises by such an implication as is indicated by the principal cases. For instance, the owner of a landlocked ground has a way of necessity over the surrounding lands of his neighbours. *Clarke* v. *Cogge*, Cro. Jac. 170. In *Howton* v. *Frearson* (1798), 8 T. R. 50, 4 R. R. 581, it was held that where one, even as a trustee, conveys land to another, to which there is no access but over the grantor's land, a right of way passes of necessity as incidental to the grant.

If in a conveyance of lands, the mines be reserved with power to dig through the surface to get at the minerals, the mine-owner has also the right of erecting a steam engine, if necessary, for the purpose of draining the mines. *Dand* v. *Kingscote* (1840), 6 M. & W. 174, 9 L. J. Ex. 279. So an owner of mines under the waste land of a lordship who can not otherwise gain the minerals, can dig through the surface land of the waste for that purpose, and carry the minerals away over that land. *Rogers* v. *Taylor* (1857), 1 H. & N. 706, 26 L. J. Ex. 203.

A question arises whether if the condition of the dominant tenement is changed, an easement of necessity may be varied or increased from time to time. In *Corporation of London* v. *Riggs* (1880), 13 Ch. D. 798, 49 L. J. Ch. 297, 42 L. T. 580, 28 W. R. 610, the question was answered in the negative. There, the owner of certain land sold part to the Corporation of London, retaining two acres which were landlocked and used for agricultural purposes. When he subsequently pro-

posed to build a house of public entertainment on the two acres, the corporation contended that he was not entitled to use the way for the carriage of building materials to erect the house, and that he could not be entitled to use the way for approach to the house when built; for the extent of his right was to be measured by the necessity which existed when the right came into existence. This contention was upheld by the Master of the Rolls, who observed that the point was not covered by any previous decision.

A way of necessity is founded on a presumed grant, and therefore, if the circumstances are such that no grant can be presumed, no such easement arises. This grant is generally presumed when property in land has been severed by sale, and when one portion is inaccessible except by passing over the other, or by trespassing on the land of a stranger. But no grant can be presumed over a stranger's land. Per Lord Ellenborough in *Bullard* v. *Harrison* (1815), 4 M. & S. 387, 16 R. R. 493. And, where on the death of the owner of two parcels of copyhold land held of A. and B. respectively who thereupon acquired the respective parcels by escheat, it was held that A. could acquire no right over the land which escheated to B.; for, even if the owner had granted to A., he could not have bound B. by the grant. *Proctor* v. *Hodgson* (1855), 10 Ex. 824, 24 L. J. Ex. 195.

Where land laid out for building is purchased or let, a grant of easement may be implied from the building plan of which the purchaser has notice at the time of his purchase. In *Davies* v. *Sear* (1868), L. R. 7 Eq. 427, 38 L. J. Ch. 545, 20 L. T. 56, 17 W. R. 390, A. purchased from B. the lease of a house, part of an estate agreed to be let to B. upon building leases. There was an open archway under part of the house. In the ground plan of the house drawn on the lease, this archway was described as a "gateway;" and when the buildings on the estate were completed in accordance with the plan, the archway formed the only means of access to a mews behind the house. At the time of the purchase, the buildings not being then completed, there were other means of access to the mews. The assignment contained no reservation of a right of way, but the archway was used as an entrance to the mews until the buildings were completed. It was held that B. had a right of way through the archway by implied reservation, the state of the property at the time of the purchase being such as to put A. upon enquiry, and fix him with the constructive notice of the building plan.

Only one way of necessity is allowed; and where there are two ways, either of which is convenient, the election is in the grantor. *Bolton* v. *Bolton* (1879), 11 Ch. D. 968, 48 L. J. Ch. 467, 40 L. T. 582. The following cases bearing on the point of selection were cited in the judgment: — *Clarke* v. *Rugge*, 2 Rolle. Ab. p. 60 "Grants" Z, pl. 17;

Packer v. *Welsted*, 2 Sid. 39, 111.; *Pearson* v. *Spencer* (1861, 1863), 1 B. & S. 585, 3 B. & S. 761. See also *Pheysey* v. *Vicary* (1847), 16 M. & W. 484; *Dodd* v. *Burchell* (1862), 1 H. & C. 113. The cases seem to point to this, that the selection of the way lies with the person by whose act the way was created, but this must be done consistently with the convenient enjoyment by the other of the subject of the grant.

An easement of necessity ends with the necessity. *Holmes* v. *Goring* (1824), 2 Bing. 76, 9 Moore 166, 2 L. J. (O. S.), C. P. 134. It is indeed suggested by Parke, B., and Alderson, B., in *Proctor* v. *Hodgson* (1855), 10 Ex. 824, 24 L. J. Ex. 195, 197, that *Holmes* v. *Goring* might be reviewed in a Court of Error. But it would probably be too late to review it now. And in *Pearson* v. *Spencer* (1863), 3 B. & S. 761, the judgment of the Exchequer Chamber delivered by Erle, C. J., lends weight to the decision of *Holmes* v. *Goring*.

Such a way of necessity, like every other easement, is extinguished by unity of possession. But where a lessor using a certain way over his own land in connection with certain premises, demises those premises with all ways appertaining, it has been held that the way although not appurtenant in the strict sense of the term, — there being no way which was appurtenant in the strict sense — would pass by the demise. *Morris* v. *Edgington* (1810), 3 Taunt. 23, 12 R. R. 579. In *Worthington* v. *Gimson*, however (1860), 2 El. & El. 613, 29 L. J. Q. B. 116, a conveyance by a partition deed, of premises "with their and every of their rights, members, easements, and appurtenances," was held not to carry the right to a way which had been enjoyed (apparently as a convenience) by the occupiers of one farm to another during the time of unity of seisin. The case was distinguished from *James* v. *Plant*, a decision of the Exchequer Chamber (1836), 4 Ad. & E. 749, 6 L. J. (N. S.) Ex. 260 (No. 19, p. 279, *post*), where the *habendum* "with the appurtenances" was construed by reference to the express words of conveyance "with all ways, &c., used or enjoyed" to carry the right to a way which formerly had been enjoyed as of right, and had continued to be used and enjoyed in fact though the easement had been extinguished by unity of seisin. The later cases relating to a conveyance "with all ways used, &c.," have been conflicting, but it is now settled law, that these words are sufficient to carry the right to a way which has been used in fact, although as a merely convenient way and not of right. *Kay* v. *Oxley* (1875), L. R., 10 Q. B. 360, 44 L. J. Q. B. 210, 33 L. T. 164; *Barkshire* v. *Grubb* (1880), 18 Ch. D. 616, 50 L. J. Ch. 731, 45 L. T. 383, 29 W. R. 929; *Bayley* v. *Great Western Railway Co.* (C. A. 1883), 26 Ch. D. 434, 51 L. T. 337. These cases are all consistent with *Worthington* v. *Gimson*, the principle of which is confirmed by the authority of the judgment of the Queen's Bench delivered

by BLACKBURN, J., in *Pearson* v. *Spencer* (1861), 1 B. & S. 571, 583, as follows: — "We do not think that, on a severance of two tenements, any right to use ways, which during the unity of possession have been used and enjoyed in fact, passes to the owner of the dissevered tenement unless there be something in the conveyance to show an intention to create the right to use these ways *de novo*. We agree with what was said in *Worthington* v. *Gimson* (1 El. & El. 618, 625, 29 L. J. Q. B. 116, 119), that in this respect there is a distinction between continuous easements such as drains, &c., and discontinuous easements, such as a right of way; and *Pheysey* v. *Vicary* (16 M. & W. 484), is an authority that the same rule in this respect applies to a will as to a deed. But when, as in the present case, property devised or granted is landlocked, and there is no other way of getting at it without being a trespasser, so that it cannot be enjoyed without a way of some sort over the lands of the testator or grantor, it is clear that a way of necessity is created *de novo*."

An easement which is in its nature continuous will, as well as an easement of necessity, pass by implication of law without any words of grant. So in *Watts* v. *Kelson* (1871), L. R., 6 Ch. 166, 40 L. J. Ch. 126, 24 L. T. 209, 19 W. R. 338, it was held that where the owner of Whiteacre and Blackacre conveyed Blackacre to another, the latter acquired a right to the continuance of the flow of water by an artificial pipe through Whiteacre as it existed at the time of the conveyance. The conveyance contained the words "together with all watercourses," and it was held that if words of grant were necessary, these would have been enough. But the decision was mainly rested on the rule that a continuous easement passed as incident to the grant. (See further as to this point in Notes to *Ewart* v. *Cochrane*, No. 6, p. 60, *post*.)

Espley v. *Wilkes* (1872), L. R. 7 Ex. 298, 41 L. J. Ex. 241, 26 L. T. 918, shows how the doctrine of estoppel may give rise to an easement. By a lease, under which the defendant claimed as assignee, S. demised "all that plot of land, bounded on the east and west by newly made streets. . . . a plan whereof is indorsed on these presents." On the indorsed plan, the site of the new street was shown and was marked as "new streets." The lease contained covenants by the lessee to build two houses on the land, and to "kerb the causeways adjoining the said land." S. afterwards granted to the plaintiff a lease of the land comprised on the site of one of the proposed new streets (which had in fact never been made into a street) and the plaintiff enclosed the land, so that the defendant was unable to reach the east side of the premises. In an action against the defendant for pulling down this obstruction, it was held that by the defendant's lease a right of way was granted along the site of the proposed new streets to his premises.

Grant of an easement may be implied from surrounding circumstances. *Hall* v. *Lund* (*supra*), *Siddons* v. *Short* (1877), 2 C. P. D. 572, 46 L. J. C. P. 795, 37 L. T. 230. There the plaintiffs were iron founders, and were desirous of erecting an iron foundry and other buildings for the purpose of their business. Some of the defendants were owners of land, and the plaintiffs applied to them to sell nine acres, and told them the purpose for which they wanted it; and the nine acres were sold to them. The plaintiffs had partly erected their buildings when the defendants, who owned adjoining land, under which there was coal, let it to the other defendants for mining purposes; and the plaintiffs alleged that their buildings would be injured if the coal was taken within 50 yards; and they claimed an injunction to restrain the defendants from taking the coal within that distance. It was held that although there was no express grant of right of support, the plaintiffs were, from the circumstances of the case, implied grantees of such a right.

In *Serff* v. *Acton Local Board* (1886), 31 Ch. D. 679, 55 L. J. Ch. 569, 54 L. T. 379, 34 W. R. 563, where under compulsory powers the Board took land for the purpose of a sewage farm, it was held that they acquired the right to use for the purposes of the sewage farm a way which had been for 30 years past used by the occupiers of that land, for ordinary agricultural purposes.

AMERICAN NOTES.

The principal cases are cited by Washburn on Easements, p. 49, 61, and this is the American doctrine. *Gayetty* v. *Bethune*, 14 Massachusetts, 49; 7 Am. Dec. 188; *Lawton* v. *Rivers*, 2 McCord (So. Car.), 445; 13 Am. Dec. 741; *Cooper* v. *Maupin*, 6 Missouri, 624; 35 Am. Dec. 456; *Kimball* v. *Cocheco R. Co.*, 27 New Hampshire, 448; 59 Am. Dec. 387; *Williams* v. *Safford*, 7 Barbour (New York Supr. Ct.), 312; *Thomas* v. *Bertram*, 4 Bush (Kentucky), 319; *Collins* v. *Prentice*, 15 Connecticut, 39; 38 Am. Dec. 61; *Smith* v. *Kinard*, 2 Hill (So. Car.), 642; *Alley* v. *Carleton*, 29 Texas, 74; 94 Am. Dec. 260; Coleman's Appeal, 62 Pennsylvania State, 275; *Hall* v. *Lawrence*, 2 Rhode Island, 218; 57 Am. Dec. 715. "The doctrine is a general one, that the grant of a thing carries all things as included, without which the thing granted cannot be enjoyed." Washburn on Easements, p. 49; *Bonelli Brothers* v. *Blakemore*, 66 Mississippi, 136; 14 Am. St. Rep. 550; *Whitehouse* v. *Cummings*, 83 Maine, 91; 23 Am. St. Rep. 756; *Mead* v. *Anderson*, 40 Kansas, 203; *Oswald* v. *Wolf*, 129 Illinois, 200; *Barnard* v. *Lloyd*, 85 California, 131; *Ellis* v. *Bassett*, 128 Indiana, 118; 25 Am. St. Rep. 421. Most of the foregoing cases are of ways.

A grant of a mill carries the water power by which it is run: *Rackley* v. *Sprague*, 17 Maine, 281; *Bliss* v. *Kennedy*, 43 Illinois, 71; *Strickler* v. *Todd*, 10 Sergeant & Rawle (Penn.), 63; 13 Am. Dec. 649; and the right to flow the grantor's land as formerly, *Hathorn* v. *Stinson*, 10 Maine, 224; 25 Am. Dec. 228; *Oakley* v. *Stanley*, 5 Wendell (New York), 523; and the raceway, *Wetmore* v.

White, 2 Caines Cases (New York), 87; and the reservoir, *Perrin* v. *Garfield*, 37 Vermont, 304. A necessary drain passes, *Elliott* v. *Rhett*, 5 Richardson Law (So. Car.), 405; 57 Am. Dec. 750; *Hills* v. *Miller*, 3 Paige Chancery (New York), 254; 24 Am. Dec. 218; *Thayer* v. *Payne*, 2 Cushing (Mass.), 327. A wall of a house, *Henry* v. *Koch*, 80 Kentucky, 391; 44 Am. Rep. 484. A ditch for drainage, *Sanderlin* v. *Baxter*, 76 Virginia, 299; 44 Am. Rep. 165. A common stairway, *Galloway* v. *Bonested*, 65 Wisconsin, 79; 56 Am. Rep. 616. See notes, 57 Am. Dec. 759; 8 Lawyers' Rep. Annotated, 58.

Among very recent applications of the doctrine of easement by necessity are the following: The right to use the water of a spring conveyed by pipe from one farm to another owned by the same person passes by implication on a conveyance of the latter farm, when the flow of water is essential to the enjoyment of this farm, and the loss thereof will impair its rental value fifty dollars per year, or depreciate its fee value fifty dollars per acre. *Paine* v. *Chandler*, 134 New York, 385; 19 Lawyers' Rep. Annotated, 99. The use of stairways in a building erected by several owners of land as a single structure upon a single plan, and under a single contract, no matter whether the land was then partitioned or not, cannot be denied by the owners of that part which includes the stairway to the owner of another part the upper floors of which can be reached in no other way. *Pierce* v. *Cleland*, 133 Pennsylvania State, 189; 7 Lawyers' Rep. Annotated, 752. One who conveys a mill and dam conveys all the easements he has or purports or claims to have, at the time of conveyance, in connection therewith, incident and necessary to the just enjoyment and operation of the mill and dam. *Bowling* v. *Burton*, 101 North Carolina, 176; 2 Lawyers' Rep. Annotated, 285. But a right of way over a railroad does not exist as a necessary incident or secondary easement to a right of way reserved in a deed of a strip of land adjoining a railroad and described as going "to the crossing heretofore secured" to the grantor over said railroad, where no such right of crossing said railroad existed at that time. *Claflin* v. *Boston & A. R. Co.*, 157 Massachusetts, 489; 20 Lawyers' Rep. Annotated, 638. The owner in fee in lands occupied by a railway station, who occupies an adjoining lot, has no right of passage over the grounds except at the public crossing. *Lyon* v. *McDonald*, 78 Texas, 7; 9 Lawyers' Rep. Annotated, 295.

The necessity required to pass an easement by implication, is a reasonable, not an absolute one. *Paine* v. *Chandler*, *supra*. The test is whether the grantee might at a reasonable expense procure for himself an enjoyment of a similar easement. *O'Rorke* v. *Smith*, 11 Rhode Island, 259; 23 Am. Rep. 440. In Maine and Massachusetts however the necessity is deemed not to exist if the grantee can procure the easement at any cost. *Buss* v. *Dyer*, 125 Mass. 287; *Stevens* v. *Orr*, 69 Maine, 323. The fact that access to lands granted might be acquired over the lands of a third person, does not defeat the grantee's claim to a way of necessity over the grantor's land. *Whitehouse* v. *Cummings*, *supra*. Great convenience is not equivalent to necessity. *Field* v. *Mark*, 125 Missouri, 502. A way of access by water to land bordering on the sea defeats the claim to a way by necessity across land of the grantor which encloses it on the land side. *Kingsley* v. *Goldsboro L. I. Co.*, 86 Maine, 279; 25 Lawyers' Rep. Annotated, 502.

No. 6. — Ewart v. Cochrane, 1 Paterson (Sc. App.), 1010. — Rule.

A right of way of necessity is not lost by the subsequent acquirement of other land over which the owner might reach the first. *Zell* v. *Universalist Society*, 119 Pennsylvania State, 390; 4 Am. St. Rep. 654. But *contra*, where a public way supersedes the necessity. *Palmer* v. *Palmer*, 71 Hun (New York Sup. Ct.), 30.

A grant of ingress to and egress from a particular room in a certain building is terminated by the destruction of the building by fire. *Hahn* v. *Baker Lodge*, 21 Oregon, 30; 28 Am. St. Rep. 723; 13 Lawyers' Rep. Annotated, 158; *Shirley* v. *Crabb*, 138 Indiana, 200; 46 Am. St. Rep. 376; *Douglas* v. *Coonley*, 84 Hun (New York Sup. Ct.), 158; *Duncan* v. *Roedecker*, 90 Wisconsin, 1.

No 6. — EWART *v.* COCHRANE.

(H. L. 1861.)

RULE.

If the owner of two tenements X. and Y., makes a grant of the tenement X.; — all those rights in the nature of easements which were manifestly exercised by the owner over the tenement Y. in favour of the tenement X. and which were necessary to the convenient enjoyment of the tenement X. in the state in which it was granted, will pass by implication with the grant.

Ewart v. Cochrane.

1 Paterson (Sc. App.) 1010–1014 (s. c. 4 Macq. Sc. App. 117.)

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Servitude. — Grant. — Drain. — Right to Repair. — Presumption.

[1010] For nearly sixty years the surplus water of a tan-yard was carried by a drain into lower ground, being a neighbouring garden, belonging to the proprietor of the tan-yard at the time the drain was originally formed in 1799. In 1819 the tan-yard had been sold separately, and conveyed in terms of a disposition which created no servitude in regard to the drain.

Held (affirming judgment), That a grant was to be implied of servitude in favour of the tan-yard, and that the proprietor of it was entitled to have reasonable access to his neighbour's ground for the purpose of repairing the drain in its passage.

The pursuers, who are tanners and curriers, are proprietors of property in the town of Newton Stewart, in which they carry on their business, their tanworks having been formed about 1779 by

Anthony M'Caa, to whom belonged, as one subject, the premises owned by the pursuers, and also the adjacent property belonging to the defender. The ground occupied as the tanwork slopes to the north-east, and at that extremity a drain was formed for the purpose of carrying off surplus water. The drain, for some time open, but afterwards closed, ran into M'Caa's adjacent property, which is now the defender's garden, where the water was received into a covered cesspool or tank, and then absorbed in the soil.

The tan-yard, as well as the property belonging to the defender, continued to be held by M'Caa until 1806, when both subjects were sold to Peter Murray, the then tenant of the tan-yard. In 1819 the tan-yard was acquired separately from Murray by the pursuer's author, John Drynan, in terms of a conveyance which contained no reference to the drain. In 1853 the defender Ewart, now in right of the adjacent property, built up the drain at its entrance to his property, and so prevented the water flowing from the tan-yard.

* The proprietors of the tan-yard accordingly brought [*1011] this action, concluding to have the defender ordained "to restore to its original state, a drain or conduit, leading from the north-east end of the pursuer's tan-yard in Newton Stewart, to a tank or cesspool in the ground now occupied by the defender, and through which drain the surplus water from the pursuer's tan-yard was in use to flow and be discharged; and to take down and remove a wall erected by the defender behind the east wall of the said tan-yard, and also to remove the clay puddling, or other material inserted by the defender between the two walls, in so far as the said wall and puddling destroy or affect the said drain, or in any way impede or interfere with the free passage of the water from the pursuer's tan-yard into the ground occupied by the defender, as the same was in use to flow before the defender's operation; and it ought and should be found and declared, by decree foresaid, that the ground occupied by the defender, is bound to receive as hitherto, prior to the defender's operations, the water flowing from the pursuer's tan-yard; and the defender ought and should be interdicted, prohibited, and discharged, by decree foresaid, in all time coming, from doing anything to impede the free passage of the said water, or interrupting, molesting or obstructing the pursuers in the use of the said drain and cesspool as hitherto, for the purpose of carrying off the said water."

No. 6. — Ewart v. Cochrane, 1 Paterson (Sc. App.), 1011.

Parties being at issue as to whether the drain had been formed within forty years, the Lord ORDINARY (12th November 1857) allowed a proof on the subject. The evidence showed, that sixty years ago the water from the tan-yard flowed into a pit in what is now the defender's garden; that the properties were first separated by a wall in 1807, in which a gateway was left at the place where the drain has its course; and that when the gateway was built up in 1832, an opening was made through which the water might pass; that in 1824, five years after the property came into separate hands, certain operations took place in the defender's garden which resulted in the drain being covered up, and the pit or hole to which it led being formed into a covered cesspool; but which of the two proprietors bore the expense of these improvements did not appear.

The pursuers pleaded that — The operations complained of were illegal, and that the pursuers were entitled to be restored against them, in respect — 1. The pursuers having been infeft in the tan-yard, with parts and pertinents, they had a valid right to the use of the drain and cesspool, and the defender had no right or title to interfere with the use of it. 2. The drain and cesspool had existed, and been used by the pursuers and their authors, for the purpose of carrying away the water from the tanwork, for upwards of forty years preceding the operations complained of, and the pursuers had thus acquired a prescriptive right to the use of it.

The defender's pleas were — 1. At common law, and in the absence of any special right of servitude on the part of the pursuers, constituted by grant, or by prescriptive use and possession, the defender was under no legal obligation to receive the water discharged from the tanwork. 2. The pursuers' claim could not be maintained, in respect of any pretended special servitude, in respect no relevant grounds had been set forth or existed upon which a right and title to such servitude could be maintained. 3. More particularly — such a servitude right could not relevantly be maintained by the pursuers, in respect of any alleged use and possession prior to 1819, when both the pursuers' tan-yard and the defender's feu were held and possessed indiscriminately by Patrick Murray and Anthony M'Caa, as successive proprietors and occupiers respectively of both tenements.

The Court of Session held, that a grant of servitude was to be implied in favour of the tan-yard, and, that the proprietor, therefore, was entitled to reasonable access in order to repair it.

No. 6. — Ewart v. Cochrane, 1 Paterson (Sc. App.), 1011, 1012.

On appeal to the House of Lords, it was maintained, in the appellant's case, that the judgment of the Court of Session should be reversed for the following reasons — 1. Because, in erecting the wall and puddling the ground in question, Mr. Ewart was only exercising a right of property belonging to him, and the respondents have not — and have not relevantly alleged on record — any servitude right which they had over his property entitling them to complain of these operations. Ersk. 2, 9, 3, 37 (1); *Donaldson's Trustees* v. *Forbes* 1 D. 449; Stair, 2, 7, 1 (2); Bell's Prin. § 991; Bell's Com. 5th ed. 1, 328; *Baird* v. *Fortune*, 4 Macq. App. 127; *Preston's Trustees* v. *Lady Baird Preston* 16 Sc. Jur. 433; *Kincaid* v. *Stirling*, M. 8403; *M'Lean* v. *Richardson*, 12 S. 865. 2. Because regard being had to the state of the titles of the parties respectively, the respondents have not set forth in the record averments *relevant and sufficient* to entitle them to a proof in support of their claims. 3. Because the respondents failed to prove facts and circumstances relevant and sufficient to support the claim of right maintained by them.

The respondents, in their case, supported the judgment on the following ground — Because a servitude may be constituted *rebus ipsis et factis*, and conferred by implication; and because the servitude in question was so constituted and conferred. — Gale on Easements, p. 49; *Nicholas* v. *Chamberlaine*, Cro. Jac. 121; *Clarke* v. *Cogge*, Cro. Jac. 170; *Palmer* v. *Fletcher*, 1 Lev. 122; 1 Sid. 167; *Canham* v. *Fisk*, 2 C. & J. 126, 128; *Richards* v. *Rose*, 9 Exch. 218; *Peyton* v. *The Mayor of London*, 9 B. & C. 725; *Sury* v. *Piggott*, Palmer 444; Tudor's L. C. on Real Property, p. 95; *Pyer* v. *Carter*, 1 H. & N. 916; *Shury* v. *Piggott*, Popham, 166; s. c. 3 Bulst. 399; * *Coppy* v. *Ides*, 11 Hen. VII. 25 pl. 6; *Pinnington* v. *Galland*, 9 Exch. 1; (No. 4, p. 35, *ante*). Toullier 6 ed. p. 291, Art. 605; 3 Mason, Rep. 277; Angell on Water-courses § 153 *et seq.*; also § 191 *et seq.* [*1012]

R. Palmer, Q. C., and Anderson, Q. C., for the appellants. — This judgment was wrong. The pursuer, in the condescendence, set up a grant or prescription, but never set up the case of a servitude created on the novel ground set forth in the judgment, viz. *rebus ipsis et factis*. 1. There can be no pretence for setting up prescription, for the properties had not been held by different owners for forty years; 2. They say the grant is made out under the clause of "parts and pertinents" in their title. In constituting

servitudes by grant, express or implied, there must be some written title, and the clearest evidence of the nature of the right — Stair, 2, 7, 1; Ersk. 2, 9, 3; Bell's Prin. 991; 1 Bell's Com. 328 (5th ed.). In all cases where a prior verbal agreement has been relied on, confirmed by *rei interventus*, an express averment of the precise terms of the verbal contract has been held necessary, and in general it is incompetent to prove it by parole evidence only — *M'Lean* v. *Richardson*, 12 S. 865. In the condescendence there is no relevant and sufficient ground set forth on which such a servitude could be founded. There is no prior communing and agreement, previous to the construction of the drain, alleged. The sole plea is, that, because the respondent was infeft in the tan-yard, with parts and pendicles, therefore he had a right to the servitude. But the disposition to Drynan in 1819 could not convey the servitude "as then previously existing," for no such servitude then existed, it being impossible that a servitude could have been acquired while both properties were in one owner. Nor can such a servitude be implied from the disposition as constituted for the first time. There is no express grant to that effect; and the circumstance, that another servitude right was maintained shows, that no other was supposed to exist, or was intended to pass. Nor is there any evidence to support the construction given to the disposition by the respondent, for the evidence merely shows, that the drain in question was originally made to keep dry the servitude road enjoyed by Murray, and at his death in 1853, the reason for continuing it ceased to exist.

[Lord Chancellor. Suppose the existence of this drain was convenient and essential to the business of the tan-yard, would it not be implied with the disposition?]

That is not the ground of the claim put in the condescendence. To hold such a doctrine would prevent owners from having the ordinary use of their ground, and applying it for building purposes. There seems to be no absolute necessity for the tan yard enjoying this drain, and it is incompetent to refer to these circumstances, to qualify the deed.

[Lord Kingsdown. Is it not the rule, that the circumstances which existed at the time the deed was executed are to be looked to, and that you are to construe the deed by the light of these circumstances? Doing that here, was it not implied, that the right to the drain was a necessary part of the property conveyed?]

No. 6. — Ewart v. Cochrane, 1 Paterson (Sc. App.), 1012.

Rolt, Q. C., and Mure, for the respondents. — It is a well-established rule, that on severing the land it will be implied, that all the continuous and apparent easements which were, in fact, previously used by the owner of both, and were necessary to the enjoyment of one portion will be implied in a conveyance of that portion — Gale on Easements, 49; *Pyer* v. *Carter*, 1 H. & N. 916. On applying this principle here, it is obvious, that the drain was necessary to the enjoyment of the tan-yard, and therefore the right to its use passed by implication with the disposition in 1819.

R. Palmer replied.

Lord Chancellor CAMPBELL. — I must say, that this seems to me to be a very clear case, and I think we may satisfactorily dispose of it now. I think the interlocutors appealed against ought to be affirmed, but I by no means proceed upon one of the grounds which has been taken, viz., what may be called a new mode of acquiring a servitude, *rebus ipsis et factis*, irrespective of prescription or grant or natural right. I think the case of *Preston's Trustees* is the first case which is supposed to have recognised that new and separate and distinct mode of creating a servitude. But I think, when that case is properly examined, it will be seen, that what was there considered to be the things which create a servitude are the facts which are to be construed as giving a meaning to the grant of servitude. Therefore it is not upon the ground of *rebus ipsis et factis* that I proceed in this case. Nor do I proceed upon the other ground taken, viz., that of natural right, because it seems to me, that in this case it is not made out, that, by the law of nature, there is a right to let this drain run into the cesspool. There seems to have been by the law of nature a descent there; that is, the ground inclines, so that the water would naturally fall to the north-east corner of this property, but there is no law of nature which should render it absolutely necessary that this hole should be the place into which it should flow, because it could only be by percolation, unseen by the proprietor of the other tenement, that the water would flow into that hole. I am not prepared to say, that the fact of there having been that unseen and unknown percolation would be sufficient to prevent the owner of what is called the servient tenement from cutting off and preventing the continuance of the percolation when it came to his knowledge. But the ground upon which I proceed is this, that this is a servitude which the grant implies. I cannot entertain the

slightest doubt upon that — I mean on the grant, accompanied by the enjoyment which existed at the time when the grant was made.

[*1013] * I consider the law of Scotland, as well as the law of England, to be, that when two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was used and was necessary for the comfortable enjoyment of that part of the property which is granted shall be considered to follow from the grant, if there be the usual words in the conveyance. I do not know whether the usual words are essentially necessary, but where there are the usual words, I cannot doubt, that that is the law. In the case of *Pyer* v. *Carter*, that is laid down as the law of England, which will apply to any drain or any other easement which is necessary for the enjoyment of the property. And we have quotations from the Scotch authorities, showing, that the law is the same in both parts of the island. It is unnecessary, as it seems to me, to comment upon the cases What we have to consider in this case is, what, in point of fact, was the enjoyment in the year 1819 at the time when the grant was made. It seems to me quite clear, that from the year 1788, when this tan-yard was formed, the water which fell from the clouds, or which, in times of flood, came up from the earth, or which was discharged from the tan-yard, was conducted by a syvor to the land now occupied by the defendant. There can be no doubt, that that was the manner in which it was conducted and absorbed. And it seems to me to be clearly shown to have been essentially necessary for the convenient use of the tan-yard, and to have been enjoyed at the time when the conveyance was made by Murray to Drynan. I think the evidence shows, that it was a paved syvor or gutter, but it seems to me to be not material whether it was paved or not paved. It was a gutter by which the water was conducted from the tan-yard to the land. That was the state of things at the time when the grant was made. The grant was of this tan-yard, "and that as the whole said subjects are presently possessed by us," and so on, together with all right, title, and interest, and so on, "with the pertinents hereby disponed and inclosed as aforesaid, in all times coming." Then as the subjects of the grant were then possessed, the tan-yard was possessed along with this gutter to the hole, and was so enjoyed, and it was necessary for the reasonable enjoyment of the property. When I say it

was necessary, I do not mean, that it was so essentially necessary, that the property could have no value whatever without this easement, but I mean, that it was necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant. Then, that being so, it seems to me, that this easement passed by the conveyance. It is very different indeed from the case which we had lately before us, of *Baird* v. *Fortune*. Here we have a dominant and a servient tenement. Here we have an easement, that the law will recognize. It is an easement which was enjoyed at the time when the grant was made, and which for a long time afterwards was enjoyed; and the manner in which the cesspool was made strongly corroborates, in my mind, the right which is now claimed.

For these reasons, I must advise your Lordships that the appeal should be dismissed.

Lord CHELMSFORD. — I agree with my noble and learned friend, that these interlocutors ought to be affirmed, and I agree with him also in thinking, that the right of the pursuers cannot be placed either upon the natural right, or upon the *rebus ipsis et factis*, but that it must arise from an implied grant; which implication of grant must result from the evidence in the case, that the use and enjoyment of this drain is necessary to the enjoyment of the tan-yard.

Now I gather from the evidence, that when the tan-yard was originally formed by Mr. M'Caa, he must, in some way or other, have paved the syvor for the purpose of conducting the drainage into the hole which was dug in the garden. And I think there is distinct evidence to show, that, for the period before 1788, down at all events to 1824 when the drain and the cesspool were covered, the drainage continued to flow in that direction.

It is important to observe, that the drainage flowed uninterruptedly in this direction, whether the two properties were united, or whether they were in possession of separate owners. From 1788 to 1790, M'Caa was the owner of the tan-yard, and Murray the owner of the garden. During that time, the drainage continued. In 1790 Murray became the lessee of the tan-yard, and he continued to hold the tan-yard as lessee down to the year 1807. Now, it has been said, that it is unimportant whether, during the period when Murray was the owner of the garden, and only lessee of the tan-yard, the drainage was permitted to flow in its original

direction. But it appears to me, that it is not an unimportant circumstance to consider how the drainage was permitted to flow during that period, because, as it has been observed on the part of the pursuers, there would have been no difficulty whatever, and very little expense, in making the drainage to flow differently; and the circumstance of Murray allowing the drainage to go on in that direction during the time that he was lessee is strongly against him when we come to the consideration of the conveyance, because of course, by allowing the drainage to continue, he was burdening his own fee with a servitude which he might very easily have prevented by constructing the drainage in a different way. Then, in 1807, he becomes owner of the two properties, and the drainage continues just as it did before.

Then the question arises, whether, by the conveyance to Drynan in 1819, he did not impliedly convey to him that drain, the use and enjoyment of which, by the acts of the parties themselves, had been shown to be necessary to the enjoyment of the tan-yard. Now, I can come to no other conclusion than, that it was essential to the enjoyment of the tan-yard, and therefore that there [*1014] *was an implied grant to Drynan when the tan-yard was conveyed to him in 1819. If that is so, there can be no question whatever, but that the judgment of the Court of Session is perfectly right, and that the interlocutors ought to be affirmed.

Lord KINGSDOWN. My Lords, I am of the same opinion.

Interlocutors affirmed with costs.

ENGLISH NOTES.

Pyer v. *Carter* (1857), 1 Hurl. & N. 916, 26 L. J. Ex. 258, was an action for stopping a drain. The houses of the plaintiff and defendant adjoined each other, and had been previously one house. This had been converted into two by the owner, who sold one to the defendant, and the other sometime afterwards to the plaintiff. The drain in question ran under the plaintiff's house, and thence under the defendant's. It was held that the plaintiff was entitled, by implied reservation on the former conveyance and implied grant on the latter, to have the use of the drain as it was used at the time of the defendant's purchase.

In *Dodd* v. *Burchell* (1862), 1 Hurl. & C. 113, 31 L. J. Ex. 364, 368, MARTIN, B., said, "*Pyer* v. *Carter* went to the utmost extent of the law; but, if considered, that decision cannot be complained of; for if a man has two fields drained by an artificial ditch cut through both, and he grants to another person one of the fields, neither he nor the

grantee can stop up the drain, for there would be the same right of drainage as before, since the land was sold with the drain in it. I agree with the law as laid down in that case, and I think it may be supported without extending the doctrine to a right of way."

Pyer v. *Carter* was referred to and not disputed in *Worthington* v. *Gimson* (1860), 2 El. & El. 618, 29 L. J. Q. B. 116, (pp. 56–7, *supra*); and in *Pearson* v. *Spencer* (1861, 1863), 1 B. & S. 571, 3 B. & S. 761, the Court of Queen's Bench approved of the distinction made in *Worthington* v. *Gimson*, between continuous easements such as drains, &c., and discontinuous easements such as a right of way.

In *Polden* v. *Bastard* (1866), L. R. 1 Q. B. 156, 35 L. J. Q. B. 92, 7 B. & S. 130, ERLE, C. J., in the Exchequer Chamber said, "There is a distinction between easements, such as a right of way, or easements used from time to time, and easements of necessity or continuous easements. The cases recognise this distinction, and it is clear law that upon a severance of tenements, easements used of necessity, or in their nature continuous, will pass by implication of law, without any words of grant; but with regard to easements which are used from time to time only, they do not pass unless the owner, by appropriate language, shows an intention that they should pass."

In *Watts* v. *Kelson* (1870), L. R. 6 Ch. 166, 40 L. J. Ch. 126, 24 L. T. 209, 19 W. R. 338, (p. 57, *supra*) the passage last cited was approved.

In *Barnes* v. *Loach* (1879), 4 Q. B. D. 494, 48 L. J. Q. B. 756, 41 L. T. 278, 28 W. R. 32, and *Taylor* v. *Allen* (1881), 16 Ch. D. 355, 50 L. J. Ch. 178, the owner of property alienated it in two parts simultaneously. It was held that each alienee took the property with the right and liability in respect of light apparently enjoyed as a *quasi* easement, in relation to the other at the time of the conveyance. In the former of these cases LORD JUSTICE LOPES (delivering the judgment of himself and COCKBURN, C. J.), says: (4 Q. B. D. 497): — "If the owner of an estate has been in the habit of using *quasi* easements of an apparent and continuous character over the one part for the benefit of the other part of his property, and aliens the *quasi* dominant part to one person and the *quasi* servient to another, the respective alienees will, in the absence of express stipulation, take the land burdened or benefited, as the case may be, by the qualities which the previous owner had a right to attach to them."

In *Brown* v. *Alabaster* (1888), 37 Ch. D. 490, 57 L. J. Ch. 255, 58 L. T. 265, 36 W. R. 155, it was held that a right of way by an artificially formed path, although it cannot be brought within the definition of a continuous easement, may be as much subject to the rules governing these apparent and continuous easements, as if it were continuous. In that case, the owner of leasehold property, on which were erected three

houses in a row, sold two of them (which may be called Nos. 2 & 3) to the defendant; and subsequently sold the other (No. 1) to the plaintiff. At the time of the sale to the defendant there was a tiled path leading from a public road past the first of the three houses to the second and third. This path was obviously constructed for the occupiers of these two houses (No. 2 & 3) only. The conveyances of the first and second houses were expressed so as to comprise the ground over which the path had been made, and the premises in each case were conveyed "with their and every of their rights, members, and appurtenances." It was held that the defendant as purchaser of the two houses (Nos. 2 & 3) became entitled to the right of way by implied grant.

The question whether on the severance of a tenement by the owner he can claim an easement by implied reservation, is still a matter of controversy. It will be observed that the affirmative is implied in the decision of *Pyer* v. *Carter*, p. 68, *supra*. But though in the judgments in the principal case the authority of *Pyer* v. *Carter* is much relied on; nothing turns upon the distinction, which indeed in *Pyer* v. *Carter* is hardly adverted to, between reservation and grant. In *Suffield* v. *Brown* (1864), 4 De G. J. & S. 185, 33 L. J. Ch. 249, Lord Westbury refused to accept *Pyer* v. *Carter* as an authority on this point; for (he considered) the grantor cannot derogate from his own absolute grant, so as to claim rights over the land sold even though they are *quasi* easements of an apparent and continuous character at the time of the grant. This opinion was approved by Lord Chelmsford, L. C., in *Crossley* v. *Lightowler* (1867), L. R. 2 Ch. 478, 486, 36 L. J. Ch. 584, 590; and the principle of both these decisions was followed by Lord Justice Thesiger delivering the judgment of the Court in *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31, 48 L. J. Ch. 853, where the grantor was not allowed to claim by implied reservation, a right of light over the portion severed. The conflicting *dicta* on the point are referred to in this judgment.

In *Beddington* v. *Atlee* (1887), 35 Ch. D. 317, 56 L. J. Ch. 655, 56 L. T. 514, 35 W. R. 799, the owner in fee of a building estate subject to a mortgage agreed to sell to A. a plot of land which was vacant, and subsequently agreed to sell to B. subject to an unexpired lease in favour of H., a plot of land adjoining that contracted for by A., H. having a house built thereon with windows overlooking A.'s plot. The conveyance to B. was made prior to that of A. On a covenant in H.'s lease being broken, B. enforced the condition of re-entry. Held that B. could not restrain A. from building so as to obstruct B.'s light; that, inasmuch as at the date of B.'s conveyance, A. was in equity the actual owner of the plot contracted to be purchased by him, the unity of the vendor's ownership was severed at that date,

and therefore that B.'s conveyance could not be said to contain an implied grant on behalf of the vendor of an easement of light over the plot contracted to be sold to A. Held also that the term to H. did not after the forfeiture of the lease enure for the benefit of B. so as to confer upon B. the right of enjoyment of light, which if the lease had not been determined, would have belonged to H. until the expiration of the lease.

In *Thomas* v. *Owen* (C. A. 1888), 20 Q. B. D. 225, 57 L. J. Q. B. 198, 58 L. T. 162, 36 W. R. 440, where a way through a lane artificially made and fenced, and visibly necessary for the convenient use of a certain farm, was actually in use by a yearly tenant of that farm; the demise of another farm through which the lane ran, by the owner of both, although in terms comprising the site of the lane, was held to be subject to an implied reservation of the right to use the way for the benefit of the former farm.

AMERICAN NOTES.

This case is cited "as a leading one" in Washburn on Easements, p. 69, and the Rule states the general doctrine of this country, subject to certain limitations. The present writer, in a note, 40 Am. Rep. 538, says: "In *Pyer* v. *Carter*, 1 H. & N. 916, a house was converted into two, and sold to different persons, and there being but a single drain, it was held that there passed by implication to the subsequent purchaser the right to use it. The same principle was declared, and this decision was approved by the House of Lords, in *Ewart* v. *Cochrane*, 4 Macq. 117. It was also approved and followed in *Polden* v. *Bastard*, in the Exchequer Chamber, L. R., 1 Q. B. 156; and in *Watts* v. *Kelson*, L. R. 6 Ch. Ap. 166. But it was disapproved and rejected in *Suffield* v. *Brown*, 4 De G., J. & S. 185; *Crossley* v. *Lightowler*, L. R. 2 Ch. Ap. 486; and *Buss* v. *Dyer*, 125 Mass. 287, and doubted in *Butterworth* v. *Crawford*, 46 New York, 349; 7 Am. Rep. 352. Mr. Washburn and Mr. Goddard however in their works on Easements seem to regard it as still authoritative and not necessarily overruled."

It is a general rule that if land is conveyed by deed referring to an alley on other land of the grantor as a boundary which has been used for access to the land, an easement in the alley passes as appurtenant. The court cite *Pyer* v. *Carter*, and observe: "It is a general rule that upon a conveyance of land, whatever is in use for it, as an incident or appurtenance, passes with it. The law gives such a construction to the conveyance, in view of what is thus used for the land as an incident or appurtenance, that the latter is included in it. Whether a right of way or other easement is embraced in a deed is always a question of construction of the deed, having reference to its terms and the practical incidents belonging to the grantor of the land at the time of the conveyance." *Huttemeier* v. *Albro*, 18 New York, 48, citing also *United States* v. *Appleton*, 1 Sumner (U. S. Circ. Ct.), 492; *New Ipswich Fac.* v. *Batchelder*, 3 New Hampshire, 190. See *Horton* v. *Williams*, 99 Michigan, 423; *Lord* v. *Atkins*, 138 New York, 184; *Haynes* v. *Thomas*, 7 Indiana, 38; *Rhea* v. *Forsyth*, 37 Pennsylvania State, 503. When the owner of land through which ran a

public highway, the fee of the soil of which was in him, conveyed part of the land by description beginning and ending on the side of the highway, "with the easements, privileges, advantages, and appurtenances," although the fee of the highway may remain in him, yet an easement to have the highway perpetually remain open passes to the grantee. *Holloway* v. *Southmayd*, 139 New York, 390. (Three judges dissented.)

The principal case is largely cited and relied on in *Janes* v. *Jenkins*, 34 Maryland, 1; 6 Am. Rep. 300, where it is held that an easement of light and air may be implied for the benefit of a grantee on severance, from a deed conveying all "rights, privileges, appurtenances, and advantages to the same belonging or in any wise appertaining." The court said: "And so the law is explicitly announced, upon full review of the authorities both English and American, by the court of appeals of New York, in the case of *Lampman* v. *Milks*, 21 N. Y. 505; it being there decided that wherever the owner of land has, by any artificial arrangement, created an advantage or incident for the benefit of one portion to the burdening of the other, upon a severance of the ownership the holders of the two portions take them respectively charged with the servitude and entitled to the benefit openly and visibly attached at the time of the conveyance of the portion first granted." Citing also *United States* v. *Appleton*, *supra*.

This doctrine was adopted in *Shaw* v. *Etheridge*, 3 Jones Law (Nor. Car.), 300, in the case of a ditch for drainage, the court holding that it made no difference whether the ditch was originally made to drain the part of the land conveyed or not, provided it actually answered that purpose.

In *Overdeer's Adm'r* v. *Updegraff*, 69 Pennsylvania State, 110; Huiney owned two lots and built on both; on lot 2 he left an alley under the second story of the house, extending beyond both houses, with a gate into the rear lot of each. This alley was used fourteen years by the occupants of both houses, Huiney occupying lot 2. After his death, lot 2 was sold to pay his debts. The alley was not mentioned in the proceedings, but in the deed it was reserved. *Held*, even without such reservation, the purchaser "would have taken it subject to the servitude imposed upon it by the decedent for the use and benefit of the adjoining lot. It was a continuous and apparent easement, and the law is well settled that in such a case the purchaser, whether at private or judicial sale, takes the property subject to the easement." Citing Pennsylvania decisions. See *Geible* v. *Smith*, 146 Pennsylvania State, 276; 28 Am. St. Rep. 796; *Grace M. E. Church* v. *Dobbins*, 153 Pennsylvania State, 294; 34 Am. St. Rep. 706, and note, 708; *McNeal* v. *Rebman*, 168 Pennsylvania State, 109.

The same was held in *Thompson* v. *Miner*, 30 Iowa, 386, of a hall and stairway in a building covering an entire lot owned by tenants in common and built by them by agreement, who deeded their respective interests to one another, although without reservation of privileges. "That the agreement of the owners of the building as to the plan of construction, and its erection in accordance with such plan, with a passage-way from the front across lots 10 and 11, affording access thereby to that part of the building on lot 9, gave to the owners of that lot a right of way across the other lots, there can

be no doubt. This right of way was appurtenant to lot 9 at the time of the mutual conveyance, and passed by the deed with the fee.

In *McPherson* v. *Acker*, MacArthur & Mackey (District of Columbia), 150; 48 Am. Rep. 749, the owner of two adjoining houses conveyed one of them. There was an arched passage wholly under the one retained, which had for some time been used by the tenants of both houses. There were also drainage pipes under the passage-way, by which both lots were drained. The deed conveyed by metes and bounds, not including the passage-way, and at the time the grantee was informed that the right of way did not pass. He sold to the plaintiff, who saw the premises, but had no assurance from the original owner. *Held*, that the original owner might close or obstruct the way, but might not disturb the pipes. The court comment on the lack of harmony in the authorities in New York, Massachusetts, and Pennsylvania, and strive to reconcile the Pennsylvania holding about ways on the ground that in the leading case there "the way was fenced in," and was therefore "apparent and continuous." The court also cite *Pyer* v. *Carter*, stating that it "is a leading authority in England, and seems to be recognized by the weight of authority in this country." They lay stress on the notification to the first grantee that the way was not to pass, conceiving it to be an act *in pais* operative to detach the easement from the grant, and hold that the plaintiff had constructive notice. The right of drainage however was held to pass, without any consideration of necessity.

In *Goodal* v. *Godfrey*, 53 Vermont, 219; 38 Am. Rep. 671, this doctrine as to a right of way was recognized, *obiter*, citing *Wheeldon* v. *Burrows*, 12 Ch. D. 31, but the decision was that on a judicial division of a decedent's lands among his heirs, a right of way as formerly used may be implied of necessity from one part to another.

In *Elliott* v. *Sallee*, 14 Ohio State, 10, A. owned two mills upon a stream, B. owning an intermediate mill. A. opened a sluice above B.'s dam, and drew water from B.'s pond to his lower mill. Afterwards he purchased B.'s mill, and then sold the three to three distinct purchasers. It was held that the purchaser of the middle mill took subject to the right of the lower owner to continue to draw water through the sluice.

Where the owner of two lots, upon one of which is a spring, and upon the other of which is a paper mill to which for many years the water of the spring has been conducted by artificial means, conveys the spring lot without reference to the spring in the deed, either by way of grant or reservation, the grantee takes subject to the easement of the mill lot. *Seymour* v. *Lewis*, 2 Beasley Chancery (New Jersey), 439; 78 Am. Dec. 108; citing *Lampman* v. *Milks*, 21 New York, 505; *Kilgour* v. *Ashcom*, 5 Harris & Johnson (Maryland), 82; and *Brakely* v. *Sharp*, 9 New Jersey Equity, 9; 10 *ibid.* 206, which was a case of easement in a spring asserted in favor of the grantee of the servient tenement.

It is held however in most cases that an easement by implication passes only where it is continuous, apparent, and necessary, such as a right of way, and the doctrine does not extend to such easements as underground drains and pipes. This exception is well explained in *Fetters* v. *Humphreys*, 18 New Jersey Equity, 260; 19 *ibid.* 471. Here the owner of land devised it in two parcels,

one to A. and the other to B., and it was held that the fact that he had been accustomed to use an alley on the B. land as an egress from his stable on the A. land to the street, did not create an easement in the B. land in favor of A., he being able to construct a way over his parcel to the street, and the easement therefore not being necessary to his enjoyment of his land. The court observed: —

"In some cases easements are created by implication, where lands held by the same owner are sold or devised in different parcels, or where lands held in common are partitioned. If until the time of severance of title there has been a way or drain, or other matter in the nature of an easement, from one of the parcels through the other established and kept up by the common owner of both, and necessary for the beneficial enjoyment of the dominant parcel, then an easement is created by such sale, devise, or partition."

"The exception to the rule, which the Chancellor attempted to apply on the argument of the injunction, is this: that if the common owner convey the servient tenement, retaining the dominant, he is held to convey all his right in it, including the right to enjoy the privileges before enjoyed upon it for the benefit of the dominant tenement, and it is conveyed free of any servitude. But the exception is too broadly stated, and is not sustained by the authority cited for it; and by most of the authorities, it is confined only to non-apparent easements, such as rights of way. And it is held that apparent or continuous easements, such as the use of water-pipes and sewers in existence, will be created by implication upon the conveyance of the servient tenement by the common owner; he retaining the dominant tenement. This is the doctrine in *Nicholas* v. *Chamberlain*, Cro. Jac. 150, cited as the leading case on the whole subject, and in *Pyer* v. *Carter*, 1 Hurlst. & Nor. 916, Judge Selden, in delivering the opinion of the Court of Appeals in New York, in *Lampman* v. *Milks*, 21 N. Y. Rep. 505, expressly holds it. He says: by a sale, easements or servitudes are created corresponding to the benefits and burthens mutually existing at the time of the sale. This is not a rule for the benefit of *purchasers only*, but is entirely reciprocal. Hence, if instead of a benefit conferred, a burthen has been imposed upon the portion sold, the purchaser, provided the marks of this burthen are open and visible, takes the property with the servitude upon it. And on page 516 he says: Those easements which are discontinuous pass upon severance of tenements by the owner, only when they are absolutely necessary to the enjoyment of the property conveyed. Gale & Whatley, in their treatise on Easements, p. 40, lay down the rule with the same qualification.

"The reasoning of the Supreme Court of Massachusetts, in *Johnson* v. *Jordan*, 2 Metc. 234, takes the other view of the case. But it is not supported by the authorities cited, and had no bearing upon the decision of the case, which turned upon the fact that the easement claimed was not necessary to the enjoyment of the tenement conveyed, which was the dominant and not the servient tenement."

"In the cases of *Pyer* v. *Carter*, and *Lampman* v. *Milks*, *supra*, it was held that the easement was created by grant, although not *necessary* to the enjoyment of the property, and although another could be created on the land granted, at a small expense; and that the grantee was entitled to the prop-

erty as it was enjoyed at the time of the grant. The contrary doctrine is held by the Massachusetts cases, *Nichols* v. *Luce*, 24 Pick. 102; *Johnson* v. *Jordan*, 2 Metc. 234; *Thayer* v. *Payne*, 2 Cush. 327. These all hold that no easement is created by implication, except in case of necessity."

"The complainant then is not entitled to the use of this way unless necessary to the beneficial enjoyment of the property devised to her for life. It is not absolutely necessary, for she can open a way to Market Street over the land devised to her, and thus have access to the barn. It will materially injure the property to open this way, and probably the opening would be attended with some expense. In the case of drains and water-pipes, and apparent and continuous easements of that nature, the fact that others may be substituted for them on the premises conveyed, at a reasonable cost, has been held in some cases not to affect the right. *Pyer* v. *Carter*, 1 Hurlst. & Nor. 919. Although the contrary doctrine is laid down in *Johnson* v. *Jordan*, 2 Metc. 234.

"But discontinuous easements, not constantly apparent, are only continued or created by a severance, when they are necessary, and that necessity cannot be obviated by a substitute constructed on or over the dominant premises. *Lampman* v. *Milks*, 21 N. Y. Rep. 505; *Thayer* v. *Payne*, 2 Cush. 332; *Pheysey* v. *Vicary*, 16 M. & W. 484."

"The case of the *United States* v. *Appleton*, 1 Sum. 492, is the only authority that I find against this rule. But Justice Story, in his opinion, was evidently guided by the cases on continuous and apparent easements, to which alone he refers, and upon which he relies. His attention was not called to the well established distinction between the two kinds of easements."

"This difference in the rule, as applied to the two classes of easements, is founded upon reason and the nature of the easement itself. A continuous or apparent easement is either a fixture, or it is enjoyed by means of a fixture, upon the land itself. There is something visible by which it may be known to a purchaser, as an overhanging roof, open windows, a sewer, or a water-pipe, actually engaged in fulfilling their duties. A right of way, or discontinuous easement of any kind, is only exercised at intervals, and is a latent encumbrance or claim, the very existence of which may depend on uncertain and doubtful testimony. In other respects, to establish the creation of a right of way by implication on a conveyance of property, because a former occupier was in the habit of passing out in a certain direction, would be productive of great inconvenience, and would work injustice, especially in city property. If A. should purchase of B. a city lot, adjoining the house-lot of B., and it should turn out that the servants of B. had been in the habit, by B.'s direction, of crossing over B.'s lot diagonally to the street, from a gate in the side of the house-lot retained, A. could not build on the front of the lot. Such use, until and at the time of sale, would create an easement over the lot sold, by implication. The same result would follow in case of partition, or a sale in partition. The rule as established in the case of permanent apparent easements is, I think, of very doubtful expediency. But this is the law as I find it. I do not feel inclined to extend it."

But the same Court, in *Larsen* v. *Peterson*, 63 New Jersey Equity, 88,

held that a water-pipe leading from a driven well in a yard to a kitchen sink in a dwelling-house, through which water was habitually drawn to the kitchen for domestic purposes, the well and pipe being hidden from view, constituted an apparent and continuous easement passing with a conveyance of the dwelling alone by the owner of both yard and house, who retains the yard or sells it at the same time to a third person who has notice of the existence of the pipe and consents to the other conveyance.

In *Dolliff* v. *Boston and Maine Railroad*, 68 Me. 173, it was *held*, that a right of drainage by an existing underground drain through the grantor's adjoining land will not pass by implication, unless clearly necessary to the beneficial enjoyment of the estate conveyed. The Court said: "Undoubtedly such a right may be established by an implied grant as well as by an express grant. But implied grants are not to be favored. They should not be held to exist except in cases of clear necessity. If it is intended that an easement shall pass as one of the appurtenances of an estate, it is very easy to have this intention expressed in the deed. If the deed is silent upon the subject it is no more than fair to the grantor to presume that he did not so intend; and to overcome this presumption, to require of the party claiming the easement clear proof that it is necessary to the beneficial enjoyment of the estate conveyed to him. Such is the doctrine maintained in Massachusetts, and it meets our approbation. In *Johnson* v. *Jordan*, 2 Metc. 234, the Court held that where the owner of two adjoining messuages and lots of land constructs a drain through one of them for the drainage of the other, and then sells the lots to different purchasers on the same day, and in the deed of the lot drained does not mention the drain, such purchaser acquires no right to the use of the drain through the other lot, if he, by reasonable labor and expense, can make a drain without going through that lot. In *Thayer* v. *Payne*, 2 Cush. 327, the Court say that the question in such a case is whether the drain is necessary to the beneficial enjoyment of the estate conveyed; that this question involves the inquiry whether or not a drain can be conveniently constructed at a reasonable expense without going through the grantor's land; because if the grantee can thus furnish his premises with a drain, it cannot be necessary to the enjoyment of his estate that he should have a drain through the grantor's land. Upon this point the plaintiff's case fails. The burden of proof is upon them to show, not only that a drain to their premises is necessary, but that it is necessary that it should go through the defendants' land. In other words that they could not, at a reasonable expense, provide their premises with a drain without going through the defendants' land."

In *Buss* v. *Dyer*, 125 Mass. 287, similar doctrine was held as to a chimney between two houses of the same owner, but wholly on one lot; on sale of the other lot an easement in the chimney was held not to pass by implication, there being no absolute necessity for it. This, it will be observed, was a case of an apparent easement. The Court said: "We are aware that it has been held in some English cases that a deed of premises carries the right to continue to enjoy as easements all privileges or conveniences in and upon adjoining lands of the grantor, which were apparent, and had been used by the grantor in connection with the premises before the conveyance; that the

conveyance is a conveyance of the premises 'as they are.' A leading case to this effect is *Pyer* v. *Carter*, 1 H. & N. 916. Similar doctrine has been held in New York. *Lampman* v. *Milks*, 21 N. Y. 505. We do not regard this as a correct view of the law. It is a well-established and familiar rule that deeds are to be construed as meaning what the language employed in them imports, and that extrinsic evidence may not be adduced to contradict or affect them. And it would seem that nothing could be clearer in its meaning than a deed of a lot of land, described by metes and bounds, with covenants of warranty against incumbrances. The great exception to the application of this rule to the construction of deeds is in the case of ways of necessity, where by a fiction of law there is an implied reservation or grant to meet a special emergency on grounds of public policy, as it has been said, in order that no land should be left inaccessible for purposes of cultivation. This fiction has been extended to cases of easements of a different character, where the fact has been established that the easement was necessary to the enjoyment of the estate in favor of which it was claimed. In this Commonwealth grants by implication are limited to cases of strict necessity. *Carbrey* v. *Willis*, 7 Allen, 364, and cases cited; *Randall* v. *McLaughlin*, 10 id. 366. The case of *Pyer* v. *Carter* was denied by Lord Chancellor Westbury, in *Suffield* v. *Brown*, 4 De G., J. & S. 185, which has been since recognized as containing the correct doctrine. *Crossley* v. *Lightowler*, L. R., 2 Ch. 478; *Watts* v. *Kelson*, L. R., 6 Ch 166. In this view of the case it appears that the jury found that the use of the chimney was not necessary to the enjoyment of the premises owned by the plaintiff. This being so, no easement in the chimney was reserved by implication in the deed to the defendant's grantor, and the defendant in destroying the chimney merely exercised a right of ownership."

So in *Butterworth* v. *Crawford*, 46 New York, 349; 7 Am. Rep. 352, the owner of two adjacent lots of land, 83 and 85, dug a vault, extending partly into each lot, connecting by a drain through lot 85 with the street sewer. He conveyed 85 by deed to defendant, covenanting against incumbrances, and afterward conveyed 83 to plaintiff. Defendant did not know of the drain when he purchased, nor was there any apparent mark or sign of it. *Held*, that defendant's lot was not servient, and that he might close up the drain. The Court expressly declined to consider the question whether the dominant holder, conveying the servient tenement, with warranty and without reservations, was precluded from asserting an easement in the servient tenement, in favor of the dominant tenement, and observed: "All the authorities cited on the argument, by the learned counsel for the respective parties, concur in holding that the rule of law which creates an easement on the severance of two tenements or heritages, by the sale of one of them, is confined to cases where an *apparent sign* of servitude exists on the part of one of them in favor of the other; or as expressed in some of the authorities, *where the marks of the burden are open and visible*. Unless therefore the servitude be open and visible, or at least unless there be some apparent mark or sign which could indicate its existence to one reasonably familiar with the subject, on an inspection of the premises, the rule has no application." Citing *Pyer* v. *Carter*. "That decision recognizes the necessity of establishing

that the servitude is apparent, or that there is an apparent mark or sign of it, and seems based on the fact that the situation and circumstances of the premises afforded such a sign. In Washburn on Easements, 2d ed., p. 68, the learned author, after reviewing the cases on the subject, states that he considers the doctrine of *Pyer* v. *Carter* confined to cases where a drain is necessary to both houses, and the owner makes a common drain for both; and this arrangement is apparent and obvious to an observer. If *Pyer* v. *Carter* goes further than that, or at all events, if it applies to cases where there is no apparent mark or sign of the drain, it is not in accordance with the current of authorities." See *Wells* v. *Garbutt*, 132 New York, 430.

"The decided weight of authority, both English and American, is to the effect that an easement, not of strict necessity, will not pass by implied grant unless it be apparent and continuous." *Bonelli Brothers* v. *Blakemore*, 66 Mississippi, 136; 14 Am. St. Rep. 550.

The conflict of the English cases is carefully reviewed in *Mitchell* v. *Seipel*, 53 Maryland, 251; 36 Am. Rep. 404, the case of an alley. The Court approved *James* v. *Jenkins*, *supra*, but held that the same doctrine did not apply in favor of the part retained by the grantor unless it was strictly necessary. The Court distinguish the principal case as one of implied grant of an easement; and *Wheeldon* v. *Burrows*, 12 Ch. Div. 31, is approved as denying the doctrine of implied reservation except in cases of ways or easements of necessity, and as to this extent overruling *Pyer* v. *Carter*. See note, 36 Am. Rep. 415. The same doctrine is found in *O'Rorke* v. *Smith*, 11 Rhode Island, 259; 23 Am. Rep. 440, the case of a right of way to a well. The Court say: "the cases are very generally to the effect that where the easement or *quasi* easement is continuous, apparent, and reasonably necessary to the beneficial enjoyment of the estate for which it is claimed, a grant thereof will be implied. The rule applies especially in favor of easements of air and light, lateral support, partition walls, drains, aqueducts, conduits, and water-pipes or spouts, all these being continuous easements technically so-called, — that is to say, easements which are enjoyed without any active intervention of the party entitled to enjoy them. Ways are not in this sense continuous easements," etc. The Pennsylvania and New Jersey cases above cited are then noticed, and it is held that the way must be strictly necessary, or that a substitute for can be created only at an excessive and disproportionate expense, or that some conclusive indication of the grantor's intention existed in the circumstances. So in *Parsons* v. *Johnson*, 68 New York, 62; 23 Am. Rep. 149, it was held that where the owner of land, over which there was a way for his own convenience, sold the land adjacent to the way, describing it by precise and definite boundaries, but not mentioning the way nor using any general term except "appurtenances," and the way not being necessary to the purchaser, it was a non-continuous *quasi* easement, and it did not pass to the grantee. The court rely on English and the New Jersey cases, and distinguish *Huttemeier* v. *Albro*, *supra*.

See also *Elliott* v. *Rhett*, 5 Richardson Law (So. Car.), 405; 57 Am. Dec. 750, and extended notes, 759; *Sanderlin* v. *Baxter*, 76 Virginia, 299; 44 Am. Rep. 165; both of which require that the easement should be apparent and

continuous. Also *Ellis* v. *Bassett*, 128 Indiana, 118; 25 Am. St. Rep. 421; *John Hancock U. S. Ins. Co.* v. *Patterson*, 103 Indiana, 582; 53 Am. Rep. 550. In the last it was said: "It may be inferred that the rule in *Pyer* v. *Carter*, *supra*, might have been looked upon with more favor by the learned courts in the cases above cited (Massachusetts and Maine), if as in the case under consideration it had been sought to apply it to grants of the dominant estate."

See also *Adams* v. *Marshall*, 138 Massachusetts, 228; 52 Am. Rep. 271, where the grantor was held entitled to the support of a building through which the boundary line ran.

Mr. Washburn says (Easements, p. 81): "The American annotator of B. & Smith's Reports, in a note to *Pearson* v. *Spencer*, says: 'It may be considered as settled in the United States, that on the conveyance of one of several parcels of land belonging to the same owner, there is an implied grant or reservation, as the case may be, of all apparent and continuous easements or incidents of property, which have been created or used by him during the unity of possession, though they could then have had no legal existence apart from his general ownership.' And he cites numerous cases as tending to establish this general proposition. But while this would seem to sustain and be fully sustained by the case of *Pyer* v. *Carter*, the inference to be drawn from *Carbrey* v. *Willis*, 7 Allen (Mass.), 364, and *Randall* v. *McLaughlin*, 10 *ibid.* 366, seems to be that though this would be true where the dominant estate is conveyed and the servient estate is reserved, it would not be so where the servient estate is granted and the dominant reserved, unless the easement claimed is strictly one of necessity, and another cannot be substituted at reasonable labor and expense."

The doctrine of implied easement on severance does not extend to air and light. *Keating* v. *Springer*, 146 Illinois, 481; 37 Am. St. Rep. 175; *Robinson* v. *Clapp*, 65 Connecticut, 365; 29 Lawyers' Rep. Annotated, 582.

No. 7. — HOLLINS *v.* VERNEY.

(C. A. 1884.)

RULE.

For Prescription under the Prescription Act (2 & 3 Will. IV. c. 71), the user must be continuous and of right; and any cessation of user must be such as not to exclude the inference of enjoyment as of right.

No. 7. — Hollins v. Verney, 13 Q. B. D. 304, 305.

Hollins v. Verney.

13 Q. B. D. 304-316 (s. c. 53 L. J. Q. B. 430; 51 L. T. 753; 33 W. R. 5).

[304] *Easement. — Prescription Act* (2 & 3 *Wm.* 4, *c.* 71), *ss.* 2, 4, 5, 6. — *User at long Intervals. — Enjoyment for full period of Twenty Years.*

In an action where a right of way was claimed under the Prescription Act (2 & 3 Wm. 4, c. 71), in respect of twenty years' user as of right, it appeared that the way had only been used by the party claiming it — the defendant — for the removal of wood cut upon an adjoining close. The wood was cut upon this close at intervals of several years; the last cutting having been in the year before the action was commenced, the one next previous twelve years before, and the next at another interval of twelve years. Between these intervals the road was occasionally stopped up, but the defendant used it as often as he wished while the wood was being cut: —

Held, that there had not been an uninterrupted enjoyment of the way for twenty years within the meaning of the Prescription Act, which did not apply to so discontinuous an easement as that claimed.

Judgment of the Queen's Bench Division (11 Q. B. D. 715) affirmed.

Appeal by the defendant from the decision of Lord COLERIDGE, C. J., DENMAN and MANISTY, JJ., whereby judgment was ordered to be entered for the plaintiff.

The facts of the case are stated in the report of the proceedings before the Queen's Bench Division (11 Q. B. D. 715), and also are noticed in the judgment of this Court hereinafter set forth.

Feb. 19. J. W. Mellor, Q. C., and E. W. Garrett, for the plaintiff.

Sir F. Herschell, S. G. (J. C. Lawrance, Q. C., and W. Graham, with him), for the defendant.

In addition to the cases cited in the judgment, the following were mentioned in the course of the argument: *Dare* v. *Heathcote*, 25 L. J. Ex. 245; *Hanmer* v. *Chance*, 4 De G. J. & S. 626, 34 L. J. Ch. 413. *Cur. adv. vult.*

[*305] *May 30. The judgment of the Court (BRETT, M. R., LINDLEY and BOWEN, L. JJ.), was now delivered by

LINDLEY, L. J. This was an appeal from the decision of the Divisional Court, reported in 11 Q. B. D. 715.

The action was for trespass on the plaintiff's land, and was commenced on the 16th of June, 1882. The defendant pleaded a right of way for carting timber and underwood from a wood of his

own. It was conceded that the right of way claimed could not be established by immemorial prescription at common law, inasmuch as the right could be shown to have originated in modern times. Nor was any attempt made to establish the right of way as a way of necessity, or as a way created or reserved by any grant, actual or presumed. The contention was that the case was brought within the Prescription Act (2 & 3 Wm. 4, c. 71), and that the evidence given at the trial in support of the right of way amounted to the proof required by that Act.

Some of the evidence given at the trial went to show an actual user of the way every year for more than twenty-five years before action; and if this evidence had been reliable, the right of way would clearly have been established. But this part of the evidence was very conflicting and unsatisfactory, and the learned Judge who tried the case has reported that if the jury meant to find a verdict for the defendant on this ground, such a verdict ought not to be allowed to stand.

There was, however, other evidence showing that the timber on what was called the slope of the wood had been cut in the years 1851, 1852, and 1853, and again in the years 1866, 1867, and 1868, and again in the year before the action was commenced; and that in these years the timber cut was carted along the way in question as of right and without interruption, so that the plaintiff had in fact for the last thirty years used the way whenever he wanted to do so, although that happened to be only twice before the dispute arose. The evidence on this point was satisfactory; and if the jury found for the defendant on the ground that this limited user was proved, the learned Judge reports that he is not dissatisfied with it. He, however, gave no judgment for either party.

*Under these circumstances the plaintiff obtained a [*306] rule to show cause why the verdict should not be set aside and a new trial had. The defendant, on the other hand, asked the Court to give judgment for him upon a claim of a right of way restricted to carting timber cut on the slope of the wood. The Divisional Court, after hearing both sides, set aside the verdict and gave judgment for the plaintiff with nominal damages, and decided, in effect, that such a right as the defendant claimed cannot be established under the Prescription Act by such evidence of user as the defendant was compelled to rely upon.

No. 7. — Hollins v. Verney, 13 Q. B. D. 306, 307.

The question thus raised is one of very considerable importance, and in substance is whether a right of way can be established under the Prescription Act (2 & 3 Wm. 4, c. 71), where on the one hand the right can only be proved to have been actually exercised for a period of over thirty years on what are substantially three occasions at intervals of twelve years; but where on the other hand the person claiming the right did not require to exercise it on any other occasion. The sections of the Prescription Act material for consideration, in order to determine the question thus raised, are: — First, the preamble; secondly, s. 2, relating to ways; thirdly, s. 4, relating to the computation of the periods mentioned in s. 2, and defining the meaning of "interruption;" fourthly, s. 5, relating to pleadings; and fifthly, s. 6, relating to presumptions. These various provisions must be read together, for they illustrate and explain each other. They show, first, that in order to establish a right of way under the Act in question, it is necessary that the way shall have been actually enjoyed by some person claiming right thereto without interruption for the full period of twenty years; secondly, that this period is to be reckoned next before some suit or action wherein the right of way shall have been brought in question: see as to this *Richards* v. *Fry*, 7 A. & E. 698, 7 L. J. Q. B. 68; *Wright* v. *Williams*, 1 M. & W. 77, 5 L. J. Ex. 107; *Ward* v. *Robins*, 15 M. & W. 237; thirdly, that the expression "without interruption," means without such an interruption as is described in s. 4; fourthly, that no presumption is to be made in favour of any claim upon [*307] proof * of the exercise or enjoyment of the right of way claimed for any less period than the full period of twenty years mentioned in ss. 2 and 4. The meaning of "as of right," or "claiming as of right," will be found discussed in *Bright* v. *Walker*, 1 Cr. M. & R. 211, 3 L. J. Ex. 250; *Tickle* v. *Brown*, 4 Ad. & E. 369, 5 L. J. Ex. 119; and *Earl de la Warr* v. *Miles*, 17 Ch. D. 535, 50 L. J. Ch. 754; and it has been decided that enjoyment by permission (*Monmouth Canal Company* v. *Harford*, 1 Cr. M. & R. 614, 4 L. J. Ex. 43), contentious user (*Eaton* v. *Swansea Waterworks*, 17 Q. B. 267, 20 L. J. Q. B. 482), enjoyment as owner or occupier of the servient tenement (*Battishill* v. *Reed*, 18 C. B. 696, 25 L. J. C. P. 290, and *Harbidge* v. *Warwick*, 3 Ex. 552, 18 L. J. Ex. 245), are not enjoyments "as of right" within the statute. It is not, however, necessary to

examine this point with any minuteness, as the right of way claimed in the present case may be taken as having been claimed "as of right" within the true meaning of ss. 2 and 5. It may also be taken that there has been no "interruption" of the right of way within the meaning of ss. 2 and 4. The words "without interruption" in s. 2, mean, as already stated, without such an interruption as is mentioned in s. 4. The words are not equivalent to "without cessation;" and, paradoxical as it may appear, it has been decided that an enjoyment for nineteen years and three-quarters is sufficient to establish a right to light under s. 3, although the enjoyment may have been in fact obstructed for the last three months of the full period of twenty years for which the light must be actually enjoyed, in order that a right to it may be acquired under the statute. This was decided in 1840, in *Flight* v. *Thomas*, 11 A. & E. 688, 8 Cl. & Fin. 231, 10 L. J. Ex. 529, both by the Exchequer Chamber and the House of Lords. The easement there in question was a continuous easement (light), and the non-enjoyment for part of the twenty years was due to actual obstruction and not to mere non-user. The case, however, shows that actual enjoyment for the full period of twenty years may be established by evidence which falls short of proving actual user for the whole of that period without any cessation. Common sense, moreover, is enough to show that in order to establish a right of way under s. 2, it cannot be necessary to *prove an actual continuous user of the way by day and [*308] by night for twenty years without any cessation whatever. Whatever fairly amounts to an actual enjoyment as of right of the way claimed for the full period of twenty years mentioned in s. 2, is sufficient. But it is obvious, and it has often been pointed out, that in the case of a discontinuous easement like a right of way, it is extremely difficult, if not impossible, to say exactly what cessations of actual user are, and what are not, consistent with such an actual enjoyment for the full period of twenty years as the statute requires to establish the right. The statute leaves this difficulty to be solved in each case as best it may; but some light is thrown on the subject by ss. 6 and 4. Sect. 6 prohibits the making of any presumption in favour of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period than those mentioned in the other sections of the Act. This section is addressed to presump-

tions as distinguished from legitimate inferences from facts. It is addressed to judges rather than to juries. It assumes proof of actual enjoyment for a less period than twenty years, and forbids any presumption being made simply from such short enjoyment in favour of an actual enjoyment for a longer period than that proved; but s. 6 does not forbid inferences from an enjoyment for a less period than twenty years and other circumstances, if there are any. Sects. 2 and 4 require proof of actual enjoyment for twenty years before action; s. 6 says that proof of actual enjoyment for less than twenty years before action will not do; but this after all throws little or no light on the continuity of user requisite to amount to proof of actual enjoyment for the period in question. This view of s. 6 is the same as that taken by the Court in *Carr* v. *Foster*, 3 Q. B. 581, which will be alluded to again presently. Further light is thrown on what is meant by actual enjoyment for the full period of twenty years by looking at the matter from the point of view of the owner of the servient tenement. A right of way cannot be actually enjoyed by one person without being permitted or suffered by the owner of the land, over which the way is enjoyed; and if the one must actually enjoy it for the full period of twenty years, the other must actually suffer it [* 309] for the same period. Moreover, as * the enjoyment must be as of right and without interruption for the full period of twenty years, it follows that for the same period there must have been an opportunity of resistance and interruption. Upon this principle it has been held that easements the enjoyment of which cannot be prevented, cannot be acquired. Thus, in *Webb* v *Bird*, 10 C. B. (N. S.) 268, it was held that the owner of a wind-mill cannot gain by prescription a right to the free passage of wind to his mill. In *Sturges* v. *Bridgman*, 11 Ch. D. 852, 48 L. J. Ch. 785, it was held that a person could not gain by prescription a right to make a noise which for many years affected no one, and which no one therefore could have prevented him from making. Similar reasoning from s. 4 has induced some judges to say that some user must be proved in each year of the period mentioned in the statute. See *Lowe* v. *Carpenter*, 6 Ex. 825, 20 L. J. Ex. 374. Looking, from this point of view, at a right of way exercised only at long intervals of time, it is difficult to see how its exercise can be interrupted or resisted except at those times when it is exercised. If it cannot be interrupted or resisted

during the full period of twenty years, it is difficult to see how it can be actually enjoyed for such period "as of right" and "without interruption," as required by s. 2 of the statute. The difficulty, however, of distinguishing between long and short intervals of enjoyment is not removed by such reasoning. The difference is one of degree rather than one of principle, and the statute does not afford any certain test whereby the difficulty can be solved. The truth is that the question whether in any particular case a right of way has, or has not, been actually enjoyed for the full period of twenty years, appears to be left by the Act to be treated as a question of fact to be decided by a jury, unless the Court sees that having regard to s. 6 and the other provisions of the statute there is no evidence on which the jury can properly find such enjoyment. This view of the statute will explain several decisions which are apparently conflicting, and which it is necessary to notice.

In *Lawson* v. *Langley*, 4 A. & E. 890, 6 L. J. K. B. 271, decided in 1836, a right of way was claimed under s. 2 of the statute. Enjoyment for the full period of forty years was pleaded and sought to be proved. There * appears to have [* 310] been some difficulty in proving actual user for the whole period; and evidence was tendered to show a user of the way more than forty years ago. The evidence was rejected at the trial, but a new trial was ordered on the ground that the evidence ought to have been received. The Court evidently thought the evidence admissible for the purpose of enabling the jury to draw an inference of fact, notwithstanding the rule in s. 6 against presumptions. LITTLEDALE, J., said (p. 891): "If evidence of user beyond forty years were to be excluded, it might be that after the case had been established as far as thirty-eight years back, a discontinuance of proof might occur as to two or three preceding years, and the party might fail, because he was unable to carry his case on without going to the distance of forty-one." In *Hall* v. *Swift*, 4 Bing. N. C. 381, 7 L. J. C. P. 209, decided in 1838, a watercourse was claimed. The claim was apparently made under s. 2 of the Act. Enjoyment for the last nineteen years was proved, but for three years before that the water had not flowed in its accustomed course. Before those three years, however, enjoyment for some time was proved. The report says there had been some interruption about twenty-two years before the action;

but it is tolerably plain that there had been no interruption within the meaning of s. 4 of the Act, and that the interruption spoken of was only a cessation in the flow of water. The jury found in favour of the right claimed. An application was made to set aside the verdict on the ground (amongst others) that actual enjoyment for the full period of twenty years before action had not been proved. The Court, however, refused to interfere, TINDAL, C. J., saying: "It would be very dangerous to hold that a party should lose his right in consequence of such an interruption; if such were the rule, the accident of a dry season or other causes over which the party could have no control, might deprive him of a right established by the longest course of enjoyment." This last remark seems to go rather too far; for under the statute the right is not acquired until it has been enjoyed for the requisite period, and if an immemorial, as distinguished from a twenty years' statutory, enjoyment can be proved, the right will be established independently of the statute, and will not be [*311] lost by a mere temporary *non-enjoyment. These two cases, however, seem to establish that if user before the statutory period is proved and user for eighteen or nineteen years next before action is also proved, the mere fact of non-user for some time immediately after the commencement of the statutory period is not necessarily fatal; and this we consider good law, if the non-user is capable of explanation consistently with continued actual enjoyment as of right.

Bailey v. *Appleyard*, 8 A. & E. 161, 7 L. J. Q. B. 145, is supposed to be inconsistent with this view, but it is not really so, as will be seen by reading with the report of the case the note explaining it. This note is to be found between pp. 778 and 779 in some copies of 8 A. & E., being misplaced in binding. In *Bailey* v. *Appleyard*, a right of common was claimed under s. 1. Enjoyment for twenty-eight years before action was proved; for much more than two years before that there had been an actual obstruction of the right by means of a stang or bar. Before its erection, however, enjoyment was proved for some years. The Judge asked the jury whether the stang or bar had prevented the plaintiff from exercising his right, and told them that if it had, the proof of prior enjoyment would not assist him; and it was left to the jury to say whether there had been substantially an enjoyment for thirty years or for twenty-eight years only. The jury

found for the defendant, i. e., against the right of common, and the Court held there was no misdirection. It is manifest that the verdict was right, and that the decision of the Court was correct, for actual enjoyment as of right for thirty years next before action was disproved, and could not be inferred in the face of the evidence as to the obstruction. In the course of the argument PATTESON, J., expressed an opinion "that the most undoubted exercise of enjoyment for twenty-nine and three-quarter years would not have been sufficient." But this was before *Flight* v. *Thomas*, 11 A. & E. 688, 8 Cl. & F. 231, 10 L. J. Ex. 529, had been decided, and must not be taken as literally true in all cases.

In *Parker* v. *Mitchell*, 11 A. & E. 788, 9 L. J. Q. B. 194, decided in 1840, a claim was made to a right of way under s. 2, and both a forty and a twenty years' user were pleaded. The evidence showed a user from a period of fifty years before action, but not for the last four or five years. *What the [*312] explanation of this was, does not appear. The Judge at the trial was of opinion that the claim was not supported, and by his direction the jury found against it, but the evidence on the user was not left to them. The Court refused a rule for a new trial, evidently on the ground that on the undisputed facts the jury could not properly find an actual enjoyment for the full period of twenty or forty years next before the commencement of the action, as required by ss. 2 and 4 of the statute (see per PATTESON, J., in 3 Q. B. 585). This decision seems right in the absence of all explanation accounting for the non-user.

In *Carr* v. *Foster*, 3 Q. B. 581, 11 L. J. Q. B. 284, decided in 1842, the plaintiff claimed a right of common of pasture. He proved enjoyment for forty years next before action, with the exception of an interval of two years, which occurred eighteen years back, and was accounted for by the fact that his predecessor in title had then no commonable beasts. The plaintiff at the trial seems to have relied on the statute, and not on any title he might have acquired independently of the statute; and the case was dealt with both at the trial and by the Court afterwards as turning on the provisions of the statute. The Judge at the trial asked the jury whether substantially the right of common had been enjoyed for thirty years next before the action, and the jury found for the plaintiff. A rule was obtained to show cause why a nonsuit should not be entered or a new trial had on the ground

that the verdict was against the weight of evidence; but on argument the rule was discharged, because there had been no interruption within the meaning of s. 4, and the cessation of enjoyment was accounted for in such a way as to justify an inference, that the right was actually enjoyed for the full period required by the Act, although there was in fact an intermission of enjoyment for two years, part of that period. This case certainly goes further than any other to be found in the books; but we are not prepared to say it was wrongly decided, nor to hold that the case ought not to have been left to the jury, considering the explanation given of the non-user. At the same time it is difficult to reconcile this case with *Parker* v. *Mitchell*, 11 A. & E. 788, 9 L. J. Q. B. 194, and with those cases already referred to in which it has [*313] been held that a way actually used for twenty *years before action has not been enjoyed for those twenty years as of right, if for any part of that period the dominant and servient tenements have been occupied together. In the one case there has been a total cessation of user for a time, and in the other there has been no cessation of user at all, but only a cessation of user as of right. Why a temporary cessation of user as of right should be more fatal to the acquisition of the right than a total temporary cessation of user, it is not easy to see.

The next and last case to which it is necessary to refer is *Lowe* v. *Carpenter*, 6 Ex. 825, 20 L. J. Ex. 374, decided in 1851. The defendant there claimed a right of way under s. 2 of the statute. He proved user for forty-eight years before action with the exception of the last fourteen months, when it did not appear to be used at all. It also appeared that the way was not used every year, but only as occasion required — for carting timber, lime, &c., as occasion required: whether this was the reason why the way was not used for the last fourteen months, is not stated. The case was tried before Patteson, J., who was one of the Judges who had decided both *Parker* v. *Mitchell* and *Carr* v. *Foster*. He expressed himself not altogether satisfied with *Parker* v. *Mitchell*, and under his direction the jury found for the defendant, i. e., in favour of the right claimed, leave being reserved to the plaintiff to move to set aside that verdict and to enter a verdict for himself with nominal damages. The plaintiff obtained a rule accordingly, and upon argument the Court decided in his favour. The Court considered *Parker* v. *Mitchell* rightly decided, and that the

jury could not upon the evidence find an actual enjoyment for the full period of twenty years next before the commencement of the action, as required by ss. 2 and 4 of the statute. PARKE, B., expressed an opinion that proof of some user every year was essential to bring a case within the statute, and he referred to s. 4 in support of that opinion. But at present there is no decision which goes this length; and we are not prepared to say that an actual enjoyment for the full period required by the statute may not be inferred, although there is no proof of actual user in every year. We think that, notwithstanding the rule against presumptions in s. 6, if a user for more than twenty or thirty years, as the case may be, is * proved, a non-user for more [* 314] than a year within twenty or thirty years from the commencement of the action may be so explained as to warrant a jury in finding an actual enjoyment for the statutory period, as the jury in fact did in *Carr* v. *Foster*. The observations of JAMES, L. J., in 17 Ch. D. 600, show that this also was his opinion; at the same time the total absence of user for any year of the statutory period will be fatal, unless explained in such a way as to warrant the inference of continued actual enjoyment notwithstanding such temporary non-user. We confess, however, that we do not appreciate the supposed distinction between a temporary non-user for a year occurring at the beginning, or the end, or in the middle of the statutory period. *Flight* v. *Thomas*, 11 A. & E. 688, 8 Cl. & F. 231, 10 L. J. Ex. 529 and the language of s. 4 show that an interruption for a year is fatal, and that an interruption for less than a year is not fatal whether it occurs at the commencement, or end, or at any part of the statutory period; so a cessation of user which excludes an inference of actual enjoyment as of right for the full statutory period will be fatal at whatsoever portion of the period the cessation occurs; and, on the other hand, a cessation of user which does not exclude such inference, is not fatal, even although it occurs at the beginning, or the end, of the period. The only difference is that if the non-user occurs at the end of the period there can be no subsequent user to explain it, and the inference of actual enjoyment for the full period next before action is more difficult to draw than in other cases. But we are not prepared to say that as a matter of law such an inference can in no case be drawn. On the contrary, we think it may where s. 6 does not apply. In *Parker* v. *Mitchell*, 11 A. & E.

788, 9 L. J. Q. B. 194 and *Lowe* v. *Carpenter*, 6 Ex. 825, 20 L. J. Ex. 374, the non-user at the end of the period was apparently unexplained, and was therefore fatal. In *Bailey* v. *Appleyard*, 8 A. & E. 161, the non-user at the beginning of the period was owing to actual obstruction, which was fatal; but, as already pointed out, *Hall* v. *Swift*, 4 Bing. N. C. 381, 7 L. J. C. P. 209, and *Lawson* v. *Langley*, 4 A. & E. 890, 6 L. J. K. B. 271, show that non-user at the commencement of the period is not necessarily inconsistent with the actual enjoyment for the full [*315] statutory period, and *Carr* v. *Foster* shows that *the same is true of a temporary cessation in the middle of the period. We have examined a great number of other decisions upon the Prescription Act, all indeed that we have been able to find, but none of them except those to which we have referred appear to require comment for the purpose of deciding the case before us. It is difficult, if not impossible, to enunciate a principle which will reconcile all the decisions, and still more all the dicta to be found in them; the only safe course is to fall back on the language of the statute, to give effect to it, and to introduce into it nothing which is not to be found there. It is sufficient for the present case to observe that the statute expressly requires actual enjoyment as of right for the full period of twenty years before action. No user can be sufficient which does not raise a reasonable inference of such a continuous enjoyment. Moreover, as the enjoyment which is pointed out by the statute is an enjoyment which is open as well as of right, it seems to follow that no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term (whether acts of user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognized and if resistance to it is intended. Can an user which is confined to the rare occasions on which the alleged right is supposed in this instance to have been exercised, satisfy even this test? It seems to us that it cannot: that it is not, and could not reasonably be treated as the assertion of a continuous right to enjoy; and when there is no assertion by conduct of a continuous right to enjoy, it appears to us that there cannot be an actual enjoyment within the meaning of the statute. Without therefore professing

to be able to draw the line sharply between long and short periods of non-user, without holding that non-user for a year or even more is necessarily fatal in all cases, without attempting to define that which the statute has left indefinite, we are of opinion that no jury can properly find that the right claimed by the defendant in this case has been established by evidence of such limited user as was mainly relied upon, and as was contended by the defendant to be sufficient in the present * case. Upon [* 316] this point, therefore, we affirm the decision of the Divisional Court; and, as the defendant has failed both here and in the Divisional Court on the point of law on which he relied for his defence, he ought in our opinion to pay the costs of the appeal and of the motion made to the Divisional Court.

This, however, does not quite dispose of the case. The jury found in favour of the defendant; and he gave some evidence of having carried timber from other parts of his wood along the road in question in several years besides in 1851–3, 1866–9, and just before the action. This evidence was not satisfactory, and there was a considerable amount of evidence on the other side showing that the user was by permission and not "as of right," and CAVE, J., thought that the verdict ought not to stand unless the defendant was right in his legal contention. At the same time we are not prepared to say that the verdict can be set aside and judgment entered for the plaintiff. The Divisional Court have, however, gone that length. They apparently considered that there was no evidence of user, except in the years 1851–3 and 1866–9, and if this had been the case their judgment would have been quite right. But there was some evidence, though unsatisfactory evidence, of more frequent user than in those years; and although, now that the main point on which the defendant relied throughout is decided against him, the verdict in his favour cannot stand, we think he is entitled to a new trial if he desires it, and the judgment of the Court below must be varied accordingly. But it will be useless for the defendant to go down to trial again unless he is prepared with satisfactory evidence of a much more continuous user as of right than he relied upon before. If he elects to try the case again, the costs of the action and of the new trial will abide the event. If he does not try the case again, he must pay the costs of the action, and in any event he must pay the costs of the motion to the Divisional Court and of this appeal, as already stated. *Judgment varied.*

ENGLISH NOTES.

In *Earl De La Warr* v. *Miles* (1881), 17 Ch. D. 535, 50 L. J. Ch. 754, 44 L. T. 487, 29 W. R. 809, where a right of common was claimed and decreed after a user of sixty years, BRETT, L. J., said (17 Ch. D. 593): "But then it was said that even if this right was shown to have been exercised at the commencement of the sixty years, it was not shown that it had been exercised during the whole of that term. I think it is necessary for the defendant to show that the right was exercised year by year, and that if, as regards some part of the intermediate period, he failed to show that the right had been exercised, he would not prove that which lies upon him under the statute. If, therefore, it had been shown that he or his predecessors had for a year or more submitted to tramps or gipsies, or other people who were undoubtedly trespassers, cutting the fern on their own account, and appropriating it to themselves, and instead of cutting the litter by their own servants, had bought it from these people as something which they had a right to sell — if it could have been shown that he had done that for a year or two years without cutting any litter during that year or those two years by his own servants at all, I should have thought that there was a gap made in the user for sixty years, and that he could not succeed under his plea. If he had bought from such people in each year, but also during each year had cut a part by himself and his servants under the claim of right, the mere fact of his wrongful buying from these people would not, in my opinion, have destroyed the continuity of his actual user." JAMES, L. J., then added, "I think that it requires some further consideration before we entirely adopt what was said in one of the cases — that to establish under the Statute a claim to *profit à prendre* it must be shown to have been exercised in every one of the years. If from any accident, or merely for the convenience of the man himself, the right in some years was not exercised, I think it deserves consideration whether such a pretermission as that would defeat the right, if the user was shown to have begun more than sixty years ago, and to have continued whenever it was wanted during the whole period of sixty years."

The circumstance of non-user, or failure of proof of user, for more than a year at the commencement of the statutory period is not necessarily fatal to the acquisition of an easement, unless the circumstances raise the inference of an abandonment of the right. And if the right is shown to have been exercised for a long period previously, this inference would not be readily adopted. The previous user would be accepted as evidence of the state of things at the beginning of the statutory period: *Hall* v. *Swift* (1838), 4 Bing. N. C. 381, 7 L. J. C. P. 209; *Lawson* v. *Langley* (1836), 4 A. & E. 890, 6 L. J. K. B. 271.

AMERICAN NOTES.

The principles of the Rule are well recognized in this country. The claim must be contrary to the interest of the owner of the land. "It is well known that a single lisp of acknowledgment by a defendant that he claims no title, fastens a character upon his possession which renders it unavailable for ages." *Colvin* v. *Burnet*, 17 Wendell (New York), 564. The necessity of a claim of right to constitute an easement by prescription is clearly expressed in many cases. Anything like a reliance upon permission or license of the owner of the land, or giving any consideration for the privilege, destroys the prescriptive claim. *Felton* v. *Simpson*, 11 Iredell (Nor. Car.), 84; *Sumner* v. *Tileston*, 7 Pickering (Mass.), 198. "An easement in land of another by adverse user can be acquired only with the acquiescence of the owner of the land in its exercise under a claim of right." *Powell* v. *Bagg*, 8 Gray (Mass.), 441; 69 Am. Dec. 262; *Chicago, &c. Ry. Co.* v. *Hoag*, 90 Illinois, 349; *Roundtree* v. *Brantley*, 34 Alabama, 544; 73 Am. Dec. 470; *Wiseman* v. *Lucksinger*, 84 New York, 31; 38 Am. Rep. 479; *Jewett* v. *Hussey*, 70 Maine, 433; *French* v. *Marstin*, 24 New Hampshire, 440; 57 Am. Dec. 294; *Pitzman* v. *Boyce*, 111 Missouri, 387; 33 Am. St. Rep. 536. "The foundation of a prescriptive right is a presumed grant of the party whose rights are adversely affected; but where it appears that the enjoyment has existed by the consent or license of such party, no presumption of a grant can be made," *Klein* v. *Gehrung*, 25 Texas, Supplement, 233; 78 Am. Dec. 565. See *Hodgkins* v. *Farrington*, 150 Massachusetts, 19; 5 Lawyers' Rep. Annotated, 209; *McCreary* v. *Boston & M. R. Co.*, 153 Massachusetts, 300; 11 Lawyers' Rep. Annotated, 359.

To constitute the prescriptive right the acts must be injurious and give a right of action to the party against whom they are asserted. *Turner* v. *Hart*, 71 Michigan, 128; 15 Am. St. Rep. 243; *Holsman* v. *Boiling Spring B. Co.*, 14 New Jersey Equity, 335; *Smith* v. *Russ*, 17 Wisconsin, 227; 84 Am. Dec. 739; *Burnham* v. *Kempton*, 44 New Hampshire, 90; *Mertz* v. *Dorney*, 25 Pennsylvania State, 519.

The exercise of the claim must be inconsistent with the owner's right. Thus the use by the public of a private way to a wharf and warehouse cannot ripen into a prescriptive public right because it is not inconsistent with the private ownership. *Lewis* v. *Portland*, 25 Oregon, 133; 42 Am. St. Rep. 772; 22 Lawyers' Rep. Annotated, 736; citing *Irwin* v. *Dixon*, 9 Howard (U. S. Sup. Ct.), 10.

The exercise of the right claimed must be with the knowledge and acquiescence of the owner of the land. *Ingraham* v. *Hough*, 1 Jones Law (Nor. Car.), 42; *School District* v. *Lynch*, 33 Connecticut, 330; *Warren* v. *Jacksonville*, 15 Illinois, 236; 58 Am. Dec. 610; *Webber* v. *Chapman*, 42 New Hampshire, 326; 80 Am. Dec. 111.

But where the acts are notorious, such knowledge will be presumed. As in the case of a mill-dam. *Perrin* v. *Garfield*, 37 Vermont, 304; *Close* v. *Samm*, 27 Iowa, 510. Or of a way. *Ward* v. *Warren*, 82 New York, 265; *Blake* v. *Everett*, 1 Allen (Mass.), 248.

So where the acts have been done for a great length of time. *Warren* v.

Jacksonville, supra; Bird v. *Smith*, 8 Watts (Penn.), 434; 34 Am. Dec. 483. And the presumption thus raised is not weakened by the owner's mere inattention or ignorance of the facts. *Reimer* v. *Stuber*, 20 Pennsylvania State, 458; 59 Am. Dec. 744: "Such presumptions, like the statutes of limitation, will work out their purpose, though the party affected by them should close his eyes. It will not do to say that the mere ignorance of the owner repelled the presumption of a grant."

On the point of the necessity of the owner's actual knowledge, it was said, in *Ward* v. *Warren*, 82 New York, 265: —

"It is true that it is said in some of the text-books and decided cases, that to constitute an easement by prescription, the *user* must have been for the requisite time 'with the knowledge and acquiescence' of the owner of the servient tenement. (Washburn on Easements [3d ed.], 160; 2 Washburn on Real Property, 300; *Blake* v. *Everett*, 1 Allen, 248; *Carbrey* v. *Willis*, 7 *id.* 368; *Colvin* v. *Burnet*, 17 Wend. 564; *Parker* v. *Foote*, 19 *id.* 309.) But I apprehend all that is meant by the phrase quoted is that the *user* must have been not clandestine or by stealth, but open, notorious, visible, and undisputed; and when such a *user* is under claim of right, adverse, the owner of the servient tenement is charged with notice thereof, and his acquiescence is implied. I have been able to find no case which holds that in the case of such a *user*, the easement can be defeated by mere proof that the owner of the servient tenement did not have knowledge of the *user*. In the case of *Hannefin* v. *Blake* (102 Mass. 297), it was held, that, for the purpose of preventing the establishment of a right to maintain across one lot of land a drain leading from another lot, by adverse use continued for twenty years, the testimony of a person who within that time owned the first lot is admissible, that during the time he owned it he never knew of the existence of the drain. The drain there in question must have been underground, not open to observation; otherwise the case, so far as I have discovered, stands alone.

"When the use of a way has, for the requisite time, been open, notorious, uninterrupted, undisputed, under claim of right, and adverse, the law presumes a grant of such way from the owner of the servient tenement, and such presumption is conclusive. [*Parker* v. *Foote*, 19 Wend. 309; *Curtis* v. *Keesler*, 14 Barb. 511; *Coolidge* v. *Learned*, 8 Pick. 504; *Tracy* v. *Atherton*, 36 Vt. 503; *Townsend* v. *Estate of Downer*, 32 *id.* 183; *Wallace* v. *Fletcher*, 10 Foster (N. H.), 434.] The owner of the servient tenement is not permitted to defeat such an easement by simply showing that he did not in fact grant it or have knowledge of its use. It is said in 3 Kent's Commentaries, 444: 'To render the enjoyment of any easement for twenty years a presumption *juris et de jure*, or conclusive evidence of right, it must have been continued, uninterrupted, or pacific, and adverse, that is, under a claim of right, with the implied acquiescence of the owner.' In the case of *Partridge* v. *Scott* (3 M. & W. 220), Alderson, B., said: 'We should say that such a grant (of an easement) ought not to be inferred from any lapse of time short of twenty years after the defendants might have been or were fully aware of the facts.'"

As to what constitutes actual acquiescence there is a little conflict. Most of the American cases adopt the holding of *Angus* v. *Dalton*, 6 App. Cas. 740,

that mere protests or verbal denials of the claim will not constitute an interruption of the right. *Kimball* v. *Ladd*, 42 Vermont, 747; *Lehigh Valley R. Co.* v. *McFarlan*, 43 New Jersey Law, 605; *Demuth* v. *Amwey*, 90 Pennsylvania State, 181. To the contrary: *Powell* v. *Bagg*, 8 Gray (Mass.), 441; 69 Am. Dec. 262; *Lehigh Valley R. Co.* v. *McFarlan*, 30 New Jersey Equity, 180. But where such protests and denials have been supported by some physical act, it is a question for the jury: *Connor* v. *Sullivan*, 40 Connecticut, 26; 16 Am. Rep. 10. And so where the claim has always been a subject of contention: *Smith* v. *Miller*, 11 Gray (Mass.), 145.

No prescriptive right to use the water in a ditch is acquired when during the prescriptive period the owner turns the water out, although the claimant immediately turns it back. *Authers* v. *Bryant*, Nevada, 38 Pacific Reporter, 439.

If there has been a use for twenty years of the easement unexplained, it will be *primâ facie* presumed to be under claim of right and adverse, and sufficient to establish a title by prescription. Washburn on Easements, p. 156; *Cheever* v. *Pearson*, 16 Pickering (Mass.), 266; *White* v. *Chapin*, 12 Allen (Mass.), 516; *Williams* v. *Nelson*, 23 Pickering (Mass.), 141; 34 Am. Dec. 45; *Chalk* v. *McAlily*, 11 Richardson Law (So. Car.), 153; *Ricard* v. *Williams*, 7 Wheaton (U. S. Sup. Ct.), 59, 109; *Hammond* v. *Zehner*, 21 New York, 118; *Pue* v. *Pue*, 4 Maryland Chancery, 386; *Steffy* v. *Carpenter*, 37 Pennsylvania State, 41; *Ingraham* v. *Hough*, 1 Jones Law (Nor. Car.), 39; *Polly* v. *McCall*, 37 Alabama, 20; *Perrin* v. *Garfield*, 37 Vermont, 304; *Union Water Co.* v. *Crary*, 25 California, 504; 85 Am. Dec. 145; *School District* v. *Lynch*, 33 Connecticut, 334; *Watkins* v. *Peck*, 13 New Hampshire, 360; 40 Am. Dec. 156; *Stuyvesant* v. *Woodruff*, 1 Zabriskie (New Jersey), 133; 47 Am. Dec. 156; *Postlethwaite* v. *Payne*, 8 Indiana, 104; *Lanier* v. *Booth*, 50 Mississippi, 410; *Manier* v. *Myers*, 4 B. Monroe (Kentucky), 514; *Chollar-Potosi M. Co.* v. *Kennedy*, 3 Nevada, 361; 93 Am. Dec. 409; *Railway Co.* v. *Mossman*, 90 Tennessee, 157; 25 Am. St. Rep. 670.

Some cases hold the presumption conclusive. *Tracy* v. *Atherton*, 36 Vermont, 503; *Carlisle* v. *Cooper*, 19 New Jersey Equity, 256; *Strickler* v. *Todd*, 10 Sergeant & Rawle (Penn.), 63; *Olney* v. *Fenner*, 2 Rhode Island, 211; 57 Am. Dec. 711; *Winnipiseogee Co.* v. *Young*, 40 New Hampshire, 420; *Webber* v. *Chapman*, 42 New Hampshire, 326; 80 Am. Dec. 111. In the Vermont case the court observed: —

"The general language of the books, found in innumerable cases, is that from such a possession, continued for the period of the statute, the law will presume a grant, or courts will direct juries to presume a grant. But this is purely a legal fiction. The doctrine proceeds wholly upon the ground of presuming a right after such length of possession, and not at all upon the ground that there ever was a grant made, but which has been lost, and though it may be shown ever so clearly that no grant was ever made, the case is not at all varied.

"A great deal of learning has been expended upon the question whether, in such case, the presumption arising from the length of possession is a presumption of law, or one of fact, and all the cases on the subject have been industriously brought to our attention in the argument of this case.

"The counsel for the plaintiff say that this presumption of a grant from such long possession is a presumption of fact, to be found by a jury from such possession, unless rebutted, and that therefore any evidence which tends to show that no such grant was made, or could have been made, is admissible, and should be submitted to the jury. If it were true that such was the real ground upon which these rights are sustained, the view of the counsel would be unanswerable. But the counsel themselves do not claim that this grant which is presumed is anything but mere fiction. The true view of the subject is well stated by WILDE, J., in *Coolidge* v. *Learned*, 8 Pick. 504. He says: 'It has long been settled that the undisturbed enjoyment of an incorporeal right affecting the lands of another for twenty years, the possession being adverse and unrebutted, imposes on the jury a duty to presume a grant, and in all cases the jury are so instructed by the court. Not however because either the court or jury believe the presumed grant to have been actually made, but because public policy and convenience require that long-continued possession should not be disturbed.'

"It is said in many of the cases that this length of possession is only evidence to be submitted to the jury. If by this is meant that where it is conceded or proved that there has been an uninterrupted possession under claim of right for the requisite time, and this is not encountered by any evidence to rebut the legal effect of it, that it is a proper question to be submitted to the jury to say whether this gives a right or not, it is not in our opinion correct.

"If there be any conflict of evidence as to the length or character of the case, or any evidence proper to rebut the acquiring the right, it then becomes proper to submit it to the jury. But where it stands solely upon the conceded or proved possession under claim of right for the requisite time, it is never submitted to a jury to find the right established or not, according to their judgments. And whether it is more proper for the court to tell the jury that it is their duty from this to presume a grant, or to tell the jury that from this the law presumes a grant, is mere idle speculation. In fact, and in substance, it is a verdict directed by the court, as a matter of law. And if it were submitted to the jury, and they were to return a verdict against the right, no court would ever accept the verdict.

"Mr. Washburn, who reviews all the decisions on the question whether the presumption to be drawn from possession or use of an easement for the required time, is one of law, or one of fact, and who gives the weight of his opinion in favor of its being a presumption of fact for the jury after all, says: 'It may therefore be stated as a general proposition of law, that if there has been an uninterrupted user and enjoyment of an easement, a stream of water for instance, in a particular way, for more than twenty-one, or twenty, or such other period of years, as answers to the local period of limitation, it affords conclusive presumption of right in the party who shall have enjoyed it, provided such use and enjoyment be not by authority of law, or by or under some agreement between the owner of the inheritance and the party who shall have enjoyed it.' Wash. on Eas. &c. 70."

It is also well settled that the exercise of the right claimed must be continuous. *Pollard* v. *Barnes*, 2 Cushing (Mass.), 191; *Plimpton* v. *Converse*, 42

Vermont, 712; *Watt* v. *Trapp*, 2 Richardson Law (So. Car.), 136; *Carlisle* v. *Cooper*, 4 C. E. Green (New Jersey Equity), 261; Washburn on Easements, p. 166; *Totel* v. *Bonnefoy*, 123 Illinois, 653; 5 Am. St. Rep. 570; *Turner* v. *Hart*, 71 Michigan, 128; 15 Am. St. Rep. 243; *Doyle* v. *Wade*, 23 Florida, 90; 11 Am. St. Rep. 334; *Orr* v. *O'Brien*, 77 Iowa, 253; 14 Am. St. Rep. 277, and notes, 278; *Curtis* v. *La Grande H. W. Co.*, 20 Oregon, 34; 10 Lawyers' Rep. Annotated, 484.

But continuity of exercise depends upon nature and character of the right claimed. Thus a less constant use of a way is required than of a water right. "A right of way means a right to pass over another man's land more or less frequently according to the nature of the use to be made of the easement; and how frequently is immaterial, provided it occurred as often as the owner had occasion or chose to pass. It must appear not to have been interrupted by the owner of the land across which the right is exercised, nor voluntarily abandoned by the claimant. Mere intermission is not interruption." *Bodfish* v. *Bodfish*, 105 Massachusetts, 317; and see *Cox* v. *Forrest*, 60 Maryland, 74; *Taylor* v. *Hampton*, 4 McCord (So. Car.), 96; 17 Am. Dec. 710 (interruption for nine years held fatal to a water right). A necessary interruption for repairs or in time of low water would not be material. *Wood* v. *Kelly*, 30 Maine, 47; *Gerenger* v. *Summers*, 2 Iredell Law (Nor. Car.), 229; *Haag* v. *Delorme*, 30 Wisconsin, 591; *Hesperia L. & W. Co.* v. *Rogers*, 83 California, 10; 17 Am. St. Rep. 209. One is not deprived of a prescriptive easement to keep water at a certain height by means of a dam maintained for twenty years, by the fact that he has from time to time strengthened the dam and occasionally let the water out. *Alcorn* v. *Sadler*, 71 Mississippi, 634; 42 Am. St. Rep. 484. Where the right to carry on an offensive trade had been exercised for eighteen years, a mere suspension for two years was held not material. *Dana* v. *Valentine*, 5 Metcalf (Mass.), 8. No public right of floatage grows out of the exercise of that right for thirty years by not more than twelve persons, and not more than three or four, nor for more than three to six days in any year. *Meyer* v. *Phillips*, 97 New York, 485; 49 Am. Rep. 538.

Section III. — *Particular Easements.*

No. 8. — DALTON *v.* ANGUS.

(H. L. 1879.)

Appeal from ANGUS *v.* DALTON.

(Q. B. D. 1877, C. A. 1878.)

RULE.

Right of support to land in its natural state is a right of property included in the parcel of rights belonging to the owner of the land.

The right of support to buildings on land is a right in the nature of an easement capable of being acquired by manifest user for 20 years; and (*semble*, per Lord Selborne, L. C.), is an easement within the meaning of the Prescription Act. (2 & 3 Will. IV. c. 71, s. 2.)

Dalton v. Angus.

6 App. Cas. 740–832 (s. c. 50 L. J. Q. B. 689).

Appeal from Angus v. Dalton.

3 Q. B. D. 85; 4 Q. B. D. 162.

[740] *Easement. — Support of House by adjoining Soil. — Prescription. — Prescription Act*, 2 & 3 *Will. IV., c.* 71, *s.* 2. — *Principal and Agent or Contractor. — Liability of Principal for Acts of Contractor.*

A right to lateral support from adjoining land may be acquired by twenty years' uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the lateral pressure, at the beginning of that time; and it is so acquired if the enjoyment is peaceable and without deception or concealment and so open that it must be known that some support is being enjoyed by the building.

Semble, per Lord Selborne, L. C.: — Such a right of support is an easement within the meaning of the Prescription Act, 2 & 3 Will. IV., c. 71, s. 2.

Two dwelling-houses adjoined, built independently, but each on the extremity of its owner's soil and having lateral support from the soil on which the other rested. This having continued for much more than twenty years, one of the houses (the plaintiffs') was, in 1849, converted into a coach factory, the internal walls being removed and girders inserted into a stack of brickwork in such a way

No. 8. — Dalton v. Angus, 4 Q. B. D. 164, 165.

as to throw much more lateral pressure than before upon the soil under the adjoining house. The conversion was made openly, and without deception or concealment.

More than twenty years after the conversion the owners of the adjoining house employed a contractor to pull down their house and excavate, the contractor being bound to shore up adjoining buildings and make good all damage. The contractor employed a sub-contractor upon similar terms. The house was pulled down, and the soil under it excavated to a depth of several feet, and the plaintiffs' stack being deprived of the lateral support of the adjacent soil sank and fell, bringing down with it most of the factory : —

Held, that the plaintiffs had acquired a right of support for their factory by the twenty years' enjoyment, and could sue the owners of the adjoining house and the contractor for the injury.

This was an action for damages by the owner of buildings against the defendants for wrongfully removing the land and minerals by which the buildings were supported, so that the buildings fell.

The defence (*inter alia*) denied the right of support.

The material facts and the effect of the proceedings in the Queen's Bench Division are stated by THESIGER, L. J., in his judgment delivered in the Court of Appeal, as follows: —

" Down to the year 1849 two dwelling-houses [4 Q. B. D. 164] of considerable age stood side by side, each having had in fact for a period long exceeding twenty years lateral support from the soil upon which the other house rested. In 1849, the plaintiffs' predecessor converted one of the dwelling-houses into a coach-factory. In the course of the conversion the internal walls which had previously existed, were removed, and girders, supporting the upper floors of *the factory were [*165] on one side let into a large chimney-stack which extended along a portion of the dividing wall, and on the opposite side took their bearings from the plaintiffs' walls. The effect of this mode of construction was to throw a considerable part, estimated at one-fourth, of the whole weight of the factory upon the chimney-stack, the foundations of which being in contact with the soil under the adjoining house, the lateral pressure upon that soil was materially increased. No express assent to the alteration was given by the owner of the adjoining house, but it must be taken that he was aware of the conversion of the dwelling-house into a factory, although there is no evidence of his having been

aware of the precise nature of the internal alterations made for that purpose, or of the exact effect which they would produce as regards lateral pressure. The adjoining house continued in its condition of a dwelling-house until shortly before the commencement of the present action, when the Commissioners of Her Majesty's Works and Public Buildings became possessed of it, and by a contract with the defendant Dalton, a builder, engaged him to pull it down, to excavate to such a depth as would enable cellarage which had not previously existed to be made, and to erect upon the site of the old house a building to be used as a probate office. Under the specification which was incorporated with the contract Dalton was bound to shore up adjoining buildings, and to make good all damage caused thereto during the erection of the building, and to provide three rods of brickwork in Portland cement to be used if necessary in underpinning the adjoining property. Dalton employed Messrs. Newby and Thorpe as sub-contractors to do the whole of the excavators', drainers', bricklayers' and masons' work on the building under conditions which may be assumed to have included those to which I have referred. They, therefore, excavated to the depth of several feet below the level of the foundation of the plaintiffs' chimney-stack, and notwithstanding that they left a thick pillar of the original clay around the stack for the purpose of supporting it during the erection of the new dividing wall, the clay gave away after exposure to the air, and the stack sank and fell, carrying with it a considerable portion of the factory, and causing damage to the plaintiffs in respect of which the present action was [* 166] brought. The case came on * for trial before Lush, J., and a special jury, when, in addition to proof of the above-mentioned facts, the plaintiffs' witnesses gave detailed evidence as to the construction of the factory, and the weight thrown upon the chimney-stack, the fair inferences from which evidence appear to me to be that the construction of the plaintiffs' factory, although somewhat unusual, was such as to make it reasonably stable, and that looking to the character of the building, and the purposes for which it was erected, the weight imposed upon the chimney-stack, although greater than if there had been internal walls, was not unduly great. The cross-examination of the plaintiffs' witnesses was obviously directed to displacing the plaintiffs' case upon these points, and at the close of the plaintiffs' case

it was submitted on the part of the defendants that no right to support for the chimney-stack with the weight upon it had been obtained, or that at least it was a question for the jury whether the weight which was thereby put upon the adjoining soil was of such a character as the neighbouring owner could reasonably be expected to be aware of and to provide for. It was contended also on the part of the commissioners that Dalton, the builder, being a contractor and not a servant or agent to them, was alone liable, while Dalton took the same point as regards his sub-contractors. Upon this point the learned Judge held that he was bound by the authority of *Bower* v. *Peate*, 1 Q. B. D. 321, 45 L. J. Q. B. 446, to hold both the commissioners and Dalton responsible for the acts of the sub-contractors; and upon the main question he ruled, as I gather from the shorthand writer's notes of the trial, that where a building has stood for twenty years it has acquired an absolute right to the support of the adjacent land without any reference to the question whether the adjoining owner has had notice of the alterations of structure or of the additional weight thereby imposed, and that such right is not dependent upon the implication of a grant. In accordance with his ruling he directed a verdict for the plaintiffs, leaving them to move for judgment.

Upon motion for judgment the case was argued in the Divisional Court of Queen's Bench before COCKBURN, C. J., MELLOR and LUSH, JJ., and while LUSH, J. adhered in substance to the view of * the case which he had taken at the trial, [* 167] the other members of the Court held that the facts proved showed no right of support, and directed the judgment to be entered for the defendants."

The plaintiff appealed from this judgment to the Court of Appeal, and the appeal was heard by the Lords Justices THESIGER, COTTON, and BRETT, who by a majority (THESIGER, L. J., and COTTON, L. J., against BRETT, L. J., *diss.*) reversed the judgment of the Queen's Bench, and gave judgment for the plaintiffs subject to a reference as to damages.

All the Lords Justices concurred in holding that the right to the support of a building, as distinguished from the right to support of land in its natural state, is not a right of property, but an easement; and that such an easement may be acquired by prescription from the time of legal memory, or by grant express

or implied. They further concurred in the view that the right might be supported by evidence that the building had stood for twenty years, and that during that period the owner of the adjacent soil knew or might have known that the building was thereby supported, provided he was capable of making a grant. It was further held by the majority (THESIGER, L. J., and COTTON L. J.,) that after twenty years' enjoyment in fact of the support of the building the claim to the right of support will not be defeated by proof that no grant of the easement was ever made. It was on this last point that BRETT, L. J., dissented, holding that, as it was conclusively proved, or admitted, that there never had been a grant, the plaintiff had no right to the support claimed.

The defendants appealed to the House of Lords, and the appeal was twice argued, — the second time in presence of the Judges (POLLOCK, B., FIELD, J., LINDLEY, J., MANISTY, J., LOPES, J., FRY, J., and BOWEN, J.), to whom these questions were put: —

[6 App. Cas. 741] 1. Has the owner of an ancient building a right of action against the owner of lands adjoining if he disturbs his land so as to take away the lateral support previously afforded by that land?

[*742] *2. Is the period during which the plaintiffs' house has stood, under the circumstances stated in the case, sufficient to give them the same right as if the house was ancient?

3. If the acts done by the defendants would have caused no damage to the plaintiffs' building as it stood before the alterations made in 1849, is it necessary to prove that the defendants or their predecessors in title had knowledge or notice of those alterations, in order to make the damage done by their act in removing the lateral support, after the lapse of twenty-seven years, an actionable wrong?

4. If so, is it sufficient to prove knowledge or notice of the fact that such alterations were made, or is it necessary also to prove knowledge of their effect, in causing the buildings so altered to require a degree of lateral support from the adjoining land which was not before needful?

5. Was the course taken by the learned Judge at the trial, of directing a verdict for the plaintiffs, correct, or ought he to have left any question to the jury?

No. 8. — Dalton v. Angus, 6 App. Cas. 742, 743.

The Judges, after taking time for consideration, delivered opinions answering the several questions, in short, as follows: —

Question 1. By all the Judges: — Yes.

Question 2. By all the Judges: — Yes. The answers of LINDLEY, J., and BOWEN, J., qualified by explanation or conditions.

Question 3. By all the Judges: — No. LINDLEY, J., LOPES, J., and BOWEN, J., guarding their answer with the proviso that there was open enjoyment.

Question 4. By LINDLEY, J., LOPES, J., and BOWEN, J.: — If there was open enjoyment it was not necessary that the effect of the enjoyment upon the stability of the structure should be known. By the others the answer to question 3 makes an answer to question 4 unnecessary.

Question 5. By POLLOCK, B., FIELD, J., MANISTY, J., and FRY, J.: — Yes. By LINDLEY, J., LOPES, J., and BOWEN, J.: — No. The Judge ought to have left to the jury the question whether the enjoyment was in fact open.

The following is a brief abstract of the opinion of POLLOCK, B. By a long series of decisions and expressed [743] opinions the common law has settled the law upon the first question in the affirmative. *Palmer* v. *Fleshees*, 15 Chas. II. 1 Sid. 167; *Stansell* v. *Jollard* (1803), cited Selwyn, N. P., and in notes to *Ashby* v. *White*, 1 Sm. L. C.; *Hide* v. *Thornborough* (1846), 2 Car. & Kir. 254; *Humphries* v. *Brogden* (1850), 12 Q. B. 739; *Wyatt* v. *Harrison* (1832), 3 B. & Ad. 875, per Lord TENTERDEN, C. J.; *Partridge* v. *Scott* (1838), 3 M. & W. 220; *Gayford* v. *Nicholls* (1854), 9 Ex. 708; *Rowbotham* v. *Wilson* (1857), 6 E. & B. 593, 8 E. & B. 123, 8 H. L. C. 348; *Rogers* v. *Taylor* (1858), 2 H. & N. 828; *Bonomi* v. *Backhouse* (1858), E. B. & E. 622.

Upon the second question I am of opinion that the period during which the house has stood at the date of the acts complained of was sufficient to give the plaintiff the same rights as if his house was ancient. For this purpose the presumption afforded by twenty years' enjoyment is sufficient unless it were shown that no grant of the easement could have been legally made.

On the third question it is not necessary to prove that the defendants or their predecessors in title had knowledge or notice of the alterations; and this makes it unnecessary to answer the fourth question.

On the fifth question I am of opinion that the course taken by

the Judge at the trial of directing a verdict for the plaintiff was correct.

The following was the opinion of

[779] Bowen, J. My Lords, it appears to be established by an irresistible weight of authority that an ancient house is entitled to such support from the adjacent soil as it has immemorially enjoyed. The first question put to us by your

[*780] Lordships *must, therefore, be answered in the affirmative. Before replying to the rest, I propose to state my view as to the nature of this right of support and the mode of its acquisition.

It has been urged upon your Lordships that the support from the adjoining land to which an ancient house is entitled is a natural right of property. In one aspect, but in one aspect only, it may be viewed as such, in so far namely as it arises out of the lawful use by a man of his own land. But in truth it also involves something beyond the natural use of a man's soil, viz., a collateral burden upon his neighbour, limiting, after a defined interval of time, the otherwise lawful use of the neighbour's own property. Under this aspect it is a right which cannot be natural, but must be acquired.

Nor is it necessary in order to account for its existence to invent the pretext of an imaginary positive law conferring the privilege as an exceptional boon on houses built before memory began. "Entia non sunt multiplicanda præter necessitatem." A simpler explanation will suffice. That a right of support for buildings may have a lawful origin at any moment is clear, for it can be created by agreement made in due and binding form with an adjoining owner. All that the law, therefore, seems in the case of support for ancient buildings to do is to repeat the operation it performs so constantly in the case of other immemorial user. It assumes some possible lawful origin for the enjoyment, prior to the dawn of legal memory. So long as the Courts of Common Law were hampered by the barriers between law and equity, this doctrine was stated in a necessarily narrow way as if it were some "legal" origin that ought to be presumed. At the present day, when law and equity are fused, the proposition may with advantage be recast in a more liberal form, namely, that the law will presume any lawful, and not merely any legal, origin consistent with the circumstances of the case.

No. 8. — Dalton v. Angus, 6 App. Cas. 780, 781.

A binding and irrevocable concession on the part of some adjoining owner made in bygone days, or else an arrangement effected, expressly or by implication, upon the separation of one property into two parcels, is the source to which reason turns for the requisite lawful origin of all immemorial rights which either burden a neighbour's land or curtail his natural use of it. This is the theoretical beginning of prescriptive affirmative easements. To this initial source is ascribed the ancient window light: *Aldred's Case*, 9 Co. Rep. 58. To a similar commencement by a parity of reason, and not without the sanction of authority, may be referred the right of an "ancient" house to its immemorial support: *Partridge* v. *Scott*, 3 M. & W. 228; *Wyatt* v. *Harrison*, 3 B. & Ad. 875; *Humphries* v. *Brogden*, 12 Q. B. 739.

Your Lordships, however, in the present appeal have to consider the character and limits of a presumption in favour of the right of support for a modern building which has been held to arise after a much shorter period of user, viz., user for twenty years. Unquestionably, in the case of affirmative easements and of window lights, after twenty years' user of a special kind, a presumption of right has been sanctioned by the Courts independently of and before the Prescription Act. I propose to examine its principle and nature, and, having done so, to consider whether a title by twenty years' user in the case of support for buildings is *merely an illustration of the same rule [*781] applied to distinct subject-matter, or a rule based on any different grounds and accompanied with any other limitations.

First, then, as to affirmative easements and window lights. When enjoyment of a certain kind has existed from time immemorial, the law infers for it, as we have seen, any possible lawful origin. But user of a shorter period may well be surrounded with circumstances which will point, unless explained, to the conclusion that such user is only the enjoyment of a right. "This is founded," says WILMOT, C. J., speaking of the special case of window lights: *Lewis* v. *Price*, 2 Wms. Saund. 175; "on the same reason as when the lights have been immemorial; for this" (i. e., the shorter period) "is long enough to induce a presumption that there was originally some agreement between the parties."

For a considerable period in the history of English law, there may probably have been no hard and fast line as to the length of user short of the date of legal memory which would be sufficient

in the case of an alleged easement to authorize the inference of a right. It is at all events certain that the twenty years limit did not make its appearance in our law till a comparatively recent date. In the reign of Queen Elizabeth, when *Pope* v. *Bury*, Cro. Eliz. 118 was decided, it had not been introduced so far as window lights were concerned, nor is there any trace of its existence up to this time in the case of any easement affirmative or negative. But in the year 1623 the statute of 21 Jac. I., c. 16, was passed, by which entry into lands was prohibited, except within twenty years after the accruer of the right, and, as a necessary corollary, an adverse enjoyment of lands for twenty years became a bar to any action of ejectment. Easements were not and could not be treated as within the statute; but the idea of twenty years was apparently borrowed by the Courts as a *quasi* parliamentary standard, for the use of Judges and juries, by which to mete out a reasonable measure of time. In the case of affirmative easements the twenty years rule obviously thus began (2 Wms. Saunders, 175). It was in the same manner that the twenty years rule was applied by very slow degrees to window lights: *Lewis* v. *Price*; *Dougal* v. *Wilson*; *Darwin* v. *Upton*, *per* BULLER, J., 2 Wms. Saund. 175 a. It was not a positive proprietary law, for the rule at the date of *Pope* v. *Bury* was not a part of the common law, and the Judges have no power to engraft new laws on old. In truth it was nothing but a canon of evidence. In *Read* v. *Brookman*, 3 T. R. 159, BULLER, J., speaks of it "as a rule which has been laid down respecting the length of time which shall be sufficient to raise a presumption."

Similar specimens of judge-made rules of proof are to be found in other passages of the law of evidence. If seven years elapse after a traveller has crossed the four seas without his being heard of, the presumption of the continuance of his life ceases and a counter-presumption arises that he is dead. This seven years rule has been said to be adopted by the Courts in analogy to the statute 19 Car. II. c. 6, with respect to leases dependent upon lives, and 1 Jac. I. c. 11, with respect to bigamy. Traces, on the other hand, of some such limitation appear earlier than these statutes in the books; but whether the judge-made rule upon the subject of the continuance of life be imitated or not from the statutes of the realm, it is at best a mere maxim of evi-

[* 782] dence recommending an inference * which it is for the

jury to find and which may be rebutted. The original presumption that after twenty years a bond had been satisfied by payment, was in like manner a rule of evidence, first introduced, it is said, by Lord HALE, and accepted slowly and reluctantly by the Courts: *Oswald* v. *Legh*, 1 T. R. 270. The presumption that after thirty years a document produced from the proper custody has been duly executed is another instance of such rules. In all these, the inference of which the Courts approve must be drawn, not by the Court, but by the jury; in none of these is the inference conclusive.

The form in which the presumption built upon a twenty years' enjoyment has usually been framed is that of a lost grant or covenant, according as the right claimed is to an affirmative or a negative easement. At the time when the twenty years rule was first promulgated by the Courts, a document under seal was the only specific mode known to the common law in which an incorporeal hereditament could be created. But there are many cases in which equitable rights in the nature of an easement arise without any deed at all. There may be a binding agreement for valuable consideration not under seal. There may be stipulations which would not otherwise run against the land, but which will bind a purchaser with notice. Or there may be conduct or inaction on the part of an adjoining owner which will in equity preclude him from denying that a right in the nature of an easement has been acquired against himself. Any of these suppositions under appropriate circumstances may conceivably furnish a lawful origin of which Courts of Law, released in these later times from the narrow confines of a limited jurisdiction, may properly take cognizance. Even at a time when a deed was the only origin for an easement known to the common law, language is found in the judgments of the Law Courts suggestive of the notion that this lost deed was merely the specific form in which the lawful origin had taken shape.

It is further to be noted that the exact inference recommended by the law was not, in the case of affirmative easements, that the consent of the adjoining owner had been first given during the twenty years' user, but that some lawful origin preceded the earliest act of enjoyment. The lost grant was in theory anterior to the user; it was not the shape in which the submission of the servient owner was supposed during the twenty years to mould

itself: *Doe* v. *Reed*, 5 B. & Ald. 232, (24 R. R. 338); *Moore* v. *Rawson*, 3 B. & C. 339. In this sense it is inaccurate to speak of such rights as arising from the twenty years' acquiescence of the servient owner. His acquiescence for twenty years, in the case of affirmative easements, was evidence that the right had existed previously.

It appears to be manifest, in spite of some inexact expressions of earlier Judges, that this presumption of a lost grant or covenant was nothing more than a rebuttable presumption of fact. This view is supported by a chain of authorities, the earliest of which are collected in 2 Wms. Saunders, 175 a, and all of which have been examined and discussed in the judgments of COCKBURN, L. C. J., and BRETT and THESIGER, L. JJ. It must at the same time be conceded that the Courts exhibited a disinclination to treat the presumption as an ordinary one. They preferred to leave it in a logical cloud, and juries were encouraged, [* 783] for the sake of * quieting possession, to infer the existence of deeds in whose existence nobody did believe: *Eldridge* v. *Knott*, 1 Cowp. 215. Some metaphysical industry indeed has been expended with the view of explaining how a presumption of fact might yet be hedged round with an artificial authority and prestige which would allow it to be treated as something more than a mere presumption of fact. Thus it has been argued that the imaginary deed was legal machinery only, the only question being, as was said, whether the legal consequences really incident to a valid grant were well annexed to the state of facts disclosed by the twenty years' user: 3 Stark. Ev. 928, ed. 1842. The embarrassment of the Courts and of the profession appears, from the judgment of PARKE, B., delivered shortly after the passing of the Prescription Act, in *Bright* v. *Walker*, 1 C. M. & R. 221, and from the report of the Real Property Commissioners which preceded the passing of that statute.

But it seems a contradiction in terms to maintain that this rebuttable presumption of the existence of a grant would not at any time have been necessarily counteracted by actual proof that no such grant ever had been made. No case, it is true, occurs in which the presumption is recorded as having been displaced in this manner at Nisi Prius, though proof that no such deed could be efficacious in law was acknowledged to put an end to the pre-

No. 8. — Dalton v. Angus, 6 App. Cas. 783, 784.

sumption. But the reasoning of BRETT, L. J., in the Court of Appeal in this case, seems to me to show what would, before the recent fusion of law and equity, have been the necessary result of positive disproof of the supposed deed, though I think, with deference, that he overlooks the altered condition of the problem due to the modern recognition in Courts of Law of equitable rights. And with regard to the law as it formerly existed, the fact that the presumption, in the reign of Queen Elizabeth, was unknown, proves, I submit, to demonstration, that it is at most an artificial canon of evidence and nothing more. In *Darwin* v. *Upton*, GOULD, J., explains its nature by the illustration of a demand and refusal which, in an action in trover, are evidence of a conversion, but not the conversion itself. It has always been the law that this evidence of conversion is for the jury, and that if a jury find simply a demand and refusal, the Courts have no power as a matter of law to infer a conversion: *Vaughan* v. *Watt*, 6 M. & W. 492; *Chancellor of Oxford's Case*, 10 Co. Rep. 57; 3 Stark. Ev. 1160, ed. 1842.

The question, so far as lost grants and lost covenants are involved, seems to me to have lost much of its practical importance, owing to recent changes in the law. It would not now be sufficient to disprove a legal origin, unless the possibility of an equitable origin were negatived as well.

Such is the history and character of the twenty years rule as applied to affirmative easements, and further to the negative easement of the window light. Is there any valid reason to doubt that such also is its history and explanation as applied to the claim of support for modern buildings? The presumption raised in cases of support to buildings by the shorter user of twenty years, is modelled upon the presumption growing out of immemorial enjoyment. The one presumption is the echo at a distance of the other. The distinction is, that the shorter
*period gives rise to a rebuttable, the longer to an irre- [*784]
sistible inference. What necessity is there for inventing the hypothesis of some positive law in virtue of which in some special way a house after twenty years' user is to be clothed with an absolute right to support as if it were an ancient house? The objection to this theory always is the same. Such a positive law apparently did not exist prior to the Statute of James. Judges have had no power to create it since.

No. 8. — Dalton v. Angus, 6 App. Cas. 784.

There are unquestionably certain broad differences between affirmative easements and the negative easement of a window light. There are differences between the window light and the right of a modern house to support from the adjoining soil. In the first place, it is true that the window light, unlike a right of way, does not begin in acts of enjoyment which are *primâ facie* an encroachment upon the neighbour's soil. "It is acquired," says LITTLEDALE, J., in *Moore* v. *Rawson*, 3 B. & C. 332, "by occupancy." It is acquired, that is to say, by occupancy upon one's own soil as distinct from user upon another's and without any necessity, therefore, to assume that the occupancy is preceded by a grant. But a consensual origin at one time or another, in the case of a title to window lights, the law still implies: *Lewis* v. *Price; Cross* v. *Lewis*, 2 B. & C. 689.

The right to support for buildings from the neighbouring land is more allied in some ways than the window light to the class of affirmative easements. The man who uses his neighbour's soil for the support of his house affects his neighbour's land more tangibly than the man who opens a window to overlook it. In the instance of the building which is supported we have a direct lateral pressure upon the adjoining soil. There is certainly no case which decides that this pressure gives rise to a right of action on the neighbour's part, and practical reasons of convenience may be adduced against such a surmise, although it might perhaps be argued that an action ought on principle to lie against, and an injunction be obtainable to restrain, the man who is actually availing himself of his neighbour's soil and using it in a manner which in twenty years will be evidence of the acquisition of a right so to do. But assuming from the silence of the books that no right of action is created by the adverse enjoyment of support for buildings, the right to support may none the less be a negative easement like light, and capable of a similar origin. It is on the theory of agreement made at some time or another between the neighbours that the right to support is based in the case of an ancient house. Borrowing the argument used as to lights by WILMOT, C. J., we may say that the twenty years rule is "founded on the same reason" as the immemorial title.

If, however, authority be needed in support of reason for the view that the neighbour's presumed consent is the foundation of the modern as well as the ancient title to support for buildings,

it will be found in the language of the Courts in various cases: *Partridge* v. *Scott*; *Humphries* v. *Brogden*, 12 Q. B. 739; *Bonomi* v. *Backhouse*, E. B. & E. 646, 654.

Nor can I admit that any reason exists why in the case of support to buildings the same doctrines should not regulate the quality and nature of the user required as apply to the mode of acquisition of affirmative easements and of light. *Some conditions there surely must be determining the [*785] character of the enjoyment. If it be otherwise, the case of support to buildings so far from being analogous to the case of lights, as Lord ELLENBOROUGH and others have called it, is an anomaly without parallel in English law. For mere possession is, as a rule, inadequate to create by lapse of time an adverse right which is to limit a neighbour's enjoyment of his property. "Mere lapse of time," says DALLAS, C. J., in *Gray* v. *Bond*, 2 Brod. & Bing. 671, (23 R. R. 533), "will not of itself raise against the owner the presumption of a grant. When lapse of time is said to afford such a presumption, the inference is also drawn from accompanying facts." Such too was the principle of the Roman law. The cantilena *nec clam, nec vi, nec precario* is a doctrine not peculiar to affirmative easements, though we are chiefly familiar with it in that chapter of the law of England. It seems in truth a natural condition of any inchoate user which is to mature by length of time and apart from statute into the presumption of a right acquired at a neighbour's expense. Whatever may be the peculiarities of the right of support to buildings as contrasted with ordinary easements, and I admit that such exist, why should the generic maxim *nec vi, nec clam, nec precario* be discarded as inappropriate when we come to deal with support to buildings?

It is no doubt urged that the right to such support differs from all other acquired rights in this, that the enjoyment of support by a building cannot be reasonably interrupted. This cannot be true always, even if it is true at times. There may be circumstances in which any interruption of the modern building's support would be attended with great expense and even danger to the property of the servient owner. But is there any distinction in this respect between the window light and the right of support except what may be called a distinction of degree? In some instances it is easy to interrupt the enjoyment of both. In some

it will be difficult to interfere with either. Circumstances may be conceived in which it would be as serious an enterprise to block out a light as to withdraw the support of the house. Yet there can scarcely be an instance in the case of either in which the interruption would not be physically possible if it were worth the necessary trouble and expense. The difficulty of interrupting percolating water is of a wholly different kind, and far more insurmountable. But admitting that physical possibility or impossibility of interruption may not be the test, and that no right of support ought to arise by lapse of time where interruption is not practically feasible, it follows, not that a right of support for buildings can never be acquired as ordinary easements are, but merely that a right of support for buildings cannot always and under all circumstances be acquired. In like manner our law has distinguished between that access of air, light, and wind which is definite and can be interrupted, and that access of air, light, and wind which is indefinite, incapable of interruption, and which accordingly never grows into a right.

If, indeed, the law recognised no such thing as the right of support to buildings as it recognises no rights to the access of percolating subterranean water, there might be good grounds for saying that the possibilities of interrupting a building's support were possibilities of which the law took no account; but the contrary is the case. The law of England treats the right of [*786] support for buildings as a *right perfectly susceptible of acquisition, and it does so, I conceive, upon the very ground that the enjoyment can usually as a fact be interrupted, even though interruption may be very inconvenient. "Although," says Lord CAMPBELL in *Humphries* v. *Brogden*, 12 Q. B. at p. 749, "there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favours the preservation of enjoyments acquired by the labour of one man, and acquiesced in by another who has the power to interrupt them; and as on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle." This is a con-

sidered judgment of Lord CAMPBELL and PATTESON, COLERIDGE, and ERLE, JJ. They distinctly refer the right of support for the modern building to the hypothesis of a modern covenant, and do so on the express ground that the adjoining owner can in fact interrupt the user, expensive or inconvenient as the interruption may be. To assume, indeed, that interruption in such cases is out of the question, and that a right nevertheless is gained by user, would be to make the right of support for buildings a right at variance with all the principles of English law. Nor would the difficulty be avoided by calling it a law of property. This would be only creating for its benefit a new class in the category of rights of which it will be a solitary member. To say, on the other hand, that the Courts have created such a doctrine without rhyme or reason, is to do scant justice to the great authority of the Common Law Courts of past ages. Surely it is simpler to believe that the law deals with support to buildings as with light, considers it an enjoyment capable on the whole of interruption, and capable therefore of ripening into a right where interruption does not occur. It might, perhaps, be added with some show of reason that the user ought, if the analogy of lights and other easements were to be followed, to be neither violent nor contentious. The neighbour, without actual interruption of the user, ought perhaps, on principle, to be enabled by continuous and unmistakable protests to destroy its peaceable character, and so to annul one of the conditions upon which the presumption of right is raised: *Eaton* v. *Swansea Waterworks Company*, 17 Q. B. 267.

I am aware that this view is not one that has been laid down in any decided case. On the contrary, it has been said that in the case of window lights, the only manner in which enjoyment could be defeated before the Prescription Act was by physical obstruction of the light. But for the language of some of the Judges, one might well hesitate with Lord WENSLEYDALE, in *Chasemore* v. *Richards*, 7 H. L. C. 386, in accepting this statement of the law as reasonable. Such was not the doctrine of the civil law, nor the interpretation which it placed upon the term "non vi;" but the difficulty at any rate is not greater with respect to the right of support than that which might easily, up to the passing of the Prescription Act, have occurred in the analogous case of a window. If in any particular instance interruption is impracticable, and if perpetual protests in such instances

are also legally useless, there is no necessity that I know [* 787] of in law or in sense to * assert that any right will in that special instance be the consequence of non-interruption. I am not, however, aware that in the case of *Angus* v. *Dalton*, which is now before your Lordships, it ever was or could be suggested that the enjoyment of support was in any degree incapable of interruption.

Finally, why should not the condition be recognised in cases of support for buildings which prescribes that the user must be open? In the negative easement of the window light the condition is no doubt almost necessarily fulfilled. The adjoining owner, if he is a person capable in law of being affected by adverse user, has notice either by himself or his agents of the construction of the window. Probably with respect to support the character of the building and the nature of the soil often afford an equal notice to the adjoining owner of the enjoyment, out of which a right is developing; but I do not regard actual notice to the adjoining owner as the crucial point: *Cross* v. *Lewis*, 2 B. & C. 686. The publicity or openness of the enjoyment seems to me the real test. Without this publicity the quality of the user cannot be such as is uniformly required to raise the inference of an acquired right. If there be peculiarities in the construction of the building which render the enjoyment secret, the user is not strictly adverse. It is said that it would be an idle ceremony to acquaint a neighbour with the fact of an user which he cannot reasonably prevent. I have already stated what seems to me to be the real value of the argument drawn from the supposed difficulties of interruption. It must not, however, be forgotten that the real question is what is the quality of the user? Has it been an enjoyment in the face of day which reasonable neighbours might see and understand? If so, the presumption arises that it is of right, whether such right has been conceded during the twenty years' user or at any previous time.

It has been asked whether a man, whenever he increases the internal weight of portions of his house, is bound to give notice to his neighbours. But if, by the increased weight, he is seeking to acquire additional rights against the neighbour, the analogy of all law would appear to demand that his enjoyment should be open. There is no abstract difficulty in leaving it to the jury to say whether the conditions of publicity have in fact been fulfilled.

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Your Lordships have been told indeed in argument at the bar that to submit such questions to the jury would be to render titles of adjacent owners insecure and dependent on matters of much nicety. The danger would not be so great as is assumed, for in most of such cases a right to some support will *ex hypothesi* have been acquired, and adjoining owners will not be able easily to do wanton mischief. Nevertheless, the suggested danger, if it exists at all, ought not to be overlooked. But it can readily be cured by legislation. All that is needed is to bring into the existing Prescription Act the omitted case, if omitted it really has been, of a claim to support for buildings, and to deal with it as window lights have been dealt with.

If the user complies with the necessary conditions, the presumption, after twenty years, of some lawful origin will arise. A case thus *primâ facie* established may be met in two ways. The defendant may disprove the user or its quality, or in the last resort he may, if he can, while admitting the user attempt to answer the presumption of some lawful origin, a task which he will find difficult *in practice, inasmuch as [*788] mere proof of the absence of any covenant under seal, for the reason I have above indicated, will not any longer, since the fusion of law and equity, cover the necessary ground.

The above, I submit, is a fair account of the law as regards the claim to support for a modern house, and of the application to such a claim of the twenty years rule. The adaptation of the twenty years rule to the case of support to buildings has no doubt been slow. It has been accepted gradually and with hesitation, a fact which of itself bears testimony to the soundness of the view that it is no part of the positive law of property. Its application to the case of lights was equally gradual, for the rule as to lights had not become stereotyped up to the beginning of the reign of George III. (See *Lewis* v. *Price.*) The twenty years rule as to the presumed satisfaction of bonds also grew into force by slow degrees. But I think that there is an ample weight of authority to show that in cases of support to buildings, such a rule now at last prevails, and that it can be applied in substantial accordance with the general principles of the law of easements. Yet even if the case of support for buildings differs materially from all easements, affirmative or negative, if it stands alone by itself as a separate species of *pseudo* easement, can it on the other hand

be doubted that the twenty years rule as found in connection with it is really the same presumptive rule which governs easements in general, and that it is the doctrine applicable to the acquisition of easements which the law of England has chosen to adapt to the special, and in some ways the anomalous, case of support to a modern building.

Against the above view has been placed the language of Lord WENSLEYDALE and Lord CRANWORTH in the case of *Backhouse* v. *Bonomi*. "I think it perfectly clear," says Lord WENSLEYDALE, (9 H. L. C. 503), "that the right in this case was not in the nature of an easement, but that the right was to an enjoyment of his own property, and that the obligation was cast on the owner of the neighbouring property not to interrupt that enjoyment."

I have already considered to what extent and in what sense the right to support for buildings is a right to use a man's own property; to what extent it also involves a collateral title to impede the neighbour in the natural use of the neighbour's own. It is to this important distinction between the case of support to houses and the case of an ordinary affirmative easement that Lord WENSLEYDALE and Lord CRANWORTH appear to me to be referring, and a similar criticism applies to like expressions which at times have fallen from other Judges. *Backhouse* v. *Bonomi*, 9 H. L. C. 503, was in any event a case which proceeded on the basis of the existence in that special instance of the full right under discussion. The arbitrator had found all and every lawful origin which in law could create it. Whether the right when created arose from the presumption of a grant or from some imaginary law of property was not therefore necessarily in question.

In *Stansell* v. *Jollard*, 1 Selw. N. P. 11th ed. 457, the character of the user does not seem to have been disputed nor the presumption challenged. Lord ELLENBOROUGH indeed places the origin of support and lights on the same footing. He merely held that "Where, as in the case before the Court, a man had built to the extremity of his soil, and had enjoyed his building above [*789] twenty years, by analogy to the case of lights, he *had acquired a right to support." If the right of support is indeed analogous to the right to a window light, then the law would seem to be such as I have argued that it is.

Nor in *Hide* v. *Thornborough*, 2 C. & K. 260, did any question apparently occur as to the quality of the user, nor was any attempt

made to disprove the presumption. Here, again, the right was taken as having arisen, if it was a right acknowledged by the law. "If," said PARKE, B., "there was twenty years' enjoyment by the plaintiff of the support of his house from the neighbour's land, and it was known that the defendant's land supported the plaintiff's house, that is sufficient to give him a right of support." This is but recognizing the proposition that the user must be open. In *Partridge* v. *Scott*, 3 M. & W. 220, the right is ascribed to the idea of a grant which ought not, at common law, says ALDERSON, B., to be inferred from any lapse of time short of twenty years after the defendants might have been or were fully aware of the facts. I abstain from reviewing at length the other cases which bear on this point, as they have been abundantly examined by THESIGER, L. J., in the Court of Appeal below.

I now proceed to apply the above reasoning to the questions put by your Lordships.

1. This question I have already answered in the affirmative.

2. The period during which the house had stood was sufficient to give the plaintiff the same right as if his house was ancient, provided the enjoyment fulfilled the conditions I have described, and provided it was not shown by the defendant that the right had no lawful origin.

3. It was necessary to prove that the plaintiff had openly enjoyed the additional support rendered necessary by his alterations. It would of course be an open enjoyment if the defendants or their predecessors in title had express knowledge or notice of the alterations and of their character. But the enjoyment of the additional support would also be open if the appearance of the altered building was such as to afford a reasonable indication to the adjoining owner of the alterations that had taken place. Except to this extent it was not necessary in my opinion to prove either knowledge or notice to the adjoining owner.

4. If the alterations were openly enjoyed, I do not think it would be necessary also to prove knowledge of the effect of the alterations.

5. The course taken by the learned Judge seems to me to have been wrong. It should, I submit, have been left to the jury to find whether the enjoyment was in fact open. I may add that I consider this would be the correct ruling at Nisi Prius, whether the right acquired after twenty years' user be a right of property

or a right acquired as I have described, for I do not regard the doctrine *nec vi, nec clam, nec precario* as necessarily peculiar to the law of affirmative easements. The law as to the quality of the user required to raise the presumption, and as to the rebuttable character of the presumption when raised should, I submit, be laid down as I have indicated. The exact forms of the questions for the jury would depend on the issues arising out of the defendants' case. I think that the learned Judge was premature in assuming that no issues under the circumstances were likely to arise. One already had arisen upon the admitted facts, viz., whether the user was open or the reverse.

[* 790] *The House took time to consider.

1881. June 14. Lord Coleridge: —

My Lords, in this case I have had the great advantage of reading the printed judgments prepared by my noble and learned friend the Lord Chancellor, and by my noble and learned friend opposite (Lord Blackburn). I had prepared a judgment of my own, but I have found that it would add nothing to what is about to be said, and much better said, by my noble and learned friends. I therefore content myself with saying that I entirely concur in the conclusions at which they have arrived, and in the reasons which they have given for them. I have to thank my noble and learned friend on the woolsack for allowing me to say this at once, as I have to be elsewhere.

The Lord Chancellor (Lord Selborne): —

My Lords, your Lordships are much indebted to the learned Judges by whom you have been assisted in this case for their careful and valuable opinions, in which the authorities have been fully examined. I do not myself propose to refer to those authorities, except so far as they seem to me to bear upon principles which have been brought into controversy, and as to which the learned Judges (even when they concur as to the practical result) are not agreed.

The questions upon these appeals may be reduced, shortly, to two: — The first, whether a right to lateral support from adjoining land can be acquired by twenty-seven years' uninterrupted enjoyment for a building proved to have been newly erected at the commencement of that time; the second, whether (if so) there was anything in the circumstances of this case, as appearing in the evidence, sufficient either to disprove the acquisition of such a

right, or to make it dependent upon some question of fact, which ought to have been submitted to the jury.

There was another point, made by both the petitions of appeal, which I only mention, lest it should appear to have been overlooked. The action was brought by reason of the falling of the plaintiff's house through the excavation of the adjoining land of the commissioners, in the course of certain works executed for *them by the appellant Dalton, under a contract, [*791] and for Dalton by sub-contractors. The commissioners disputed their liability for the acts of Dalton, and Dalton disputed his liability for the acts of his sub-contractors. The same point arose, under very similar circumstances, in *Bower* v. *Peate*, 1 Q. B. D. 321, and was decided adversely to the contention of the appellants. It follows from that decision (as to the correctness of which I agree with both the Courts below) that, if the plaintiffs are entitled to recover at all, they are entitled to recover against both the commissioners and Dalton.

I proceed to consider the principal questions in the case.

In the natural state of land, one part of it receives support from another, upper from lower strata, and soil from adjacent soil. This support is natural, and is necessary, as long as the *status quo* of the land is maintained; and, therefore, if one parcel of land be conveyed, so as to be divided in point of title from another contiguous to it, or (as in the case of mines) below it, the *status quo* of support passes with the property in the land, not as an easement held by a distinct title, but as an incident to the land itself, *sine quo res ipsa haberi non debet.* All existing divisions of property in land must have been attended with this incident, when not excluded by contract; and it is for that reason often spoken of as a right by law; a right of the owner to the enjoyment of his own property, as distinguished from an easement supposed to be gained by grant; a right for injury to which an adjoining proprietor is responsible, upon the principle, *sic utere tuo, ut alienum non lædas.* This is all that I understand to be meant by those passages of the judgments in *Humphries* v. *Brogden*, 12 Q. B. 744, *Rowbotham* v. *Wilson*, 8 E. & B. 142, 146, 151, *Bonomi* v. *Backhouse*, 1 E. B. & E. 639, 642, 644, and *Backhouse* v. *Bonomi*, 9 H. L. C. 512, 513, to which some of the learned Judges who assisted your Lordships have referred.

In these cases, or in some of them, there were buildings upon

the land; but no separate question was raised as to the support necessary for the buildings, as distinguished from that necessary for the land; and the doctrine laid down must, in my [* 792] opinion, be * understood of land without reference to buildings. Support to that which is artificially imposed upon land cannot exist *ex jure naturæ*, because the thing supported does not itself so exist; it must in each particular case be acquired by grant, or by some means equivalent in law to grant, in order to make it a burden upon the neighbour's land, which (naturally) would be free from it. This distinction (and, at the same time, its proper limit) was pointed out by WILLES, J., in *Bonomi* v. *Backhouse*, 1 E. B. & E. 655, where he said, "The right to support of land and the right to support of buildings stand upon different footings, as to the mode of acquiring them, the former being *primâ facie* a right of property analogous to the flow of a natural river, or of air, though there may be cases in which it would be sustained as matter of grant (see *Caledonian Railway Company* v. *Sprot*, 2 Macq. 449): whilst the latter must be founded upon prescription or grant, express or implied; but the character of the rights, when acquired, is in each case the same. Land which affords support to land is affected by the superincumbent or lateral weight, as by an easement or servitude; the owner is restricted in the use of his own property, in precisely the same way as when he has granted a right of support to buildings. The right, therefore, in my opinion, is properly called an easement, as it was by Lord CAMPBELL in *Humphries* v. *Brogden*, 12 Q. B. 742; though when the land is in its natural state the easement is natural and not conventional. The same distinction exists as to rights in respect of running water, the easement of the riparian land owner is natural; that of the mill-owner on the stream, so far as it exceeds that of an ordinary riparian proprietor, is conventional, *i. e.*, it must be established by prescription or grant.

If at the time of the severance of the land from that of the adjoining proprietor it was not in its original state, but had buildings standing on it up to the dividing line, or if it were conveyed expressly with a view to the erection of such buildings, or to any other use of it which might render increased support necessary, there would then be an implied grant of such support as the actual state or the contemplated use of the land

would * require, and the artificial would be inseparable [* 793] from, and (as between the parties to the contract) would be a mere enlargement of, the natural. If a building is divided into floors or "flats," separately owned (an illustration which occurs in many of the authorities), the owner of each upper floor or "flat" is entitled, upon the same principle, to vertical support from the lower part of the building, and to the benefit of such lateral support as may be of right enjoyed by the building itself: *Caledonian Railway Company* v. *Sprot.*

I think it clear that any such right of support to a building, or part of a building, is an easement; and I agree with LINDLEY, J., and BOWEN, J., that it is both scientifically and practically inaccurate to describe it as one of a merely negative kind. What is support? The force of gravity causes the superincumbent land, or building, to press downward upon what is below it, whether artificial or natural; and it has also a tendency to thrust outwards, laterally, any loose or yielding substance, such as earth or clay, until it meets with adequate resistance. Using the language of the law of easements, I say that, in the case alike of vertical and of lateral support, both to land and to buildings, the dominant tenement imposes upon the servient a positive and a constant burden, the sustenance of which, by the servient tenement, is necessary for the safety and stability of the dominant. It is true that the benefit to the dominant tenement arises, not from its own pressure upon the servient tenement, but from the power of the servient tenement to resist that pressure, and from its actual sustenance of the burden so imposed. But the burden and its sustenance are reciprocal, and inseparable from each other, and it can make no difference whether the dominant tenement is said to impose, or the servient to sustain, the weight.

Lord CAMPBELL, in *Humphries* v. *Brogden*, 12 Q. B. 756, referred to the servitude *oneris ferendi* (applied in the law of Scotland to a house divided into "flats" belonging to different owners), as apt to illustrate the general law of vertical support. The servitude so denominated (*ut vicinus onera vicini sustineat*) in the Roman law was exclusively "urban," that is, relative to buildings, whether in town or country; and the instances of it given in the Digest refer * to rights of support [* 794] acquired by one proprietor for his building, or part of it, upon walls belonging to an adjoining proprietor: Inst. lib. 2, tit.

3; Dig. lib. 8, tit. 2, sects. 24, 25, 33; also tit. 5, sects. 6, 8. But, in principle, the nature of such a servitude must be the same, whether it is claimed against a building on which another structure may wholly or partly rest, or against land from which lateral or vertical support is necessary for the safety and stability of that structure.

These principles go far, in my opinion, to establish, as a necessary consequence, that such a right of support may be gained by prescription. Some of the learned Judges appear to think otherwise, and to doubt whether it could be the subject of grant. For that doubt I am unable to perceive any sufficient foundation. LITTLEDALE, J., in *Moore* v. *Rawson*, 3 B. & C. 340, spoke of the right to light as being properly the subject, not of grant, but of covenant. If he had said (which he did not), that a right to light could not be granted, in the sense of the word "grant" necessary for prescription, I should have doubted the correctness of the opinion, notwithstanding the great learning of that eminent Judge. Although the general access of light from the heavens to the earth is indefinite, the light which enters a building by particular apertures does and must pass over the adjoining land in a course which, though not visibly defined, is really certain, and, in that sense, definite. Why should it be impossible for the owner of the adjoining land to grant a right of unobstructed passage over it for that light in that course? The term "ancient" light seems to me itself to imply that such a right might be acquired by prescription. But, however this may be, the opinion of LITTLEDALE, J., is stated by him in words which (unless I misunderstand the true nature of support) do not apply to that easement. "A right of common" (he says) "or a right of way, being a privilege of something positive to be done or used in the soil of another man's land, may be the subject of legal grant; yet light and air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction and non-interruption of them more properly arises by a covenant, which the law would imply, not to interrupt [*795] the free use of the light and *air." The pressure of the dominant tenement, in the case of support, is upon the soil of another man's land, and I can see no material difference between this and "something positive done or used in the soil of another man's land." WILLES, J., in *Bonomi* v. *Backhouse*, when

delivering the unanimous judgment of the Court of Exchequer Chamber, said that "the right to support of buildings" not only might, but "must be founded upon prescription or grant, express or implied." BRAMWELL, B., in *Rowbotham* v. *Wilson*, 8 E. & B. 147, said, "I am of opinion that it is competent to the owner of land, on or after the severance of the mines, to grant to the grantee of the mines the right to damage the surface. I cannot see how, if there may be a grant of mines, and of the right to enter, sink shafts, and work, there may not be such a grant as that contended for here" (*i. e.*, the right to take away support from the surface). "Nor can I see how, if a grant of the right of unobstructed light and air, or of support of the soil, to an adjoining owner, would be good, a grant of such a right as claimed here would not be. My Brother HAYES said, presumed grants of windows and of support were idle fictions which ought never to have been invented; perhaps so, but the fact that they were shows that the inventors and everybody else supposed that real grants of such a nature would be good." The rule as to prescription is thus stated, in Sir Francis North's argument in *Potter* v. *North*, 1 Vent. 387: "The law allows prescriptions but in supply of the loss of a grant. Ancient grants happen to be lost many times, and it would be hard that no title could be made to things that lie in grant but by showing of a grant; therefore, upon usage *temps dont*, &c., the law presumes a grant and a lawful beginning, and allows such usage for a good title; but still it is but in supply of the loss of a grant; and, therefore, for such things as can have no lawful beginning, nor be created at this day by any manner of grant, or reservation, or deed that can be supposed, no prescription is good." ASHHURST, J., in *Lord Pelham* v. *Pickersgill*, 1 T. R. 667, (1 R. R. 354), laid it down as the general rule, that "every prescription is good, if by any possibility it can be supposed to have had a legal commencement." Be the theory what it may, its true foundation, in point of fact, is that which the Romans called * "usucapio," under the conditions [*796] defined by Sir Edward Coke. "Both to customs and prescriptions, these two things are incidents inseparable, viz., possession or usage, and time. Possession must have three qualities, it must be long, continual, and peaceable, for it is said, "transferuntur dominia, sine titulo et traditione, per usucapionem, scilicet per longam, continuam, et pacificam possessionem.

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Longa, *i. e.*, per spatium temporis per legem definitum. . . . Continuam, dico, ita quod non sit legitime interrupta. Pacificam dico, quia si contentiosa fuerit, idem erit quod prius, si contentio fuerit justa. . . . Longus usus, nec per vim, nec clam, nec precario," 1 Co. Lit. 113 b, 114 a. (The Latin is from Bracton.) All these conditions are capable, in my judgment, of being fulfilled as to the right of support to buildings, and, when they are fulfilled, I am unable to understand why the right should not be held to be prescriptively established. The policy and purpose of the law on which both prescription and the presumptions which have supplied its place, when length of possession has been less than immemorial, rest, would be defeated, or rendered very insecure, if exceptions to it were admitted on such grounds as that a particular servitude (capable of a lawful origin) is negative rather than positive; or that the inchoate enjoyment of it before it has matured into a right is not an actionable wrong; or that resistance to or interruption of it may not be conveniently practicable. I assume, for the present purpose, that a man who places on his own land, where it adjoins that of his neighbour, a weight which increases its pressure upon his neighbour's land, is not thereby guilty of an actionable wrong. If this be so, the reason probably is, that the act is lawfully done upon his own land, and that the owner of the adjoining land suffers no actual or appreciable damage from the increased amount of pressure which it has to bear, except so far as the continuance of that pressure, if uninterrupted, may tend to ripen into a right, and so to enlarge the servitude to which this land was previously subject. But against this he has his own remedy, if he chooses to prevent and interrupt it. That power of resistance by interruption does and must in all cases exist, otherwise no question like the [* 797] present could arise. It is true that in * some cases (of which the present is an example) a man acting with a reasonable regard to his own interest would never exercise it for the mere purpose of preventing his neighbour from enlarging or extending such a servitude. But, on the other hand, it would not be reasonably consistent with the policy of the law in favour of possessory titles, that they should depend, in each particular case, upon the greater or less facility or difficulty, convenience or inconvenience, of practically interrupting them. They can always be interrupted (and that without difficulty or inconvenience),

when a man wishes, and finds it for his interest, to make such a use of his own land as will have that effect. So long as it does not suit his purpose or his interest to do this, the law which allows a servitude to be established or enlarged by long and open enjoyment, against one whose preponderating interest it has been to be passive during the whole time necessary for its acquisition, seems more reasonable, and more consistent with public convenience and natural equity, than one which would enable him, at any distance of time (whenever his views of his own interest may have undergone a change), to destroy the fruits of his neighbour's diligence, industry, and expenditure.

The law of ancient lights, as it stood before the Prescription Act, was a stronger example of the application of these principles; the easement in that case being more purely negative. I cannot agree with those who think that law too exceptional and anomalous to furnish an analogy, or exemplify a principle, applicable to any other case. The servitude *non altius tollendi, ne luminibus officiatur*, was as well known to the Roman jurisprudence as the servitude *oneris ferendi*, or any other; and, if natural and not only technical reasons are to be regarded, it is difficult to conceive anything more needful for the comfort of life and enjoyment of house property than the unobstructed enjoyment of light. There is no actionable wrong done by opening new lights which overlook a neighbour's land; and to obstruct them, by building or erecting hoardings on that land, when there is no other motive for doing so than to prevent them from ripening into an easement, is as seldom likely to be conveniently practicable as the obstruction of the vertical or lateral support of buildings by excavation or otherwise. But these have not been regarded as sufficient reasons * why the right to light should not be gained by [* 798] an enjoyment and user for more than twenty years.

From the view which I take of the nature of the right of support, that it is an easement, not purely negative, capable of being granted, and also capable of being interrupted, it seems to me to follow that it must be within the 2nd section of the Prescription Act (2 & 3 Will. IV., c. 71), unless that section is confined (as Erle, C. J., in *Webb* v. *Bird*, 10 C. B. (N. S.) 282, appears to have thought) to rights of way and rights of water. The opinion to that effect expressed by that eminent Judge was not necessary for the decision of *Webb* v. *Bird*, nor can I perceive that any con-

currence in it was expressed by WILLES, J., and BYLES, J., who agreed in the decision. The point then determined (as I understand it) was, that a claim to have free access for all the winds of heaven to the sails of a windmill was too large and indefinite in its nature to be acquired by use or to be capable of interruption, within the meaning of the 2nd section of the Prescription Act. That determination I assume to have been correct. But I do not think it possible, without a degree of violence to the express terms of the Act, for which neither its context nor its policy (as expressed in the preamble) affords any justification, to restrict the operation of the 2nd section to "the two descriptions of easement therein specified, viz., the right to a way or watercourse." The expressed policy of the Act is large and general; it is to prevent claims of prescription from being defeated by showing a commencement within time of legal memory. Why should not this extend to other easements besides ways and water rights, and lights, which (by the 3rd section) are specially provided for, and exceptionally favoured? In terms the 2nd section extends to every claim which could be "lawfully made at the common law by custom, prescription, or grant, to any way, or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water." The interjection of the words, "or other easement," between ways and watercourses may seem singular, but I cannot think that they ought therefore to be reduced to silence, or arbitrarily limited. If any explanation of the place in which they occur is necessary, [*799] it may, I think, *be found in the separate mention, which follows, of "land" and "water." *Reddendo singula singulis*, the words (as it seems to me) may be read thus, "Any way or other easement to be enjoyed or derived upon, over, or from any land, or any watercourse, or use of water to be enjoyed or derived upon, over, or from any water." So reading them, they would include (unless there is something else in the statute to exclude it, and I find nothing) the easement of support.

I am not insensible to the probability that there may be some error in an opinion which seems to be opposed to that of all the learned Judges in both the Courts below, and of most of those by whom your Lordships have been assisted on this occasion. They did not all advert to the Prescription Act, but, of those who did, LINDLEY, J., was, I think, the only one who expressed any doubt.

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The opinions of those learned Judges may possibly have been, in some degree, influenced by what was said by so distinguished a Judge as ERLE, C. J., in the case of *Webb* v. *Bird*, which was cited for this purpose by LUSH, J. To those who considered that the right of support was not an easement, or that it was of so purely negative a character as to be incapable of being granted, or of being interrupted, within the meaning of the statute, the conclusion that the statute did not apply to it would naturally follow. I have already stated my reasons for not assenting to those premises. The point may probably not now require decision; because the same practical conclusion may be reached by your Lordships (as it has been by all the learned Judges, except the late LORD CHIEF JUSTICE of England, MELLOR, J., and BRETT, L. J.), by a different road. But, having regard to its possible importance in other cases, I have not thought it right to withhold the expression of the opinion which, after much consideration, I have myself formed upon it.

Assuming the statute to apply, what would be its effect? The late LORD CHIEF JUSTICE of England thought it would be nugatory. "It was passed" (his Lordship said) "with the view of putting an end to the scandal on the administration of justice which arose from forcing the consciences of juries," to find that there had been a lost grant, when "the presumption was known to be a *mere fiction, (3 Q. B. D. at p. 105). [*800] But he nevertheless concluded, (3 Q. B. D. at p. 119), that, except in the case of light, "as regards the effect of twenty years' user or enjoyment in the matter of easements by presumed grant, the law stands exactly as it did before the passing of the Act," a conclusion extending as much to those rights of way, &c., which are expressly mentioned in the 2nd section, as to "other easements."

It is undoubtedly true that, under the 2nd section, there is an important difference between a forty years' and a twenty years' user. Forty years' user has the same effect which (under the 3rd section) twenty years' user has as to light; it makes the right absolute and indefeasible, unless it is shown to have been enjoyed by consent or agreement in writing. But twenty years' user, under the 2nd section, may be defeated "in any other way by which" it was previously (*i. e.*, before the 1st of August, 1832) "liable to be defeated," except that it can no longer be defeated

or destroyed "by showing only that it was first enjoyed at any time prior to such period of twenty years." The effect of this, as I understand it, is to apply the law of prescription, properly so called, to an easement enjoyed as of right for twenty years, subject to all defences to which a claim by prescription would previously have been open, except that of showing a commencement within time of legal memory. To allege that there was no evidence from which a grant could be presumed, or that there was evidence from which it ought to be inferred that there was, in fact, no grant, would not (as I understand the law) have been, before the 1st of August, 1832, a competent mode of defeating or destroying any claim to an easement by prescription, and no jury would have been directed to find a grant in any such case, when there was no proof of a commencement within time of legal memory. The section, therefore (assuming it to apply), would in the present case be sufficient to establish a title by prescription to the right claimed by the plaintiffs, unless it had been enjoyed *vi*, or *clam*, or *precario*. Of *vi*, or *precario*, there is here no question.

Supposing, however, that the 2nd section of the Prescription Act ought not to be held to apply to the easement of sup-
[* 801] port, the *same result would practically be reached by the doctrine, that a grant, or some lawful title equivalent to it, ought to be presumed after twenty years' user. As to this, I think it unnecessary to say more than that I agree with the view of the authorities taken by Lush, J., by the majority of the Judges in the Court of Appeal, and by all the learned Judges who attended this House (unless Bowen, J., who preferred to rely upon the equitable doctrine of acquiescence, is an exception) in their answer to the first two questions proposed to them by your Lordships.

Upon the other three questions proposed to the learned Judges, which involve the doctrine of *clam*, as applied to the easement of support, there has been much difference of opinion; four of the learned Judges being in the plaintiff's favour, and the other three thinking that the jury were not properly directed on that point.

The inquiry on this part of the case is, as to the nature and extent of the knowledge or means of knowledge which a man ought to be shown to possess, against whom a right of support for another man's building is claimed. He cannot resist or interrupt that of which he is wholly ignorant. But there are some things

of which all men ought to be presumed to have knowledge, and among them (I think) is the fact, that, according to the laws of nature, a building cannot stand without vertical or (ordinarily) without lateral support. When a new building is openly erected on one side of the dividing line between two properties, its general nature and character, its exterior and much of its interior structure, must be visible and ascertainable by the adjoining proprietor during the course of its erection. When (as in the present case) a private dwelling-house is pulled down, and a building of an entirely different character, such as a coach or carriage factory, with a large and massive brick pillar and chimney-stack, is erected instead of it, the adjoining proprietor must have imputed to him knowledge that a new and enlarged easement of support (whatever may be its extent) is going to be acquired against him, unless he interrupts or prevents it. The case is, in my opinion, substantially the same as if a new factory had been erected, where no building stood before. Having this knowledge, it is, in my judgment, by no means necessary that he should have particular * information as to those details [* 802] of the internal structure of the building on which the amount or incidence of its weight may more or less depend. If he thought it material, he might inquire into those particulars, and then if information were improperly withheld from him, or if he received false or misleading information, or if anything could be shown to have been done secretly or surreptitiously, in order to keep material facts from his knowledge, the case would be different. But here there was no evidence from which a jury could have been entitled to infer any of these things. Everything was honestly and (as far as it could be) openly done, without any deception or concealment. The interior construction of the building was, indeed, such as to require lateral support, beyond what might have been necessary if it had been otherwise constructed. But this must always be liable to happen, whenever a building has to be adapted to a particular use. The knowledge that it may or may not happen is in my opinion enough, if the adjoining proprietor makes no inquiry. I think, therefore, that in this case the kind and degree of knowledge which the adjoining proprietor must necessarily have had was sufficient; that nothing was done *clam*, and that the evidence did not raise any question on this point which ought to have been submitted to the jury.

My opinion, therefore, upon the whole case is in favour of the respondents, the plaintiffs in the action, and against the appellants; and the motion which I have to make to your Lordships is, that the judgment of the Court below be affirmed, and the appeal dismissed with costs. The effect of this will be, that judgment will stand for the plaintiffs, for £1943, the amount of damages assessed by the special referee; the defendants not having elected to take a new trial within the time allowed them by the order of the Lords Justices; and which option was more than, according to the view which I take of this case, they were entitled to.

Lord PENZANCE:—

My Lords, in dealing with the questions of law to which the present case gives rise, it is material to bear in mind that the exact proposition which the appellants call upon your [*803] Lordships *to repudiate, or affirm, is to be found in the ruling at the trial given by the learned Judge. It is in these words: "The authorities oblige me to hold, that when a building has stood for twenty years it has acquired a right to the support of the adjacent land, and I do not think that it all depends upon whether the opposite or adjacent neighbour had notice, or not, of what was done, or what weight was put upon it, nor does it rest on the fact of there being an implied grant. I think it has become absolute law, that when a building has stood for twenty years, supported by the adjacent soil, it has acquired a right to the support of the soil; and no one has a right to take all that soil without putting an equivalent to sustain the building. That is the ruling which I must lay down here, because that is upheld by many authorities" (printed papers, appendix, p. 69). Your Lordships have now to say whether this view of the authorities is a correct one; and, with some reluctance, I feel constrained to say that in my opinion it is so. I say with some reluctance, not because I think that the support which the plaintiff claims for his house is unreasonable, or inequitable, but because the circumstances under which the claim is held to arise, are, so far as I am able to discover, incapable of giving rise to it in accordance with any known principle of law.

It must be borne in mind both what the claim is, and what it is not. It is not a claim asserted for the support of a house by the adjacent soil as soon as that house is built; but a claim that when the house has stood "for twenty years supported by the

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adjacent soil it has by absolute law acquired a right to the support of the soil;" and this not by reason of any implied grant, and quite independently of whether "the opposite or adjacent neighbour had notice or not of what was done or what weight was put upon" the ground to which the lateral support was required.

It is this sudden starting into existence of a right which did not exist the day before the twenty years expired, without reference to any presumption of acquiescence by the neighbour (to which the lapse of that period of time without interruption on his part might naturally give rise) which I find it impossible to reconcile with legal principles. I find myself therefore in entire accord with the opinion which FRY, J., has offered to the house; and he *has so fully and ably illustrated his views [*804] on the subject, which are also mine, that I have little to add.

If this matter were *res integra*, I think it would not be inconsistent with legal principles to hold, that where an owner of land has used his land for an ordinary and reasonable purpose, such as placing a house upon it, the owner of the adjacent soil could not be allowed so to deal with his own soil by excavation as to bring his neighbour's house to the ground. It would be, I think, no unreasonable application of the principle *sic utere tuo ut alienum non lædas* to hold that the owner of the adjacent soil, if desirous of excavating it, should take reasonable precautions by way of shoring, or otherwise, to prevent the excavation from disastrously affecting his neighbour. A burden would no doubt be thus cast on one man by the act of another done without his consent. But the advantages of such a rule would be reciprocal, and regard being had to the practicability of shoring up during excavation, the restriction thus placed on excavation would not seriously impair the rights of ownership.

But the matter is not *res integra*. It has been the subject of legal decisions, and those decisions leave it beyond doubt that such is not the law of England. On the contrary it is the law, I believe I may say without question, that at any time within twenty years after the house is built the owner of the adjacent soil may with perfect legality dig that soil away, and allow his neighbour's house, if supported by it, to fall in ruins to the ground. This being so, and these being his legal rights (the rights incident to his ownership), it seems to me that these rights

must remain to him, or those who come after him, for all time, unless he, or they, have done something by which these rights have been divested, restricted, or impaired. I find it impossible to conceive, within the application of any legal principles, that mere lapse of time can divest him or them of the rights they once had. Legal rights do not perish by lapse of time, but rather grow confirmed. What I mean to express is this, that the right to excavate the neighbouring soil not being impaired or restricted by the house being built, anything which afterwards impairs or restricts it must proceed from those who possess that right, and cannot come about, all things remaining unchanged, by the mere efflux of time.

[*805] *In all the cases in which lapse of time is held to stand in the way of the assertion of rights attaching to the ownership of property, it is not the lapse of time itself which so operates but the inferences which are reasonably drawn from the continuous existence of a given state of things during that period of time. These inferences are inferences of acquiescence or consent, and they are drawn from the fact that the person against whom the right is claimed has for a length of time failed to interrupt or prevent an enjoyment by his neighbour which he might have interrupted had he so pleased. In *Chasemore* v. *Richards*, 7 H. L. C. 349, the language held puts this beyond doubt. WIGHTMAN, J., said that no presumption could be raised from non-interruption unless the person against whom the right is claimed might have prevented it, and Lord WENSLEYDALE, in addressing your Lordships, distinctly relied upon the fact that the defendant was not able to prevent the enjoyment which after a lapse of years had been claimed as a right against him. In the more modern case of *Sturges* v. *Bridgeman*, 11 Ch. D. 852, it was distinctly determined that no easement could be created by lapse of time unless the defendant might have interrupted it. "Qui non prohibet quod prohibere potest assentire videtur" is the legal maxim upon which, in my opinion, all the cases of easements of whatever kind acquired by length of time substantially rest.

The question therefore in each particular case must be, could the defendant have interrupted the enjoyment in question? Now if these words are taken literally all cases are alike, and the question is no question at all. For an action for the disturbance of the enjoyment claimed involves the possibility of its being dis-

turbed, and the fact that the defendant has at last interrupted the plaintiff's enjoyment (say of support to his house) which constitutes his cause of action, is a very simple proof, except under special circumstances, that the enjoyment was capable of interruption at an earlier period. The defendant's power of interruption, therefore, in my opinion, means something very different from the mere physical possibility of interrupting. It involves knowledge that the necessity for support existed, and the possibility of withdrawing that support without the expenditure of so much labour * or money, or the incurring of so [* 806] much loss or damage, as a man could not reasonably be expected to incur.

There is direct authority for this proposition to be found in the case of *Webb* v. *Bird*, 10 C. B. (N. S.) 285, 13 C. B. (N. S.) 841, in which WILLES, J., states the principle which is to be extracted from the previous cases, in the following language: — "In general a man cannot establish a right by lapse of time and acquiescence against his neighbour, unless he shows that the party against whom the right is acquired might have brought an action, or done some act, to put a stop to the claim, without an unreasonable waste of labour and expense." Nor is any other view of this matter, as it seems to me, consistent with the terms in which a right to be gained by prescription or lapse of time is defined. A claim by prescription to a right of this character is said only to arise when a right, or benefit, enjoyed over a length of time, has been enjoyed *nec vi, nec clam*. What is the meaning and bearing of these qualifications? or what place could they have in such a definition, unless they point to the fact that the benefit claimed after a lapse of years as a right is one, the existence of which the person against whom it is claimed had the means of knowing, and the enjoyment of which he had the power to stop? And of what importance are these matters, except that they lay the foundation, where the right or benefit has not been interfered with, for presuming that he who might have interfered with them, has granted or consented that they should be undisturbed in future?

Continuous enjoyment without interruption is surely insisted upon as the basis of the right for some reason, and for what reason except that it is the evidence of assent? The physical power to interrupt, if accompanied, as I have above suggested, by a knowledge that the enjoyment of support existed, and by the

means of exercising that power of interruption without extravagant and unreasonable loss or expense, may well give ground for an implied assent if it be not exercised for so long a period as twenty years. But if unaccompanied by these qualifications, the fact of non-interruption appears to lead to no conclusion whatever, and the restrictions insisted upon, that the enjoyment [* 807] must be " open " * and not sustained by " force," cease to have an intelligent place in the definition. In the present case it is obvious that a power to interrupt is one which, although it has existed, and been physically possible ever since the plaintiff's house was built, could only be exercised by measures which no man in his senses would take. It would indeed be an unreasonable state of the law which should enforce upon the defendant, if he wished to retain his original right to excavate his own soil at such time as his interests might require him to do so, that he should pull his own house down, and drag his neighbour's to the ground with it at a time when his interest did not require it, and when it could be nothing but a grievous loss and injury to all parties concerned.

For these reasons I am unable to support the conclusion that a right such as that here in question could be gained by the plaintiff by anything in the shape of prescription or lost grant; but if I am mistaken in this, I think it is clear that in the present case the question should have been submitted to the jury whether the enjoyment of the support to the house was an " open " enjoyment at all. The house was built in an exceptional manner, and that, which seen from the outside, would appear to be nothing more than an ordinary chimney-stack carrying nothing but its own weight, was in truth a pier of brickwork, intended to carry, and in fact carrying, one end of an iron girder, upon which girder the whole upper floor of the house rested. If the plaintiff's right, therefore, was to be established by prescription I think it inevitable that the matter should have been dealt with by the learned Judge in the manner clearly described by Lindley, J., in his answer to your Lordship's fifth question. And I dare say it would have been so dealt with, if the learned Judge had not considered the plaintiff's right to stand on a different ground altogether, and asserted it to be an absolute right acquired by twenty years' enjoyment, quite independent of grant, acquiescence, or consent. In so doing he relied, he said, upon the existing authorities. I will

not recapitulate them or criticise them individually, as they have been carefully reviewed by others. They constitute the existing law on the subject; and I think the learned Judge has drawn what is upon the whole the correct inference from them, though they are by no means uniform, and although, for the reasons I have given, * and for those more fully expanded [* 808] in the opinion of FRY, J., I am unable to find a satisfactory legal ground upon which these authorities may be justified. I feel the less difficulty in acquiescing in them, inasmuch as they affirm a right to exist after twenty years, which in my opinion should have been held to exist as soon as the plaintiff's house was built. The learned Judge's direction at the trial was therefore, in my opinion, correct, and this appeal should be dismissed with costs; and if I have ventured to question the legal principles upon which the authorities which guided him are founded, I have only done so lest this case should be thought an authority for the establishment of other rights more or less similar to the right here in question.

So far as my opinion goes this right, to the lateral support of the soil for an ancient house, stands upon the positive authority of a series of cases and a long acceptance in the Courts of Law, and the ratification of it by your Lordships ought not to be considered as the adoption of principles which might have a wide application in analogous cases.

Lord BLACKBURN: —

My Lords, the first of the defences raised by the pleadings is a denial that plaintiffs were entitled to have their buildings supported by the land adjacent thereto. It is on this defence that the most difficult questions arise, and I shall consider it first.

It is, I think, conclusively settled by the decision in this House in *Backhouse* v. *Bonomi*, 9 H. L. C. 503, that the owner of land has a right to support from the adjoining soil; not a right to have the adjoining soil remain in its natural state (which right, if it existed, would be infringed as soon as any excavation was made in it); but a right to have the benefit of support, which is infringed as soon as, and not till, damage is sustained in consequence of the withdrawal of that support.

This right is, I think, more properly described as a right of property, which the owner of the adjoining land is bound to respect, than as an easement, or a servitude *ne facias*, putting a

restriction on the mode in which the neighbour is to use
[* 809] his land; * but whether it is to be called by one name or the other is, I think, more a question as to words than as to things. And this is a right which, in the case of land, is given as of common right; it is not necessary either in pleading to allege, or in evidence to prove, any special origin for it; the burthen, both in pleading and in proof, is on those who deny its existence in the particular case. No doubt the right is suspended, or rather perhaps cannot be infringed, whilst the adjoining properties are in the hands of the same owner. He may dig pits on his own land, and suffer his own adjoining land to fall into those pits just as he pleases. When he severs the ownership and conveys a part of the land to another, he gives the person to whom it is conveyed (unless the contrary is expressed) not a right to complain of what has been already done, but a right to have the support in future. It is, I think, now settled that the conveyance may be on such terms as to prevent any such right arising (see *Rowbotham* v. *Wilson*, 8 H. L. C. 348; *Smith* v. *Darby*, L. R. 7 Q. B. 716; *Eadon* v. *Jeffcock*, L. R. 7 Ex. 379; *Aspden* v. *Seddon*, L. R. 10 Ch. 394). But the burthen both of pleading and proving such a case lies on those setting it up. And I think that the decision of this House in *Backhouse* v. *Bonomi*, also conclusively settles this, that though the right of support to a building is not of common right and must be acquired, yet, when it is acquired, the right of the owner of the building to support for it, is precisely the same as that of the owner of land to support for it. Both Lord Cranworth and Lord Wensleydale say that this right also is more properly to be called a right of property to be respected by the owner of the adjoining land than a negative easement or servitude *ne facias*. Lord Wensleydale could not mean to say that the right of support to a house was of common right, and so overrule several authorities, including *Gayford* v. *Nicholls*, 9 Ex. 702, where he himself had delivered judgment.

In the case now before your Lordships, nothing was proved which could have given rise to this right unless it arose from enjoyment in the manner and subject to the conditions and for the time required by law to give a title by prescription.
[* 810] And * inasmuch as it was clearly proved that, though there had been more ancient buildings on the spot, they were removed, and buildings of a different structure and requir-

ing a different degree of support were erected in their place only twenty-seven years before the excavations complained of, it seems to me clear that the buildings are not ancient buildings in the sense that they or similar buildings, for which in the course of repair they were substituted, had stood there from time beyond memory. The plaintiffs must (unless the construction of 2 & 3 Will. IV., c. 71, is such as to embrace such a case as this) rely on the comparatively modern doctrine, by which enjoyment of a right appurtenant to land for twenty years or more, under such circumstances as are required by law, is given the effect of prescription, though it is proved that the enjoyment began within living memory.

I do not understand the late Lord Chief Justice COCKBURN to doubt that such a right as that now in question might be acquired, according to English law, where the building had stood from time immemorial, by enjoyment open and peaceable from time immemorial. It was questioned on the argument at the Bar of this House, whether a right of support for a building could be acquired by any length of enjoyment, even from time immemorial, and I shall consider that later. But the LORD CHIEF JUSTICE, I think, denied that this right could be acquired by enjoyment for a less time than time immemorial. He said that such enjoyment might give rise to a presumption that there was originally a grant, or at least an assent in point of fact to the enjoyment, but said that when it was proved, or, what comes to the same thing, admitted, that the assent of the defendant's predecessors was not asked for, or obtained by grant or in any other way, the presumption was at an end. This is expressed (3 Q. B. D. at p. 118), in terms confined to this particular right, but I think his position is general, and applies to every easement, unless it is claimed under Lord TENTERDEN'S Act. This requires examination.

The English Common law is stated by Lord COKE, (Co. Lit. 113 b, 114 a). He says, to make prescription, two things are incidents inseparable, possession or usage, and time. Possession must be long, continual, and peaceable. As to "long," Lord COKE says: "It is the time *given by law, which in [*811] England is the time whereof there is no memory of man to the contrary." But though living memory might not be to the contrary, yet if written evidence showed that the possession had a

beginning, it was defeated. By what COCKBURN, C. J., seems to think a judicial usurpation of legislative power, the time of legal memory was fixed to be the same as the limitation of real actions by the Statute of Westminster (A. D. 1275), viz., the time of Richard I., A. D. 1189. This, when first introduced, gave a prescription of about eighty-six years, but being a fixed date it became longer and longer, and already when Littleton wrote, in the reign of Edward IV., he observes on the inconvenience felt, because the time of limitation of a writ of right is of so long time past.

This inconvenience must have been particularly felt with regard to any rights attached to buildings. For though a few buildings which existed in 1189 still exist, and there are some old cities and towns (not of very great extent) which then existed, and in which it is possible that the ancient buildings have been from time to time repaired without altering their structure, yet far the greater part of the buildings in England stand on land which can be shown to have been first built upon at a much later date.

In *Bedle* v. *Beard*, A. D. 1606, 12 Co. Rep. 5, it was held that, though it was proved that there was a time within legal memory when the right claimed had not existed, and consequently the right could not have its origin in prescription, long possession was a sufficient ground for presuming what was necessary to make that possession lawful; and consequently, in that case, where there had been possession for 303 years, for presuming a grant from the Crown, though none was shown. "This," says Lord COKE, "was resolved by Lord ELLESMERE, with the principal Judges, and on consideration of precedents." So that the doctrine was not then introduced for the first time. But the length of time necessary to give rise to such a prescription was left indefinite, and though I think no one, in that case, could have really believed that there actually had been a grant from the Crown which was lost, that is not said, and it may have been thought that long user was evidence by which the fact might be
[* 812] proved, but that it should not be found unless * believed.

The modern doctrine that a jury ought to be directed that if they believed that there had been what was equivalent to adverse possession as of right for more than twenty years, they ought to presume that it originated lawfully, that is, in most cases, by a grant, must certainly have been introduced after the

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passing of the Statute of Limitations, 21 Jac. 1, c. 16 (A. D. 1623), and as the earliest reported decision is that of *Lewis* v. *Price* in 1761, referred to in Serjeant Williams' note to *Yard* v. *Ford*, 2 Wms. Saund. 504, Ed. 1871, the doctrine is probably not much more than a century old. I quite agree with what is said by the late Chief Justice COCKBURN (3 Q. B. D. at p. 105), that where the evidence proved an adverse enjoyment as of right for twenty years, or little more, and nothing else, "no one had the faintest belief that any grant had ever existed, and the presumption was known to be a mere fiction." He thinks that thus to shorten the period of prescription without the authority of the legislature was a great judicial usurpation. Perhaps it was. The same thing may be said of all legal fictions, and was often said (with, I think, more reason) of recoveries. But I take it that when a long series of cases have settled the law, it would produce intolerable confusion if it were to be reversed because the mode in which it was introduced was not approved of: even where it was originally a blunder, and inconvenient, *communis error facit jus*. But to refuse to administer a long-established law because it was based on a fiction of law, admitted to be for a purpose and producing a result very beneficial, is, as it seems to me, at least as great a usurpation of what is properly the function of the Legislature as it was at first to introduce that fiction.

It is difficult to reconcile all the *dicta* and decisions on the subject. There is language used in *Darwin* v. *Upton*, reported by Serjeant Williams in his note to *Yard* v. *Ford*, 2 Wms. Saund. 507, Ed. 1871, as to the difference between an absolute bar and a presumptive bar which I have never been able to understand. I quite agree that where the evidence is such as to leave it a question whether the enjoyment has been such — open, peaceable, and continual — as to raise a presumption of the right, the jury must be asked to find as a fact whether the enjoyment was of that kind; but the late CHIEF JUSTICE seems (3 Q. B. D. at p. 107), to *understand *Darwin* v. *Upton*, 2 Wms. Saund. [*813] 507, Ed. 1871, as amounting to this, that the jury should be told that if the enjoyment has been such as to raise a presumption of a right they may find a grant whether they believe in its existence or not; but that, if they choose to be scrupulous, they need not so find. I cannot believe that the Judges meant that, and if they did, I think the subsequent cases are inconsistent

with that ruling. I would more particularly rely on what is said by BAYLEY, J., in *Cross* v. *Lewis*, 2 B. & C. 686. The Judges never altered the form of pleading, and it was still necessary for a defendant setting up a right as a defence, to plead it with particularity: see *Hendy* v. *Stephenson*, 10 East, 55. In *Campbell* v. *Wilson*, 3 East, 294, (7 R. R. 462), the defendant pleaded, first, a way by prescription, which was traversed; and, secondly, that Bryan Grey was seised in fee of the *locus in quo*, and that Joseph Wilson (under whom the defendant made title by devise) was at the same time seised in fee of an adjoining moss dale, and that by deed, lost by time and accident, Bryan Grey granted a right of way over the *locus in quo* to Joseph Wilson and his heirs. The replication traversed the grant. At the trial in 1803, before CHAMBRE, J., it appeared that in 1778, by an award made under an Inclosure Act, all ways not set out in the award were extinguished. And this way was not set out in the award. This put an end to the plea of prescription, and it would also have put an end to the second plea, unless the alleged grant by Bryan Grey was made subsequent to the award, that is, within twenty-five years next before the trial, and, of course, within less than that time before the plea was pleaded, in which it was alleged that the deed was lost by time and accident. But evidence was given that there had been, for more than twenty years, an adverse enjoyment of the right of way. Now, if the issue joined was to be understood in its literal and natural sense, it could hardly have been suggested that this was evidence to justify the Judge in leaving it to the jury whether, in fact, in the short interval between the making of the award and the commencement of the twenty years' enjoyment, not more than two or at most four years, there actually had been a grant since lost. But so to construe the [*814] issue would have made the question of *whether there was a right, to depend on the accident of whether the right was set up by a plaintiff complaining of an obstruction to it, or a defendant justifying under it. CHAMBRE, J., who was a very learned pleader, does not seem to have had the least doubt of the meaning of the issue. He never said one word to the jury as to the reality of the grant, but left it to them to presume it, if satisfied that the enjoyment was adverse, and had continued twenty years before the action. And this direction was approved of by Lord ELLENBOROUGH and the whole Court of King's Bench,

the only question on which they seem to have had any difficulty being as to whether there was a proper direction given as to the nature of the enjoyment which would give rise to the presumption that the defendant acted by right. And in *Penwarden* v. *Ching*, Mood. & M. 400, where issue was taken on a plea justifying a trespass in defence of an ancient window, and on the trial in 1829 it was proved before TINDAL, C. J., that the window was first erected in 1807, that learned Judge said that "the question is not whether the window is what is strictly called ancient, but whether it is such as the law, in indulgence to rights, has in modern times so called, and to which the defendant has a right, for this is the substance of the plea." The verdict was for the plaintiff, so that this ruling could not be reviewed, but it was the ruling of a Judge who was a very learned pleader. In both those cases and in many more, if the question had been whether there really in fact had been a grant, or really in fact the window was ancient, there could have been no possible question. It was, no doubt, desirable that such artificial doctrines should be dispensed with. Lord TENTERDEN'S Act (2 & 3 Will. IV., c. 71), so far as it went, made that a direct bar which was before only a bar by the intervention of a jury and the use of an artificial fiction of law. But it did not abolish the old doctrine; if it had, old rights even from time immemorial would have been put an end to by unity of occupation for the space of a year. But this was not done: see *Aynsley* v. *Glover*, L. R. 10 Ch. 283. I think the law, as far as regards this subject, is the same as it was before that Act was passed. Neither can I agree with what seems thrown out by LUSH, J., rather as a makeweight than as a substantial ground of decision, that the more recent Limitation Act
* (3 & 4 Will. IV., c. 27) which put an end to the doctrine [* 815]
of adverse possession, has made any difference in the law. This view of the matter renders it unnecessary to decide anything as to the construction of Lord TENTERDEN'S Act (2 & 3 Will. IV., c. 71), and I wish to say nothing that may prejudice the decision of that question if hereafter it becomes material.

I scarcely think that, if this had been the only point argued at your Lordships' bar on the first occasion, it would have been thought of sufficient difficulty to ask the opinions of the learned Judges. But it is satisfactory to find that they all agree that a building, which has *de facto* enjoyed (under the circumstances

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and conditions required by the law of prescription) support for more than twenty years, has the same right as an ancient house would have had.

I am glad that the recent alterations in the law have obviated the necessity of putting such very artificial constructions on issues as I have mentioned. But I am not able to agree with BOWEN, J., in thinking that the alterations in the modes of procedure and the fusion of law and equity have made any alteration in the substance of the law. I quite agree with him in thinking that circumstances might, and often did, give rise to an equity to protect a house which would not have given rise to a legal claim to maintain an action at law. But those circumstances must always have existed in fact, and generally there must have been notice of them. I cannot think the alterations in procedure have altered the law.

On the first argument at the Bar of this House in November, 1879, when the Lords present were the then Lord Chancellor (Earl CAIRNS), Lord PENZANCE, and myself, a very able argument was addressed to this House by the then Attorney-General, (Sir John Holker) and the now Solicitor-General (Sir F. Herschell), and at the close of it the LORD CHANCELLOR summarized the argument (I took a note of it at the time), and asked if this was a correct statement of their proposition: — "In order to gain for the owner of land, by enjoyment, a title to some advantage from or upon his neighbour's adjacent close, greater than would naturally [*816] belong to him, the *advantage must be one the enjoyment of which is or ought to be known to the neighbour, and could, without destruction or serious injury to his own close, be interrupted by him." And this was accepted by the Attorney-General as truly representing the argument. As 2 & 3 Wm. IV., c. 71, was couched in terms which, as it has been held, prevented its applying to this case, it might be necessary in considering this proposition, to decide questions of great importance, which had never yet been finally decided; and, therefore, it was deemed advisable to have the assistance of the learned Judges, and a further argument was ordered.

I do not think anything was said at the second argument that was not involved in the summary of the first argument which I have above quoted. It was admitted that if the proposition was correct, no lapse of time, not even from time immemorial, could

give a right of support to a building, such as to oblige the owners of adjoining land to respect it; and that the same would have been before 2 & 3 Will. IV., c. 71, and still was in cases not within its provisions, the law as to the acquisition by enjoyment of the right to require the neighbours to respect the access of light and air to a window, unless it made a difference that the enjoyment in this latter case could be easily interrupted. And reference was made to cases which were said to be analogous, such as that of keeping land undrained, so as to act as a reservoir for springs: *Chasemore* v. *Richards*, or that of claiming to have uninterrupted the access for the wind to a windmill: *Webb* v. *Bird*, 13 C. B. (N. S.) 841, 31 L. J. C. P. 335; and it was said that the principle on which those cases were decided was one which showed that there was no right of support acquired by the common-law prescription for a building, though it had stood for time immemorial, and if that was so, there could be none by the prescription for a shorter period created by the modern decisions; for I agree with BRAMWELL, L. J., where, in *Bryant* v. *Lefever*, 4 C. P. D. 175, he says that what he calls the expedient, introduced by these decisions, is ancillary to the doctrine of prescription at common law, and applicable in cases where something prevents the operation of the common-law prescription from
*time immemorial, and is therefore only applicable where [*817]
the right claimed is such as, if immemorial, might have
been the subject of prescription.

My Lords, during the very considerable interval that elapsed between the first argument in November, 1879, and the time when the opinions of the learned Judges were delivered, the 15th of March, 1881, I have at intervals bestowed consideration on this proposition, and though I refrained from finally coming to a decision till I had the advantage of considering their opinions, I was strongly impressed with the conviction that such a right as is here claimed, was, according to the established law of England, one which might be acquired by prescription. And I find that all the Judges agree in that result, though not entirely for the same reasons, and I am not sure that any of them would have quite assented to the train of reasoning which has led me to that same result. On a minor point — whether there should be a new trial because the Judge at the trial left no question to the jury when, as it was said, there was or might have been evidence pro-

duced which would raise a question of fact which might have been a defence, — the learned Judges are divided in opinion; LINDLEY, LOPES, and BOWEN, JJ., agreeing with the majority of the Court of Appeal that there should be a new trial; POLLOCK, B., and FIELD, MANISTY, and FRY, JJ., thinking that there should not. It is not necessary to choose between the divers reasons which led them to the same result on the first point. It may be necessary to do so on this minor point, where their reasons led to different results. I have come to the conclusion that there should not be a new trial. I will state the reasoning which has led me to these conclusions.

My Lords, I cannot agree that the only principle on which enjoyment could give the owner of property a prescriptive right over a neighbour's land exceeding what would, of common right, belong to the owner of that property, was acquiescence on the part of the neighbour. Nor even that it is the chief principle. In general such enlarged rights are of such a nature that those over whose property they are enjoyed could in the beginning have stopped them; and a failure to stop them is evidence of acquiescence, and may afford a ground for finding that there [* 818] was *an actual assent, but that is, in many if not in all cases, a fiction; there is seldom a real assent. But no doubt a failure to interrupt, when there is power to do so, may well be called laches, and it seems far less hard to say that for the public good and for the quieting of titles enjoyment for a prescribed time shall bar the true owner when the true owner has been guilty of laches, than to say that for the public good the true owner shall lose his rights, if he has not exercised them during the prescribed period, whether there has been laches or not; but there is not much hardship. Presumably such rights if not exercised are not of much value, and though sometimes they are "Ad ea quæ frequentius accidunt jura adaptantur." This ground of acquiescence or laches is often spoken of as if it were the only ground on which prescription was or could be founded. But I think the weight of authority, both in this country and in other systems of jurisprudence, shows that the principle on which prescription is founded is more extensive.

Prescription is not one of those laws which are derived from natural justice. Lord STAIR, in his Institutions, treating of the law of Scotland, in the old customs of which country he tells us

prescription had no place (book 2, tit. 12, s. 9), says, I think truly, "Prescription, although it be by positive law, founded upon utility more than upon equity, the introduction whereof the Romans ascribed to themselves, yet hath it been since received by most nations, but not so as to be counted amongst the laws of nations, because it is not the same, but different in diverse nations as to the matter, manner, and time of it."

It was called by the old Roman lawyers "Usucapio," which is defined (Dig. lib. 41, tit. 3, "De usurpationibus et usucapionibus," art. 3), to be "adjectio dominii per continuationem possessionis temporis lege definiti." And in the same book and title, art. 1, the reason is given, — "Bono publico usucapio introducta est ne scilicet quarundam rerum diu et fere semper incerta dominia essent, quum sufficeret dominis ad inquirendas res suas statuti temporis spatium." This is precisely the object with which modern Statutes of Limitations are established, and it would be baffled if there was to be a further inquiry as to whether there had been acquiescence on the part of the true owner. It is both fair and expedient that there should be provisions to enlarge the time when the true owners are under *disa- [*819] bilities or for any other reason are not to be considered guilty of laches in not using their right within the specified period, and such provisions there were in the Roman law, and commonly are in modern Statutes of Limitations, but I take it that these are positive laws, founded on expedience, and varying in different countries and at different times. The minor question whether there should be a new trial, in my mind, depends on the question what positive laws have been adopted by the English Courts. To return to the Roman law, "Usucapio," it will be noticed, was confined to the *dominium*, nearly equivalent to the modern phrase of the legal estate. It was enunciated in the laws of the Twelve Tables, in terms brief to the extent of being obscure, and simple to the extent of being rude — "Usus auctoritas fundi biennium, cæterarum omnium annuus est usus." This for centuries, down to the time of Justinian, continued to be the law, as far as regarded the *dominium*, within the old territory of the republic, but side by side with it, the Prætors introduced, by their edicts, a *jus prætorium*, nearly equivalent to the modern phrase of equity, which practically superseded the old law, and in the provinces was the only law. No one who has ever looked

at the Digest will complain of this Prætorian law as brief; nor will any one who has read any portion of it fail to admire the skill with which legal principles are worked out. Some of the edicts of the Prætors are so obviously just and expedient, and are so tersely expressed, that they have been generally adopted, and are quoted as legal maxims by those who often do not know whence they came. Two edicts were restitutory: — "Prætor ait, Quod vi aut clam factum est qua de re agitur id cum experiendi potestas est, restituas" (Dig. lib. 43, tit. 24, art. 1). This relieved the true owner from the *usucapio* which transferred the *dominium* in consequence of a possession of two years if the possession was not peaceable, or not open.

"Ait Prætor, Quod precario ab illo habes aut dolo malo fecisti ut desineres habere qua de re agitur, id illi restituas" (Dig. lib. 43, tit. 26, art. 2). This relieved him from the effect of a possession of two years if it was not adverse, or if it was fraudulent. By a prohibitory edict, "Uti possidetis" (Dig. lib. 43, tit. 17), the Prætor forbade any one to disturb, by force, any possession which had been obtained "nec vi, nec clam, nec pre-
[*820] cario." And on the *basis principally, but not exclusively, of those three edicts, the Prætors established what was called the "præscriptio longi temporis." I will read what Pothier says in his treatise "De la Prescription, Article Préliminaire, Article 3." I quote from the eighth volume of Pothier's works by M. Dupin, p. 390: — "Suivant ce droit du préteur le possesseur de bonne foi, qui avait eu une possession paisible et non interrompue soit d'un droit incorporel, soit d'un héritage qui n'était pas du nombre de ceux qui étaient res mancipi pendant le temps de dix ans inter præsentes, et de vingt ans inter absentes, acquérait après l'accomplissement du temps de sa possession, non le domaine de la chose, mais une prescription ou fin de non recevoir, à l'effet d'exclure la demande en revendication du propriétaire de la chose, qui n'aurait été intentée qu'après l'accomplissement de ce temps. Depuis, on avait aussi accordé une action utile à ce possesseur pour revendiquer la chose, lorsqu'il en avait perdu la possession après l'accomplissement du temps de la prescription." Thus the Prætors, whilst professing to leave the Law of the Tables in force, at least within the old territory of the Republic, practically deprived it of all force. Justinian by two laws (Codex, lib. 7, tit. 25), "De nudo jure Quiritium

tollendo," and tit. 31, "De usucapione transformanda," changed all this. The two laws are couched in terms that show that those who framed them had very little respect for antiquity, and were intolerant of legal fictions. Justinian, says Pothier, by these enactments has changed the prescription of ten and twenty years into a true "usucapio," for they have caused the "dominium" to pass to the possessor of the heritage, or the incorporeal right of which he has had during that time a possession or quasi-possession peaceable and not interrupted.

The name of prescription has, however, survived the thing. And in the numerous provinces into which France was before the Revolution divided, many of which were governed by their own customs, the laws of prescription varied. Domat in his treatise on the Civil Law (I quote from the translation by Doctor Strahan), book 3, title 7, s. 4, says: "It is not necessary to consider the motives of these different dispositions of the Roman law, nor the reasons why they are not observed in many of the customs. Every usage hath its views, and considers in the opposite usages *their inconveniences. And it sufficeth to remark [*821] here what is common to all these different dispositions of the Roman law, and of the customs as to what concerns the times of prescriptions. Which consists in two views; one, to leave to the owners of things, and to those who pretend to any rights, a certain time to recover them; and the other to give peace and quiet to those whom others would disturb in their possessions or in their rights after the said time is expired." Those who framed the Code Napoléon had to make one law for all France. To facilitate their task they divided servitudes into classes, those that were continuous and those that were discontinuous, and those that were apparent and non-apparent (Code Civil, Arts. 688, 689). Those divisions, and the definitions, were, as far as I can discover, perfectly new; for though the difference between the things must always have existed, I cannot find any trace of the distinction having been taken in the old French law, and it certainly is not to be found in any English law authority before Gale on Easements in 1839. On this division their legislation was founded. The first Projet of the Code allowed continuous servitudes, whether apparent or not, and discontinuous servitudes, if apparent, to be gained by title or by possession for thirty years. The Code Civil as it was finally adopted by Article 690, allows servitudes, if con-

tinuous and apparent, to be acquired by title or by possession for thirty years, and by Article 691 enacts that continuous servitudes not apparent and servitudes, if discontinuous, whether apparent or not, can only in future be established by titles, but saves vested rights already acquired. The authors of Lex Pandectes Françoises (Paris, 1804), on whose authority I state this, say, Vol. v. p. 488, that this great change from the principle of the Projet was made without any publication of the discussions concerning it, or of the reasons that led to it. And they state more openly than I should have expected in a book published in Paris in 1804, that in their opinion it was not an improvement. It certainly has never been received in English law.

I think that what I have above stated is quite enough to confirm Lord Stair's position that the laws of different countries relating to prescription are positive laws differing in mat-
[* 822] ter, * manner, and time in different countries. I think that, though the English law as to prescription was, beyond controversy, greatly derived from the Roman law, the very words of which are often quoted in the earliest English authorities, yet, to borrow the idea expressed by Domat in the passage I have above cited, every system of law is founded on its own ideas of expediency, and that we must look to the English decisions to see what principles have been adopted in it, as upon the balance of inconvenience and convenience expedient, and what have in it been rejected as on the balance inexpedient.

It cannot be disputed that from the earliest times the owner of adjoining land was bound to respect the access of light and air acquired by enjoyment of an ancient window. The immemorial custom of London to build upon an ancient foundation, though thereby an ancient window was obstructed, which was pleaded and held to be a good custom in *Hughes* v. *Keme*, A. D. 1613, Yelv. 215, proves the great antiquity of this law. But as far as I find, the first mention of it in a reported case is *Bowry and Pope's Case*, 1 Leon. 168, Michaelmas, 29 & 30 Eliz. A. D. 1587. I will read the whole of it, for though the point actually decided was only that a window first erected in the reign of Queen Mary, that is, after 1553, and not later than 1558, had not acquired in 1587 the status of an ancient window, I think the opinion of the Court on points not actually decided is important. "Bowry brought an action upon the case against Pope, and declared that in

the time of Edward VI., the Dean and Chapter of Westminster leased two houses in St. Martin's, in London, to Mason for sixty years. The which Mason leased one of the said houses to one A., and covenanted by the indenture of lease with the said A., that it should be lawful for the said A., his executors and assigns, to make a window in the shop of the house so to him assigned, and afterwards in the time of Queen Mary a window was made accordingly where no window was there before. And afterwards A. assigned the said house to the plaintiff. And now Pope, having a house adjoining, had erected a new building 'super solum ipsius Pope ex opposito' the said new window, so as the new window is thereby stopped. The defendant pleaded not guilty and it was found for the plaintiff. And it was moved for the defendant in arrest of judgment * that here upon the declaration [* 823] appeareth no cause of action, for the window, in the stopping of which the wrong is assigned, appears upon the plaintiff's own showing to be of late erected *scilicet* in the time of Queen Mary. The stopping of which by any act upon my own land was held lawful and justifiable by the whole Court. But if it were an ancient window time out of memory, &c., there the light or benefit of it ought not to be impaired by any act whatsoever, and such was the opinion of the whole Court. But if the case had been that the house and soil upon which Pope had erected the said building had been under the estate of Mason, who covenanted as above said, then Pope could not have justified the nuisance, which was granted by the whole Court."

It is for this last opinion that I cite the case. The Court of Common Pleas do not seem to have felt the difficulty which pressed so strongly on LITTLEDALE, J., in *Moore* v. *Rawson*, 3 B. & C. 332, and which leads FRY, J., in his very able opinion, to declare that this right does not lie in grant. They seem to have had no doubt that the express covenant operated as a grant of the window, and that neither Mason nor any who held under his estate, could derogate from that grant by stopping the benefit of the window.

In Trinity, 29 Eliz., about nine months later, the Queen's Bench, in *Bland* v. *Moseley*, decided the second point resolved by the Common Pleas the same way, and they also seem to have agreed with the third resolution. The case is cited in *Aldred's Case*, 9 Co. Rep. 58 b The reasons, as reported by Lord COKE,

are: "It may be that, before time of memory, the owner of the said piece of land has granted to the owner of the said house to have the said windows without any stopping of them, and so the prescription may have a lawful beginning: and WRAY, C. J., then said that for stopping as well of the wholesome air as of light, an action lies, and damages shall be recovered for them, for both are necessary, for it is said 'et vescitur aura ætherea,' and the said words 'horrida tenebritate' are significant, and imply the benefit of the light. But he said that for prospect, which is a matter only of delight and not of necessity, no action [*824] lies for stopping thereof, *and yet it is a great commendation of a house if it has a long and large prospect, 'unde dicitur, laudaturque domus longos quæ prospicit agros.' But the law does not give an action for such things of delight."

It will be noticed that not a word is said about the possibility of obstructing the light; and, indeed, it seems to me clear that no one could ever have thought of stopping his neighbour's lights by hoardings, until it was established that uninterrupted enjoyment for a period short of time immemorial would give a right. Then some ingenious lawyer thought of that easy mode of preventing the acquisition of a right in a window not yet privileged. The distinction between a right to light and a right of prospect, on the ground that one is matter of necessity and the other of delight, is to my mind more quaint than satisfactory. A much better reason is given by Lord HARDWICKE in *Attorney-General* v. *Doughty*, 2 Ves. Sen. 453, where he observes that if that was the case there could be no great towns. I think this decision, that a right of prospect is not acquired by prescription, shows that, whilst on the balance of convenience and inconvenience, it was held expedient that the right to light, which could only impose a burden upon land very near the house, should be protected when it had been long enjoyed, on the same ground it was held expedient that the right of prospect, which would impose a burden on a very large and indefinite area, should not be allowed to be created, except by actual agreement. And this seems to me the real ground on which *Webb* v. *Bird*, 10 C. B. (N. S.) 268; 13 C. B. (N. S.) 841 and *Chasemore* v. *Richards* are to be supported. The rights there claimed were analogous to prospect in this, that they were vague and undefined, and very extensive. Whether that is or is not the reason for the distinction, the law has always, since

Bland v. *Moseley*, been that there is a distinction; that the right of a window to have light and air is acquired by prescription, and that a right to have a prospect can only be acquired by actual agreement.

Shury v. *Pigott*, decided in 1625, is reported in Palmer, 444, Popham, 166; 3 Bulstrode, 339; Noy, 84; Latch, 153; and W. * Jones, 145. It seems to have excited a good [* 825] deal of attention, and many things collaterally to have been discussed which were not necessary for the decision. The actual point decided in *Shury* v. *Pigott* was, that in a conveyance there was (though nothing was said), an implied grant that neither the conveyor nor any who claimed under him should use their lands so as to deprive the property conveyed of what was necessary for its enjoyment, in that case an artificial supply of water; a principle which, in the case of a house, would certainly include support.

In *Palmer* v. *Fleshees*, 1 Sid. 167, the first point ruled by Twysden and Windham, JJ., was, "if I, being seised of land, lease forty feet to A., to erect a house upon it, and other forty feet to B. to erect a house on it, and one of them builds a house, and then the other dig a cellar in his land by which the wall of the first house adjoining falls, no action lies for this. And so they said it had been adjudged in *Shury* v. *Pigott's Case*, for each can make the best advantage of his own, but to them it seemed that the law was otherwise if it had been an ancient wall or house which fell by this digging." The reference to *Shury* v. *Pigott* shows that in this place "ancient" means "existing before the conveyance of the land." The point actually decided was as to light, and the *ratio decidendi* is thus stated in the report in 1 Levinz, 122. "It was resolved that, although it be a new messuage, yet no person who claims the land by purchase under the builder" (vendor) "can obstruct the lights any more than the builder himself could, who cannot derogate from his own grant, by Twysden and Windham, JJ., Hyde being absent and Kelynge doubting. For the lights are a necessary and essential part of the house. And Kelynge said, Suppose the land had been sold first and the house after, the vendee of the land might stop the lights. Twysden, to the contrary, said, Whether the land be sold first or afterwards, the vendee of the land cannot stop the lights in the hands of the vendor or his assigns. But all agreed that a stranger

having lands adjoining to a messuage newly erected, may stop the lights, for the building of any man on his lands [* 826] * cannot hinder his neighbour from doing what he will with his own lands; otherwise if the messuage be ancient, so that he has gained a right in the lights by prescription." I say nothing as to the questions whether there is an implied reservation where the lands are parted with, as well as an implied grant where the house is parted with; or whether, when the land is sold before the house is erected on it, but on the terms that a house is to be built, the purchaser is driven to have recourse to equity to protect his subsequently built house; as neither of these questions is raised by the facts in the present case. But I think it is now established law that one who conveys a house does, by implication and without express words, grant to the vendee all that is necessary and essential for the enjoyment of the house, and that neither he, nor any who claim under him, can derogate from his grant by using his land so as to injure what is necessary and essential to the house. And I think that the right of support from the adjoining soil is necessary and essential for the enjoyment of the house.

Now, if the motive for introducing prescription is that given in the Digest, lib. xli., tit. 3, art. 1, quoted before, I think it irresistibly follows that the owner of a house, who has enjoyed the house with a *de facto* support for the period and under the conditions prescribed by law, ought to be protected in the enjoyment of that support, and should not be deprived of it by showing that it was not originally given to him. And I think that the decisions ending in *Backhouse* v. *Bonomi*, which is put in a very clear light by Manisty, J., in his opinion, decide that he should not be deprived of it. Fry, J., thinks those decisions are contrary to principle, but too strong to be departed from. I have come to the conclusion, for the reasons I have given, that they are founded on principle.

But it still remains to inquire whether any of the doctrines established by the English law, which on the ground of expediency prevent the acquisition of a right by enjoyment, would apply.

In *Backhouse* v. *Bonomi* the workings which did the mischief were at a considerable distance from the plaintiff's house, [* 827] and * would not have done any harm if the intervening

minerals had not been previously removed by the defendant. Very different considerations may arise where the intervening minerals have been removed by the plaintiff himself, or those under whose estate he claims, or even by a third person. I express no opinion as to this, because it is not raised by the facts; but I mention the *Corporation of Birmingham* v. *Allen*, 6 Ch. D. 284, as LUSH, J., did below, to show that it has not been overlooked.

Neither do I think it necessary to express any opinion as to the distinction taken in *Solomon* v. *Vintners' Company*, 4 H. & N. 585, where it was said that, at all events, the right, if it could be acquired against the next adjoining house, could not be acquired when there were intervening properties, for, in this case, the defendants' land which they excavated was next adjoining to the plaintiffs' house; and I think the right to support from the adjoining land is not open to the objection that it is extensive and indefinite, and so far analogous to a prospect. It seems much nearer in analogy to the right to the access of light to a window; perhaps if it were *res integra* one might doubt if it was expedient to protect an ancient window. But I see no ground for doubting that the right to forbid digging near the foundations of a house without taking proper precautions to avoid injuring it, is, for the reasons given by LUSH, J. (3 Q. B. D. 89), one very little onerous to the neighbours, and one which it is expedient to give to the owner of the house.

No question here arises as to the effect of any disability on the part of the owner of the land, nor as to the effect of any restrictions arising from the state of the title.

But a question does arise as to whether there was not, or at least might have been, evidence of something which would prevent the enjoyment here being of that nature which would give rise to prescription on the ground that the possession was not open. The edict of the Prætor that possession must not be *vi vel clam*, as I think, is so far adopted in English law that no prescriptive right can be acquired where there is any concealment, and probably none where the enjoyment has not been open. And in cases where the *enjoyment was in the beginning [*828] wrongful, and the owner of the adjoining land may be said to have lost the full benefit of his rights through his laches, it may be a fair test of whether the enjoyment was open or not to ask whether it was such that the owner of the adjoining land, but

No. 8. — Dalton v. Angus, 6 App. Cas. 828, 829.

for his laches, must have known what the enjoyment was, and how far it went. But in a case of support where there is no laches, and the rights of the owner of the adjoining land are curtailed for the public benefit, on the assumption that, in general, rights not exercised during a long time are not of much value, and that it is for the public good that such rights (generally trifling) should be curtailed in favour of quieting title; where that is the principle, I do not see that more can be requisite than to let the enjoyment be so open that it is known that some support is being enjoyed by the building. That is enough to put the owner of the land on exercising his full rights, unless he is content to suffer a curtailment, not in general of any consequence. And in the present case all that is suggested is that the plaintiffs' building was not an ordinary house, but a building used as a factory, which concentrated a great part of its weight on a pillar. It had stood for twenty-seven years, and, as far as appears, would, but for the defendants' operations, have stood for many more years; and there was nothing in the nature of concealment. Any one who entered the factory must have seen that it was supported in a great degree by the pillar. And there is not the slightest suggestion that those who made the excavation were not perfectly aware that the factory did rest on the pillar, or that they took such precautions as would have been sufficient if the building had been supported in a more usual way, but that the mischief happened from its unusual construction. That being so, I am at a loss to see what question the learned Judge could, at the trial, on this evidence, have left to the jury, beyond the question whether the building had for more than twenty years openly, and without concealment, stood as it was and enjoyed without interruption the support of the neighbouring soil. The Judge offered to ask the jury if the building fell on account of the weight of the goods stored on the upper storey, and I cannot see what else could have been asked.

[* 829] *The second defence is a question of pure law. Ever since *Quarman* v. *Burnett*, 6 M. & W. 499, it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing

something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it: *Hole* v. *Sittingbourne Railway Co.*, 6 H. & N. 488; *Pickard* v. *Smith*, 10 C. B. (N. S.) 473; *Tarry* v. *Ashton*, 1 Q. B. D. 314.

I do not think either side disputed these principles, nor that, in *Bower* v. *Peate*, 1 Q. B. D. 321, the Queen's Bench Division thought that the case of a man employing a contractor to excavate near the foundation of a house which had a right of support, fell within the second class of cases; nor that, if correctly decided, that case was decisive. But *Butler* v. *Hunter*, 7 H. & N. 826, was relied on, which case the Court of Exchequer held fell within the first class of cases. I am not quite sure that I understand from the report what the state of the evidence was. But assuming that the defendants are right in saying that it was such as to make the case not distinguishable from *Bower* v. *Peate*, I think that the reasoning in *Bower* v. *Peate* is the more satisfactory of the two.

My Lords, the Court of Appeal in this case ordered that unless the defendants elected within fourteen days to take a new trial, judgment should be entered for the plaintiffs. If your Lordships take the view of the case which I have stated, and which is that of Lush, J., Pollock, B., Field, Manisty, and Fry, JJ., it will be sufficient to dismiss the appeal, for the time for the election to take a new trial is long passed, and it need not be noticed.

* Lord Watson: — [* 830]

My Lords, it is unnecessary for me to make any lengthened observations in this case. Seeing that my opinion is in substantial concurrence with what has already been said, few words of explanation will suffice to express my views.

I am of opinion that a right to lateral support from the adjoining soil may be acquired for a building which has enjoyed that support peaceably and without interruption for the prescriptive period of twenty years. That proposition appears to me to have been recognised as the law of England in a long series of weighty,

if not conclusive, judicial opinions, and to have been tacitly accepted by this House in the case of *Backhouse* v. *Bonomi*.

The obligation which the creation of such a right by user imposes upon the owner of the adjacent soil, is to give continued support to the building. Consistently with that obligation he can make any lawful use of his land which he thinks proper. He may dig into, or even remove, the strata from which the building derives support, provided he gives efficient substituted support, by means of a retaining wall or other device. The proprietor of the building cannot, according to the decision in *Backhouse* v. *Bonomi*, complain that his right has been infringed, unless and until the stability of the edifice has been affected by the withdrawal of its lateral support. I agree with the noble and learned Lord on the woolsack in holding the right in question to be a proper easement, and in the results which follow from taking that view of its character. In one sense every easement may be regarded as a right of property in the owner of the dominant tenement, not a full or absolute right, but a limited right or interest in land which belongs to another, whose *plenum dominium* is diminished to the extent to which his estate is affected by the easement. But a right constituted in favour of estate A. and its owners, in or over the adjoining lands of B., is in my opinion of the nature of an easement, and that whether such right is one of the natural incidents of property, or has its origin in grant or prescription.

[* 831] * I am unable to regard the right of support to a building, whether lateral or vertical, as a negative easement, and I concur in the observations which have been made upon that point by the noble and learned Lord on the woolsack, as well as by Lindley and Bowen, JJ. It appears to me to be as truly a positive easement, as the well-known servitude *oneris ferendi*, when a wall or beam is rested on the servient tenement. The distinction between positive and negative easements may not be of vital importance in the present case; but in dealing with this point I am probably influenced by the consideration that a decision to the effect that an easement of lateral support to buildings is negative, would form an unsatisfactory precedent in another part of the country where positive servitudes alone are capable of being acquired by prescriptive enjoyment.

It appears to me, for reasons which have already been fully

explained by your Lordships, that the respondents have adduced proof of possession for the prescriptive period sufficient to establish their right to support from the adjacent soil, for the new or altered building which has stood for the last twenty-seven years. I do not think that any question of fact is disclosed by the pleadings or by the evidence in the case, which ought to have been, but was not, submitted to the jury.

Upon the point of law which was not remitted to the learned Judges who have favoured the House with their opinions upon the main questions arising in this appeal, I agree with your Lordships. The operations of the commissioners were obviously attended with danger to the building in question; but these appellants seek to shelter themselves from responsibility by proving that they took their contractor bound to adopt all measures necessary for ensuring the safety of the building. When an employer contracts for the performance of work, which properly conducted can occasion no risk to his neighbour's house which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor. But in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is * performed, and is [* 832] therefore liable, as well as the contractor, to repair any damage which may be done.

I therefore concur in the judgment which has been proposed by your Lordships.

Judgment affirmed and the appeals dismissed with costs.

Lords' Journals, 14th June, 1881.

ENGLISH NOTES.

Although, as the principal case shows, the right of support to land in its natural state is not, properly speaking, an easement, this may be a convenient place to note some cases illustrating the nature of that right.

In the *Corporation of Birmingham* v. *Allen* (1877), 6 Ch. D. 284, 46 L. J. Ch. 673, 37 L. T. 207, 25 W. R. 810, the question of distance to which this right extends was considered. It was in effect held that it extends so far as the existence of the adjoining land in its natural state is necessary to the support in its natural state of the land (X) to be affected. But if the adjoining land (Y) has been already excavated,

and the proprietor of the next further land (Z) carries on operations which would not have affected the land (X) if the intervening land (Y) had remained in its natural state, the owner of X has no right of complaint against the owner of Y, although the result of the operation is to let down the land X. The MASTER OF THE ROLLS (Sir G. JESSEL) observed: — "Now what is the right of the adjoining owner? It is to the support of his land in its natural state. Support by whom? The judges have said 'support by his neighbour.' What does that mean? Who is his neighbour? It was contended that all the landowners in England, however distant, were neighbours for this purpose, if their operations in any remote degree injured the land. But surely that cannot be the meaning of it. The neighbouring landowner to me for this purpose must be the owner of that portion of land, whether a wider or narrower strip of land, the existence of which in its natural state is necessary for the support of my land. As long as that land remains in its natural state, and it supports my land, I have no right beyond it, and therefore it seems he is my neighbour for this purpose." This decision was affirmed on Appeal.

The right to subjacent support was first determined in *Humphries* v. *Brogden* (1850), 12 Q. B. 739, 20 L. J. Q. B. 10, 15 Jur. 124. The measure of the support required was said by Lord CAMPBELL, C. J., to be "that which will protect the surface from subsidence and keep it securely at its ancient and natural level." This decision has been repeatedly approved. See *Smart* v. *Morton* (1855), 5 El. & Bl. 30, 24 L. J. Q. B. 261; *Harris* v. *Ryding* (1849), 5 M. & W. 60, 8 L. J. Ex. 181; *Rowbotham* v. *Wilson* (1861), 8 H. L. Cas. 348, 30 L. J. Q. B. 49. It follows that if the soil is of such a character that the subjacent mines cannot be worked without causing the surface land to subside, the mines must not be worked. *Wakefield* v. *Duke of Buccleugh* (1867), L. R. 4 Eq. 613, 36 L. J. Ch. 763; *Hext* v. *Gill* (1872), L. R. 7 Ch. 699, 41 L. J. Ch. 761, 27 L. T. 291, 20 W. R. 957.

The extent of this right of support is that the subjacent and adjacent land must keep the surface of the dominant tenement in its natural condition and position. Provided this is attained, the dominant owner cannot demand of the servient owner to leave any particular means of support. He may work the minerals supporting the soil and substitute artificial props to support the surface land in lieu of the natural means of support which he has removed. See per Lord CAMPBELL, C. J., *Humphries* v. *Brogden* (1850), 12 Q. B. 739, 744; *Bonomi* v. *Backhouse* (1858), El. Bl. & El. 622 per WIGHTMAN, J., p. 637; *per Curiam*, Ex. Ch. pp. 655, 656, *Backhouse* v. *Bonomi* (1861), 9 H. L. Cas. 503, per Lord CHELMSFORD, p. 508.

Such a right of support is a natural right attached to the ownership

of surface land. In absence of any express or implied contract to the contrary this right of support remains on severance of the surface land from the minerals underneath, whether it is the surface land that is sold, or the minerals, or both. A stipulation that the minerals shall be worked "in the usual and most approved manner" does not extend to a permission to let down the surface, although this would be the effect of the manner of working which was usual in the district; *Davis* v. *Treharne* (1881), 6 App. Cas. 460, 50 L. J. Q. B. 665, 29 W. R. 869. The express terms of the contract or special Act in the nature of a contract (such as an Inclosure Act) may however confer a right to remove the support altogether or confer greater rights of support: *Rowbotham* v. *Wilson* (1860), 8 H. L. Cas. 348, 30 L. J. Q. B. 49; *Eadon* v. *Jeffcock* (1873), L. R. 7 Ex. 379, 42 L. J. Ex. 361, 28 L. T. 273, 20 W. R. 1033; *Mundy* v. *Duke of Rutland* (C. A. 1883), 23 Ch. D. 81, 31 W. R. 510; *Consett Waterworks Co.* v. *Ritson* (C. A. 1889), 22 Q. B. D. 702. The right so conferred to take away the support is in the nature of an easement constituted by grant as against the right of property in the surface. *Rowbotham* v. *Wilson*, *supra*.

There is an important class of cases in which under certain circumstances, the right of support is taken away, by special Acts which incorporate the Railways Clauses Consolidation Act, 1845. By sections 77, 78, and 79 of this Act it is enacted (in effect) that Railway Companies shall not be entitled to any mines under the Railway, and that subjacent mines shall be deemed to be excepted out of conveyances of lands unless expressly conveyed; that if the mine owners at any time desire to work the mines, they are to give thirty days' notice to the company, who may then cause the mines to be inspected. If the mines cannot be worked without injury to the Railway, the company may give notice to treat for (that is in effect agree to purchase) the mines; if they do not purchase, the mineral owner may work the mines "so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district." It has been decided by the House of Lords that the effect of these enactments is that if the company, after due notice, elect not to purchase the minerals, they lose any right of support to the Railway by the minerals under it. *Great Western Railway Co.* v. *Bennett* (1867), L. R. 2 H. L. 27, 36 L. J. Q. B. 133, 16 L. T. 186, 15 W. R. 647. It might at first sight seem difficult to reconcile this decision with that in *Davis* v. *Treharne*, *supra*. But there are two essential differences between the cases. First, the right to support of a Railway (if there is any such effectual right) is essentially a right of support to an artificial work upon land; and secondly, according to the construction of the Acts adopted by the learned Lords in *Great*

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Western Railway Co. v. *Bennett*, the purchase of the land by the Railway Company under the powers of the Lands Clauses Act as modified by the Railways Clauses Act is a purchase of that portion of the upper crust only which is necessary for the purpose of the railway and without any right of support from subjacent minerals. In effect their right is not a right of property in the land with the ordinary incidents of property, but a limited parcel of the rights of property (somewhat in the nature of an easement) leaving the excepted rights to be exercised by the owners as rights of property with all their incidents which are not taken away by the conveyance to the Railway for the purposes of their Acts.

Pountney v. *Clayton* (1883), 11 Q. B. D. 820, 52 L. J. Q. B. 566, 49 L. T. 283, 31 W. R. 664, decides that a purchaser from a Railway Company of lands compulsorily purchased and sold by them as superfluous land is in no better position than the Company. In fact, as suggested by Denman, J., in that case (11 Q. B. D. 828), he may be in a worse position; as he would not, like the railway company, have any compulsory power of purchasing the mines.

The right of natural support continues in spite of buildings or excavations, provided the weight of the buildings or the excavations are not the immediate cause of the sinking of the surface land. *Brown* v. *Robins* (1859), 4 H. & N. 186, 28 L. J. Ex. 250; *Hamer* v. *Knowles* (1861), 6 H. & N. 454, 30 L. J. Ex. 102, 3 L. T. 746, 9 W. R. 615.

The grant of an easement of right of support to buildings is impliedly made by a vendor who sells a portion of his land, knowing at the time of the sale that the purchaser is about to erect substantial buildings on the land purchased. In such a case the vendor is not entitled to work mines under his own adjoining land, so as to deprive the purchaser's buildings of support. *Siddons* v. *Short* (1877), 2 C. P. D. 572, 46 L. J. C. P. 795, 37 L. T. 230.

A curious question of a right of support was considered in *Solomon* v. *Vintners' Company* (1859), 4 H. & N. 585, 28 L. J. Ex. 370, 5 Jur. (N. S.). 1177. Houses built in a row on the side of a hill had got for upwards of thirty years out of the perpendicular, so that one leant on the other. The Court of Exchequer held that however the question might have stood as to a right of support of one house by the house of the immediate neighbour, it could not acquire a right of support by the next further house. Bramwell, B., held that in such circumstances a right of support could not be acquired at all. The support, stealthily (as it were) obtained by the house getting out of the perpendicular from its neighbour cannot be presumed to have been the subject of a grant — the only way in which such a right could be acquired.

The opinion of Lord Selborne in the principal case that the right

of support to buildings is an easement within the Prescription Act (2 & 3 Will. IV. c. 71) was followed by HALL, V. C., in *Lemaitre* v. *Davis* (1882), 19 Ch. D. 281, 51 L. J. Ch. 173, 46 L. T. 407, 30 W. R. 360, where the right of support of one ancient building from another ancient building — the support being openly afforded, that is to say being evident, and necessary to the design of the buildings, — was maintained.

AMERICAN NOTES.

The principal case is cited by Washburn on Easements, p. 582, and its doctrine is sustained by some of the American courts. As to the right of lateral support of land in its natural state, see *Gilmore* v. *Driscoil*, 122 Massachusetts, 199; *White* v. *Dresser*, 135 ibid. 150; 46 Am. Rep. 454; *Myer* v. *Hobbs*, 57 Alabama, 175; 29 Am. Rep. 719; *Buskirk* v. *Strickland*, 47 Michigan, 389; *Baltimore and P. R. Co.* v. *Reaney*, 42 Maryland, 117; *Shafer* v. *Wilson*, 44 ibid. 268; Wier's Appeal, 81 * Pennsylvania State, 203; *Stevenson* v. *Wallace*, 27 Grattan (Virginia), 77; *Panton* v. *Holland*, 17 Johnson (New York), 92; *Busby* v. *Holthaus*, 46 Missouri, 161; *Richardson* v. *Vermont, C. R. Co.* 25 Vermont, 465; 60 Am. Dec. 283; *Lasala* v. *Holbrook*, 4 Paige (New York Chancery), 169; 25 Am. Dec. 524; *McGuire* v. *Grant*, 25 New Jersey Law, 356; *Transp. Co.* v. *Chicago*, 99 United States, 635; *Hay* v. *Cohoes Co.*, 2 New York, 159; 51 Am. Dec. 279; *Stearns* v. *City of Richmond*, 88 Virginia, 992; 29 Am. St. Rep. 758; *Moellering* v. *Evans*, 121 Indiana, 195; 6 Lawyers' Rep. Annotated, 449. An exception to the rule seems to be made as to mining lands, in which the whole value consists in what can be dug out of it. *Hendricks* v. *Spring Valley, M. & I. Co.* 58 California, 190; 41 Am. Rep. 257.

On the principle that municipal corporations constitute a part of the government, and are not liable in damages for injuries to individuals, inflicted in the exercise of governmental functions, it is very generally held that an abutting proprietor has no common-law right of support against a municipal corporation, when the latter proceeds, under due authority and in a proper manner, to grade its streets. The city is under no obligation to build retaining walls, or to furnish other support for soil or buildings, or to pay damages in case the soil or buildings fall into the street in consequence of such grading. This principle is a well-established exception to the general rule of lateral support. The city, having the right to grade the street, is under no greater liability with respect to the falling of the soil or buildings into the street, than in respect to any other consequential injury — such as rendering approach more difficult, or otherwise decreasing the value of the property. And as the city has no right to grant the right of support, and it being incapable, in the nature of things, of adverse use, it follows that the right cannot be acquired by prescription. 2 Dillon on Municipal Corporations (4th ed.), 990–1; *Perry* v. *Worcester*, 6 Gray (Mass.), 544; 66 Am. Dec. 431; *Fellowes* v. *New Haven*, 44 Connecticut, 240; 26 Am. Rep. 447, and note, 457–462; Note to *Larson* v. *Metropolitan, &c. Co.*, 110 Missouri, 234; 33 Am. St. Rep. 439; *Parke* v. *Seattle*, 5 Washington, 1; 34 Am. St.

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Rep. 839. But the contrary is held in *Stearns* v. *City of Richmond*, 88 Virginia, 992; 29 Am. St. Rep. 758; *Nichols* v. *City of Duluth*, 40 Minnesota, 389; 12 Am. St. Rep. 743.

In connection with the former case, Mr. Freeman says (33 Am. St. Rep. 466): "There is not much likelihood that the bold course of the Virginia court will be followed by many States." The court bases its decision chiefly upon cases from those States whose constitutions prohibit the "damaging" of private property without just compensation, and fails to notice the distinction between this language and that of the Virginia constitution, which merely prohibits the "taking" — a distinction which is perfectly established. See 2 Dillon on Municipal Corporations (4th ed.), 995 a, *et seq.*; Note to *O'Brien* v. *Philadelphia*, 150 Pa. St. 589; 30 Am. St. Rep. at p. 832; *Chicago* v. *Taylor*, 125 United States, 161. In the Virginia case the court say: "It is denied however that this right of lateral support exists as against the public — that is, in the soil of a street. But why should n't it? If there be any principle for holding that it does not, we are not aware of it, although there may be some authorities in accordance with the defendant's view." "It would be a curious doctrine to hold that the authorities of a city cannot go upon one's property without his consent, and remove even so much as a shovelful of earth, without rendering the city responsible for a trespass, and yet that they may, by excavating in the street, bring down his soil and buildings with impunity, no matter what their value may be, provided the work is not done carelessly or negligently."

A lot-owner whose lot is deprived of its natural support by a change of grade of a street may maintain an action for the damages, without resorting to the remedy provided by the charter of New Westminster in cases where access to a lot is interfered with or land taken for the excavation. *New Westminster* v. *Brighouse*, 20 Canada Supreme Court, 520; 38 Am. & Eng. Corp. Cas. 315.

The right of a land-owner to lateral support exists over land in a street upon which his land abuts, and renders a city liable for damages caused by its removal in grading the street, even in the absence of a constitutional provision against taking property without compensation. *Parke* v. *Seattle*, 5 Washington, 1; 20 Lawyers' Rep. Annotated, 68. The court said: "The time has been when it was the fashion of courts to regard the State or its instruments (municipal corporations) as in some way superior in their right to do mischief to the individual over private persons." "But what possible distinction there can be between the injury which is occasioned by casting water, earth, sand, or other materials upon one's land, and having the entire surface of the land dragged or forced away, it is hard to comprehend. Wherein is the one less a 'taking' than the other?" One judge dissented, and his opinion contains a valuable collection of the adjudications in point.

In *Transportation Co.* v. *Chicago*, 99 United States, 635, an action against a city, the court said *obiter:* "The general rule may be admitted that every land-owner has a right to have his land preserved unbroken, and that an adjoining owner, excavating on his own land, is subject to this restriction, that he must not remove the earth so near to the land of his neighbor

that his neighbor's soil will crumble away under its own weight, and fall upon his land."

A city is liable for damages sustained by the owner of a building or coal pocket resting on piles driven on his land in a river, caused by negligently digging and excavating the river bottom around and near the piles, not in dredging to improve the harbor, but to save the expense of frequent removals of sand, filth, and sewage deposited by it in the river, so as to deprive his land of its natural support, move the piles outward into the excavation, displace and dislodge them, and render the building unfit for use. *Pomroy* v. *Granger*, 18 Rhode Island, 624.

It is well settled that the right of lateral support of soil does not extend to buildings. See cases above, and *Charless* v. *Rankin*, 22 Missouri, 566; 66 Am. Dec. 642; *Thurston* v. *Hancock*, 12 Massachusetts, 220; 7 Am. Dec. 57; *Schultz* v. *Byers*, 53 New Jersey Law, 442; 26 Am. St. Rep. 435 (citing the principal case, as "a most thorough examination of the subject"); *City of Quincy* v. *Jones*, 76 Illinois, 231; 20 Am. Rep. 243; *City of Cincinnati* v. *Penny*, 21 Ohio State, 499; 8 Am. Rep. 73; *Tunstall* v. *Christian*, 80 Virginia, 1; 56 Am. Rep. 581.

In *Adams* v. *Marshall*, 138 Massachusetts, 228; 52 Am. Rep. 271, the plaintiff deeded land, on which was a barn, by metes and bounds, to the defendant. The boundary line ran through the barn. The defendant cut away that part of the barn on his own land. *Held*, that he was liable for depriving the plaintiff of its support and shelter. Citing the principal case.

Supporting the doctrine of prescriptive right to support of buildings, see *Lasala* v. *Holbrook*, *supra*; *Stevenson* v. *Wallace*, *supra*; *Aston* v. *Nolan*, 63 California, 269; *Hay* v. *Cohoes Co.*, *supra*. The Lasala case is founded on *Story* v. *Odin*, a Massachusetts case of ancient lights, since overruled.

The doctrine, however, is denied by many of the American courts; *Mitchell* v. *Mayor*, 49 Georgia, 19; 15 Am. Rep. 699; *Richart* v. *Scott*, 7 Watts (Penn.), 460; 32 Am. Dec. 779; *Gilmore* v. *Driscoll*, *supra*; *Napier* v. *Bulwinkle*, 5 Richardson Law (So. Car.), 324. In the Georgia case it is said: "But it is difficult, if not impossible, to see how this doctrine can be made to apply to those instances of easements, so called, where there is no possession of anything belonging to another, no encroachment upon another's right, no adverse user; in fact, nothing whatever done against which another could complain, or for which an action could be brought, and no remedy existing whereby to prevent such a presumption from arising." In the Massachusetts case the court observed: "It is difficult to see how the owner of a house can acquire by prescription a right to have it supported by the adjoining land, inasmuch as he does nothing upon and has no use of that land, which can be seen or known or interrupted or sued for by the owner thereof, and therefore no assent of the latter can be presumed to the acquirement of any right in his land by the former. The English cases are founded on analogy to the doctrine of ancient lights, which is not in force in this country." (This however was admitted to be *obiter*.) The same line of reasoning was adopted in the Pennsylvania case; and is also laid down in *Sullivan* v. *Zeiner*, 98 California, 346; 20 Lawyers' Rep. Annotated, 730;

Handlan v. *McManus*, 42 Missouri Appeals, 551; and in *Tunstall* v. *Christian*, 80 Virginia, 1; 56 Am. Rep. 581, overruling *Stevenson* v. *Wallace*, *supra*, on this point. The editor of the Lawyers' Rep. Annotated, says in a note, 20 ibid. 781: "Contrary to the English doctrine, the doctrine must be regarded as now settled in the United States in accordance with the man's case." All the cases, however, recognize the liability of one who carelessly excavates his own land to the injury of his neighbor's buildings.

It will thus be seen that the weight of American judicial authority is heavily opposed to the English rule. Judge Bennett says, in his notes on Goddard on Easements, p. 231: "It may be more than doubted whether such a proposition will be established on this side of the Atlantic." On the other hand, Mr. Washburn seems to regard the English rule as settled law. (Easements, Ch. IV.) See note, 7 Am. Dec. 63.

No. 9. — WIMBLEDON AND PUTNEY COMMONS CONSERVATORS *v.* DIXON. (The Cæsar's Camp Case.)

(C. A. 1875.)

RULE.

The owner of a tenement having in respect thereof a right of way by immemorial user is not entitled, by altering the character of his tenement, to use the way for new purposes, so as to increase the burden upon the servient tenement.

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1 Ch. D. 362–374 (s. c. 45 L. J. Ch. 353; 35 L. T. 679; 24 W. R. 466).

[362] *Right of Way. — Road for all Purposes. — Change in the Use of Dominant Tenement.*

The immemorial user of a right of way for all purposes for which a road was wanted in the then condition of the property, does not establish a right of way for all purposes in an altered condition of the property where that would impose a greater burden on the servient tenement. Where a road had been immemorially used to a farm not only for usual agricultural purposes, but in certain instances for carrying building materials to enlarge the farm-house and rebuild a cottage on the farm, and for carting away sand and gravel dug out of the farm: —

Held (affirming the decision of Jessel, M. R.), that that did not establish a right of way for carting the materials required for building a number of new houses on the land.

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Semble, the fact that the occupiers of the farm, in passing with carts from a particular point to a certain gate over a common on which no definite road was marked out, did not keep to one line, but used several tracks, did not prevent their acquiring a right of way between that point and the gate.

This was an appeal by the defendant from a decree of the MASTER OF THE ROLLS granting a perpetual injunction.

By the Wimbledon and Putney Commons Act, 1871, the fee simple of Wimbledon Common, including the roads hereinafter mentioned, became vested in the plaintiffs. Up to that time, it had been vested in Earl Spencer, as lord of the manors of Wimbledon and Battersea and Wandsworth, or one of them.

Adjoining the south side of the common was an ancient earthwork known as Cæsar's Camp, inclosing about fifteen acres. On the eastern side of Cæsar's Camp were three messuages built in or soon after the year 1867, and adjoining the south side of the common. Access to these houses was obtained from the east by a road called the New Road, which ran westwardly over the common near its southern boundary, from a public road called Workhouse Lane, and by two short roads running southwards out of the New Road to the entrance gates of the messuages, these short roads * being nearly at right angles to the New Road. [* 363] The most westerly of these two cross-roads was at the western end of the New Road, and at a distance of about sixty yards from Cæsar's Camp.

Cæsar's Camp, the sites of the above three messuages, and the farm and lands on the southerly and westerly sides of them, known as Warren Farm, Shadwell Wood, and Warren Cottage, were the property of Mr. Drax, and Cæsar's Camp formed part of the farm. Before 1867, access for horses and carriages to these lands was obtained by an old private road running from Workhouse Lane to a cottage, called Camp Cottage, adjoining the north-east corner of the most easterly of the above three messuages, and by several old tracks over the common, leading from the end of the road near Camp Cottage, to a gate which formed the eastern entrance to Cæsar's Camp. This user was admitted to have been immemorial.

In 1867 Mr. Drax let to the defendant the site of the three above-mentioned messuages. The defendant negotiated with Earl Spencer for a right of way to them. No grant of a right of way was ever made, but Earl Spencer made the New Road and the two

cross-roads at his own expense, making a complete road up to the most westerly of the cross-roads. There was some conflict of testimony as to whether the New Road was carried completely to the gate of the camp, but the result appeared to be that a finished road was made up to the cross-road, and that from that point to the gate little was done, but that something like a road existed. It appeared that up to Camp Cottage the New Road was nearly identical with the old private road mentioned above. Until the passing of the Act the defendant paid Earl Spencer £10 a year for the use of the roads.

In 1872 the defendant became tenant to Mr. Drax of part of Cæsar's Camp and some adjoining land, and made preparations for building a house within the camp. The plaintiffs thereupon gave him notice that they recognised no right of access to the camp over Wimbledon Common, except along the existing road or track to the gate of the camp for the purposes of agricultural occupation only. The defendant replied, asserting his right to use the roads for access to any houses he might build, but did not proceed any further till 1875, when he commenced building operations.

[* 364] The plaintiffs * thereupon filed their bill praying that the defendant might be restrained from drawing along the New Road leading from Workhouse Lane to the entrance to Cæsar's Camp, or any part of it, any building materials for the erection of houses or other buildings on Cæsar's Camp, or on any part of Warren Farm, and from otherwise using the New Road as a means of access to the camp and lands in excess of the user to which it was liable as a road made in substitution for the ancient tracks across the common.

It was not disputed by the plaintiffs that the occupier of Warren Farm and the other lands mentioned above had from time immemorial enjoyed the right of using the way for all ordinary agricultural purposes connected with the farm and adjoining land. Cæsar's Camp was much resorted to by visitors, who, when they wished to enter it in a carriage, used to send for the key of the gate, which was kept on the farm, the gate usually being locked. The defendant, however, claimed a right of way for all purposes, and in proof of the road having been used by the occupiers of the farm for all purposes, he adduced evidence to the following effect: That about thirty years ago, when a wing was added to the farmhouse and a new stable built, the materials were carted along the

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road through the gate into Cæsar's Camp and thence to the farm; that about the year 1855 buildings were being erected on Wimbledon Hill, and that for several weeks large quantities of sand and gravel were dug out of the ground which afterwards was the site of the above-mentioned three messuages, and carted along the road past Camp Cottage and through the gate into the camp and thence to Wimbledon Hill; and that about the year 1859 Warren Cottage was altered from a clay tenement into a brick-built cottage, and the materials carted to it by the same way; and that the road was used by persons having the right of shooting on the farm. There was also some evidence as to another cottage having been built on the farm and the materials brought along the new road.

The MASTER OF THE ROLLS granted a perpetual injunction restraining the defendant from drawing, or causing to be drawn, along the New Road leading from Workhouse Lane to or towards the entrance to Cæsar's Camp, or along any part of the said New Road, any bricks, stone, or other building materials to be used in the * erection of houses or other buildings, other [* 365] than ordinary farm buildings, upon Cæsar's Camp, or any part thereof, or upon any of the lands then or then lately forming part of the Warren Farm, and in which the defendant claimed to be entitled under his agreement with Mr. Drax, except for the ordinary farming purposes of the said camp and lands respectively; and from otherwise using the said New Road as a means of access to the said camp and lands in excess of the user to which it was liable as a road made in substitution for ancient tracks across Wimbledon Common. The defendant appealed.

Miller, Q. C., and Bush, for the appellant: —

The injury to the plaintiffs is too slight to make a case for an injunction.

[MELLISH, L. J.: — But must we not determine whether you have the right you claim?]

We have enjoyed a right of way from time immemorial, and it has been used for all purposes for which we had occasion to use it. A right of way for all purposes across a common may be established by slighter evidence than across a private field. *Cowling* v. *Higginson*, 4 M. & W. 245, 7 L. J. Ex. 265, and *Dare* v. *Heathcote*, 25 L. J. Ex. 245, shew that a user for all purposes for which the owner has required to use the land, shews a general right of way

for all purposes. The case of *United Land Company* v. *Great Eastern Railway Company*, L. R. 10 Ch. 586, 44 L. J. Ch. 685, supports our case. The quantum of inconvenience is the test: Gale on Easements, Ed. 1868, p. 330; and to the owner of a common there is no sensible inconvenience in a right of way for all purposes. The grant, therefore, which is presumed from immemorial user is to be supposed a general one. The Wimbledon Common Act (34 & 35 Vict. c. cciv.) s. 107, helps us, the words being "enjoyed and used" without saying "entitled."

[MELLISH, L. J.: — That is only a saving clause.

BRAMWELL, B.: — You wish to turn "shall not prejudicially affect" into "shall beneficially affect."]

[*366] *Chitty, Q. C., and W. R. Fisher, for the plaintiffs: — We admit a right of way for farm purposes, and that we have never disputed. The onus lies on the defendant to shew that he is entitled to anything more.

[MELLISH, L. J.: — The case you have to meet is that the road has been used for every purpose for which the owners of the dominant tenement wanted it, which PARKE, B., in *Cowling* v. *Higginson*, 4 M. & W. 245, 7 L. J. Ex. 265, appears to consider sufficient evidence of a general right of way.]

Williams v. *James*, L. R. 2 C. P. 577, 36 L. J. C. P. 256, lays down the rule applicable to the case. User is evidence only of a right to use the way for all purposes reasonably incident to the property as it stood, not to the property when artificially altered into something quite different. *Cowling* v. *Higginson* was cited in that case. In *Allan* v. *Gomme*, 11 A. & E. 759, 9 L. J. Q. B. 258, the rule seems to have been laid down somewhat too strictly as to the dominant tenement remaining exactly in the same condition, and probably PARKE, B., only meant to object to this. In that case (11 A. & E. p. 771) *Jackson* v. *Stacey*, Holt, N. P. 455 (17 R. R. 663), was cited with approbation. *Skull* v. *Glenister*, 16 C. B. (N. S.) 81, 33 L. J. C. P. 185, affirms the same rule.

[JAMES, L. J., referred to *Henning* v. *Burnet*, 8 Ex. 187, 194, 22 L. J. Ex. 79].

A reasonable amount of variation in the use of the dominant tenement is allowed, but the burden must not be substantially increased: *Bayendale* v. *McMurray*, L. R. 2 Ch. 790. In *Dare* v. *Heathcote*, 25 L. J. Ex. 245, it might well be found that changing the farm from an ordinary farm to a cattle farm was only a reasonable change of the use of the property in its existing state.

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Miller, in reply.

JAMES, L. J.: —

I am of opinion that, subject to a slight alteration in the words of the injunction, the order of the MASTER OF THE ROLLS ought to be affirmed.

* The question between the parties is whether Mr. Dixon [* 367] is entitled to convert a piece of land forming part of an estate or farm called Warren Farm, and hitherto uncultivated, into sites for several houses, and to use, for the purpose of bringing materials for their erection, and for all purposes connected with the houses when built, a right of way which the owners and occupiers of the farm have from time immemorial enjoyed over land of the plaintiffs. The right which Mr. Dixon claims under his landlord, Mr. Drax, is an unlimited right of way for all purposes over the plaintiffs' land to and from every portion of the land constituting the Warren Farm, after the whole of the farm has been laid out for building purposes and turned into a town, if he should be minded and able so to convert it. As far as we have any evidence before us, the farm in respect of which this right is claimed has been substantially in its present state from time immemorial, during which it is to be assumed that the right of way has been exercised, that is to say, there were a farmhouse, farm lands, and a piece of woodland. The only alterations of which we have any evidence in the state of the property, have been an enlargement of the farmhouse to a small extent, the change of a mud cottage into a brick cottage, and probably the erection of another cottage — whether an erection or change I am not quite sure. But those are the only changes which are alleged to have taken place in the property. Now, that those changes may be material, and may be to some extent evidence of such a general right as is claimed, it is probably difficult to deny; but whether they amount to evidence sufficient to justify the inference of fact that such a right existed, is another question. I am of opinion that the mere fact that over a common some building materials were taken for the purposes I have mentioned, is not sufficient to justify the inference of fact that the right of way belonging to the house and property was to be an unlimited right of going to and from the land for all purposes, to whatever purposes the land might be applied. The way has also been used for ordinary agricultural purposes — for sporting, which seems to me the same thing as an agricultural purpose, and for taking

gravel from a gravel pit in one of the fields. That is insufficient, as it seems to me, to enable us to draw the inference of fact that the extended right claimed by Mr. Dixon ever [* 368] existed. * The evidence practically comes to this, that the right of way has been exercised for all purposes connected with the use of the farm for residential or agricultural purposes.

We have then to consider whether the character of the property can be so changed as substantially to increase or alter the burden upon the servient tenement. I said when this case was first opened, that I was strongly of opinion that it was the settled law of this country that no such change in the character of a dominant tenement could be made as would increase the burden on the servient tenement. The *dicta* and observations, which are entitled to very great weight, of Lord ABINGER and Mr. Baron PARKE in the cases which have been referred to, inclined me at first to think that the opinion I had formed was wrong. But when we consider those remarks in connection with the very clear language of the Court of Queen's Bench in *Allan* v. *Gomme*, 11 A. & E. 759, 9 L. J. Q. B. 258, and of the Lord Chief Justice BOVILL and Mr. Justice WILLES, in the case of *Williams* v. *James*, L. R. 2 C. P. 577, 36 L. J. C. P. 256, I am satisfied that the true principle is the principle laid down in these cases, that you cannot from evidence of user of a privilege connected with the enjoyment of property in its original state, infer a right to use it, into whatsoever form or for whatever purpose that property may be changed, that is to say, if a right of way to a field be proved by evidence of user, however general, for whatever purpose, *quâ* field, the person who is the owner of that field cannot from that say, I have a right to turn that field into a manufactory, or into a town, and then use the way for the purposes of the manufactory or town so built. I therefore think that the MASTER OF THE ROLLS was right in the result at which he arrived.

But I think it right to say, as the judgment of the MASTER OF THE ROLLS has been read to us, that I am unable to agree with the view which apparently he formed, that there could be no right of way at all in respect of what are called the tracks over the common. I am not at all prepared to assent to that as a true statement of the law of this country. If from one terminus to another, say from the gate here to the end of a road 200 yards off, persons have found their way from time immemorial across a common, although sometimes going by one track and sometimes by another,

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I am not prepared to say that a right of road across the common * from one terminus to the other may not be validly [* 369] claimed, and may not be as good as a right over any formed road, but I fully concur in all that the MASTER OF THE ROLLS has said as to there being no right to use the way further than for all purposes according to the ordinary and reasonable use of the land in the state in which it formerly was. It probably, however, would be better that the words in the order, "except for the ordinary farming purposes of the said camp and lands respectively," should be altered into some such expression as "except for the purposes to which the land has been heretofore applied."

MELLISH, L. J.: —

I am of the same opinion. The question is whether Mr. Drax and his tenants are entitled to use this right of way for the purpose of turning the land into building land, for erecting new buildings upon it, and then, after the buildings are erected, for the purposes of those buildings. It is admitted in the bill, and proved in point of fact, that the right of way did exist for some purposes, and I do not, any more than the Lord Justice, agree with what was thrown out by the MASTER OF THE ROLLS as to the consequence of the track not being a perfectly definite track over the common, but being a track going in varying lines previously to the time when the new road was made. No doubt if a person has land bordering on a common, and it is proved that he went on the common at any place where his land might happen to adjoin it, sometimes in one place and sometimes in another, and then went over the common sometimes to one place and sometimes to another, it would be difficult from that to infer any right of way. But if you can find the terminus *a quo* and the terminus *ad quem*, the mere fact that the owner does not go precisely in the same track for the purpose of going from one place to the other, would not enable the owner of the servient tenement to dispute the right of road. Suppose the owner of this common had granted by deed to Mr. Dixon the right to go from the gate leading out of Cæsar's Camp to the highway by the National School with carriages and horses at his free will and pleasure, I cannot suppose that the grant would fail in point of law, because it did not point out the precise definite track between the one terminus and the * other in which he was to go in using the right of way. [* 370] If the owner of the servient tenement does not point out

the line of way, then the grantee must take the nearest way he can. If the owner of the servient tenement wishes to confine him to a particular track, he must set out a reasonable way, and then the person is not entitled to go out of the way merely because the way is rough, and there are ruts in it, and so forth. In my opinion the bill has properly admitted that the defendant has a right of way for some purposes.

Then comes the question, what is the extent of that right of way? That depends partly on a question of law and partly on a question of fact, but mainly on a question of law. When the question of law is settled there is no great difficulty in arriving at a proper conclusion in point of fact. The question of law is this: Assuming that it is made out that Mr. Drax and his tenants have used this way, not exclusively for agricultural purposes, but for all purposes for which they wanted it, in the state in which the land was at the time of the supposed grant — at the time when the way first began — and assuming that there has been no material alteration in the premises since that time, does that entitle Mr. Drax to alter substantially and increase the burden on the servient tenement by building any number of houses he pleases on this property and giving to the persons who inhabit those houses a right to use the way for all purposes connected with the houses. I certainly was under the impression, when this case was opened, that the owner of the dominant tenement could not increase or alter the burden on the servient tenement in any such way as that. Mr. Miller called our attention very pointedly to the language of Mr. Baron PARKE in *Cowling* v. *Higginson*, 4 M. & W. 245, 7 L. J. Ex. 265, which certainly raised some doubt in my mind as to what the true rule of law is. But now that the other cases have been cited, I doubt whether Baron PARKE had the question now before us present to his mind, and I am of opinion that the true rule is that laid down by Lord Chief Justice BOVILL and Mr. Justice WILLES in the case of *Williams* v. *James*, L. R. 2 C. P. 577, 36 L. J. C. P. 256, and substantially assented to by Baron PARKE himself in the case of *Henning* v. *Burnett*, 8 Ex. 187, 22 L. J. Ex. 79. In *Cowling* v. *Higginson*, 4 M. & W. 245, 256, 7 L. J. Ex. 265,

[* 371] * Lord Abinger is cautious in the way in which he lays down the rule. He says, (4 M. & W. 256): "If a way has been used for several purposes, there may be a ground for inferring that there is a right of way for all purposes; but if the evidence shows

a user for one purpose, or for particular purposes only, an inference of a general right would hardly be presumed." If he has used it only for purposes connected with the occupation of the land in its existing state, that may be considered to be a user for particular purposes, and I have a doubt whether Baron PARKE really intended the contrary, for if the facts in *Cowling* v. *Higginson* are looked at it will be found that the mines had been opened, and therefore, though they had not been worked for seventy years, it was a property with existing mines in it. The way, it is true, had not been used for those mines, but as the property was a property within which there were opened mines, it might fairly be inferred that the right extended to using the road for the purposes of the mines, the working them being a reasonable use of the land in the condition in which it was. But however that may be, in my opinion the true rule is that stated by Lord Chief Justice BOVILL, that when a right of way to a piece of land is proved, then that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which that land might be applied at the time of the supposed grant. Mr. Justice WILLES evidently agrees with that view.

That being the rule, what are the purposes for which, according to the ordinary and reasonable uses to which this land might be applied, according to its state at the time of the grant or supposed grant, this road may be used. When Warren Farm was first inclosed we do not know, but at whatever time it may have been inclosed, one cannot suppose that anybody thought of its being used for general building purposes, though no doubt the owner of the farm must always have required, first of all, the way to the Kingston Road in one direction, and then a way to Wimbledon, which lies in another direction. Is there any such evidence of user for purposes beyond what was necessary, and beyond what was reasonably required for the occupation of the land in its existing state, as that * we can find that the right ex- [* 372] tends beyond that? I agree, if we found that several houses had been built from time to time, and that the owner had carried the materials over this road, and the occupiers of the new houses had used the road, we might infer that the right of way was not to be confined to those particular houses, because that was not the original grant, but that the parties contemplated building generally at the time of the original grant, and intended

to include in it a right of way to all future houses. I will not say that there is no evidence here of such a right, but there is not sufficient evidence for us to act upon, or to lead us to say that there is a right beyond what is necessary and reasonable for the occupation of the premises as a farm. The enlargement of Warren Farm-house does not carry the right beyond a right for farming purposes. It would be a very narrow construction to say that where a small farm-house with some small buildings was erected 200 or 300 years ago the right of way to it did not include a right of carting materials to enlarge the farm buildings so as to adapt them to the present state of agriculture.

Then with regard to the changing a mud cottage into a brick cottage. That is very weak evidence, if it is evidence at all; because, if a mud cottage becomes unfit for human habitation, and is rebuilt with brick, although there is the carrying of bricks for the time, the burden is not permanently increased, for going to the brick cottage after it is once built is no greater burden than the going to the mud cottage. The other users that occurred of taking away gravel, of going there for the purposes of shooting, are users reasonably connected with the occupation of the premises, as they have been during the whole time that the right of way has existed, as far as we know. I am therefore of opinion that it is not made out that there is any right to use this road for the purpose of erecting entirely new buildings, and then, after those buildings are erected, to use the road for the purpose of those buildings. I agree, therefore, that the appeal must be dismissed.

Baggallay, J. A.: —

I am of the same opinion. It appears to me that there [* 373] are two * questions for decision in this case. First, what is the extent of the right of way which is proved by the evidence in the case, and, secondly, if a right of way is established limited to particular purposes, whether it can be extended consistently with the rules of law applicable to questions of the like kind. I think the judgment of Mr. Baron Parke in the case of *Cowling* v. *Higginson*, 4 M. & W. 256, has been interpreted so as to extend its application beyond what that learned Baron intended. It is true that in one part of the judgment he uses this expression: "If it is shown that the defendant, and those under whom he claimed, had used the way whenever they had

required it, it is strong evidence to show that they had a general right to use it for all purposes, and from which a jury might infer a general right." Those words taken by themselves point in the direction of Mr. Miller's argument; but I think those wide words are qualified by this further statement: "If the way is confined to a particular purpose, the jury ought not to extend it; but if it is proved to have been used for a variety of purposes, then they might be warranted in finding a way for all." Now let us take the case of an agricultural district where there had been a right of way to certain land exercised for agricultural purposes only, for a length of time, and then it appears that there is valuable gravel on the estate, and the gravel is raised and sold from time to time, and carried over the way previously used for agricultural purposes alone; if afterwards other mineral produce is found and raised, and the way is used for carrying that away, and then the way is used for a variety of other purposes that from time to time arise in the course of the occupation of the land, I can understand that if the case went to a jury, with user for all this variety of purposes established, the jury would or might infer that the original grant was a grant for all purposes. No such case arises here. If it is not proved by evidence — as I think it is — it is admitted that the right of way was used for agricultural purposes from time immemorial. In addition to that, two or three users are suggested as going beyond agricultural purposes, but do not appear to me to do so, such as building a new barn, adding a wing to the house, and the shooting. Then we have two slight circumstances — the replacing a mud cottage upon a portion of the *property by a more substantial building, and the [*374] taking gravel and carting it away. We have no evidence of user for any purposes beyond the purposes I have referred to. If the case came before me as a juryman to say whether I would infer a right to use the way for all purposes, I should answer "No." It is not like a general user for all purposes, such as Baron Parke contemplated. Therefore the first question must be answered that the right of way extended to the purposes for which it has hitherto been enjoyed, and no further.

Then the second question is, whether the right to use this way being limited to the particular purposes, as to which there has been actual proof, can be extended to the purposes for which the defendant desires to use it. I think he cannot do that con-

sistently with the rules of law which have been from time to time enunciated, and particularly in the case of *Williams* v. *James*, L. R. 2 C. P. 577, 36 L. J. C. P. 256, that you must neither increase the burden on the servient tenement, nor substantially change the nature of the user. Answering the questions that arise in this case in the way I have suggested, it appears to me that the judgment of the MASTER OF THE ROLLS is correct; and, subject to the modification which has been mentioned by the Lord Justice, there must be an injunction.

Bramwell, B.: —

I agree. I have nothing to add.

ENGLISH NOTES.

In *Ballard* v. *Dyson* (1808), 1 Taunt. 279, 9 R. R. 770, the defendant in replevin avowed taking a heifer damage feasant, and the plaintiff pleaded a right of way for cattle to a certain building. The evidence showed that the building had anciently been a barn, that it had afterwards been converted into a stable, and had been used by the last preceding occupier, a pork-butcher, for slaughtering his pigs. The present occupier, the plaintiff, who was a butcher, used the building for slaughtering oxen. The way was too narrow for a cart and foot-passengers to pass abreast, and a foot-passenger would be exposed to considerable danger if horned cattle were to be driven through it. The defendant admitted a way for carriages, but not for cattle. It was held that a right of way for carriages does not necessarily imply a drift way, but was evidence of such drift way to go to the jury; and the jury having found a verdict for the defendant — thus negativing the right to drive cattle through the passage — the verdict was maintained. LAWRENCE, J., said (1 Taunt. 286, 9 R. R. 774): — "The use proved here, is of a carriage way; the grant is not shown, and the extent of it can only be known from the use. If the use had been confined to a carriage way, I should have had no difficulty whatever in saying that it afforded no evidence of a way for horned cattle; for till they were driven there, no opposition could be made, nor the limitation of the right shown; but pigs have been driven that way, and stress is laid upon this circumstance. That then may be good proof of a right to drive pigs that way, but the user of the way for pigs is not proof of a right of way for oxen. The grantor might well consider what animals it was proper to admit, and what not. There is no danger from pigs, and carriages always have some one to conduct them. Cattle may do harm, and passengers cannot always get out of their way; but if the cattle are driven forward, serious injury may be done. The nature of the place, therefore, may probably have suggested a limitation of the grant."

No. 9. — Wimbledon and Putney Commons Conservators v. Dixon. — Notes.

In *Cowling* v. *Higginson* (1838), 4 M. & W. 245, 7 L. J. Ex. 265 (cited in the principal case), it was held to be a proper question to be submitted to a jury, whether a way which had been used for all purposes of the farm, with the exception that it had not in fact been used for carrying coals, was a way for all purposes, or for agricultural purposes only. The *dicta* of the judges are sufficiently referred to in the principal case.

In *Dare* v. *Heathcote* (1856), 25 L. J. Ex. 245, a right of way was pleaded for cattle and carts, and it appeared that the right had been used for cattle for more than twenty years, and had for the first time been used for carts, within that period, on the first occasion which had arisen requiring its use in that manner. It was held that the evidence was enough to go to the jury, as raising a presumption that the right had existed to the general extent claimed, though it had not been exercised for a period so long as in itself to create a prescription.

In *Wood* v. *Saunders* (1875), L. R. 10 Ch. 582, where an easement of the free passage of water and soil to a certain cesspool had been granted in express terms along with the conveyance of a house and grounds, the grantee was held not entitled to enlarge the user for the purposes of a lunatic asylum in which 150 persons were resident. With this case may be compared *The United Land Co.* v. *Great Eastern Railway Co.* (1875), L. R. 10 Ch. 587, 44 L. J. Ch. 685, 33 L. T. 292, 23 W. R. 896, where, an agreement having been made under the Special Act of a railway company to make (amongst other accommodation works) a level crossing over the railway of a certain width, it was held that the subsequent user of the level crossing was not to be restricted to such uses as were necessary in the state of the land at the time when the railway was constructed. It is there observed by Mellish, L. J.: — "Where a right of way is acquired by prescription, the right is limited by the purposes for which it has been used by the person acquiring it, but where it is obtained by grant or purchase, the extent of the right must depend upon the construction of the grant. . . . Where there is no limit, expressed or implied, to be found in the grant, the way may be used for all purposes."

In *Finch* v. *Great Western Railway Co.* (1880), 5 Ex. D. 254, 41 L. T. 731, 28 W. R. 229, an inclosure award set out a road as a carriage road and drift way from a highway to certain of the inclosed lands. The defendant company having acquired some of these lands, built a cattle pen thereon adjoining their railway, and used the road for the passage to and from the highway of cattle that were to be or had been conveyed on their railway, such user being much greater than the user at the time of the grant, which was exclusively for agricultural purposes. This was held to be a lawful user on their part, and they

were not restricted to the user which existed at the time of the grant.

A local board being authorised by a provisional order of the Local Government Board, confirmed by Act of Parliament, to take land for sewage works, gave notice to treat for land of which the plaintiff was tenant under a building agreement. The land had been agricultural land, to which the occupiers had had access by a path, called a warple way, used only for agricultural purposes, but since the building operation had been commenced, the path, which was the only mode of access to the land, and ran across land also held by the plaintiff under the building agreement, had been used for the cartage of bricks. The amount to be paid for the land and for compensation for damage was fixed by an umpire, and the plaintiff as beneficial owner assigned his interest to the board by a deed which contained a full recital of the circumstances under which the land was acquired by the board. The board used the path for the cartage of materials for the sewage works. It was held that as the plaintiff knew of the purposes of acquiring the land, the board was entitled to use the right of way for all purposes connected with the sewage works. *Serff* v. *Acton Local Board* (1886), 31 Ch. D. 679, 55 L. J. Ch. 569, 54 L. T. 379, 34 W. R. 563.

See also notes to Nos. 4 & 5 (*supra*, p. 54, *et seq.*).

AMERICAN NOTES.

This principle is generally recognized in this country as to material change, and many cases discuss the question, what constitutes a material change. *Darlington* v. *Painter*, 7 Pennsylvania State, 473; *Lawton* v. *Rivers*, 2 McCord (So. Car.), 445; 13 Am. Dec. 741; *Gentleman* v. *Soule*, 32 Illinois, 271; 83 Am. Dec. 264; *Crounse* v. *Wemple*, 29 New York, 543; *Johnson* v. *Rand*, 6 New Hampshire, 22; *Blanchard* v. *Baker*, 8 Maine, 253; 23 Am. Dec. 504; *Buddington* v. *Bradley*, 10 Connecticut, 213; 26 Am. Dec. 386; *Whittier* v. *Cocheco Manuf. Co.*, 9 New Hampshire, 454; 32 Am. Dec. 382; *Olcott* v. *Thompson*, 59 New Hampshire, 154; 47 Am. Rep. 184; *Atwater* v. *Bodfish*, 11 Gray (Mass.), 150.

The cases all recognize the doctrine that a material and injurious change may not be made, but that an immaterial change does not affect the easement.

The same principle applies to grants of easements. *Richardson* v. *Clements*, 89 Penn. St. 503; 33 Am. Rep. 784 (substitution of windmill for a water-wheel); *Onthank* v. *Lake Shore, &c. R. Co.*, 71 New York, 194; 27 Am. Rep. 35; *Evangelical, &c. Home* v. *Buffalo H. Association*, 64 New York, 561; *Carter* v. *Page*, 8 Iredell Law (No. Car.), 190. See *Allen* v. *San José L. & W. Co.*, 92 California, 138; 15 Lawyers' Rep. Annotated, 93, and notes, many of the cases cited holding that no material change may be made, even if it would be beneficial to both parties.

No 10. — EMBREY *v.* OWEN.

(EXCH. 1851.)

No 11. — MINER *v.* GILMOUR.

(P. C. 1858.)

RULE.

THE possessor of land through which a natural stream flows has a right to the advantage of the stream flowing in its natural course and to use it reasonably for his own purposes.

Embrey and Another v. Owen.

6 Exch. 353–373 (s. c. 20 L. J. Ex. 212; 15 Jur. 633).

Riparian Proprietors. — Natural Rights and Obligations. [353]

Flowing water is *publici juris* in this sense only, that all may reasonably use it who have a right of access to it, and that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only.

The right to have a stream of water flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes; but this is not an absolute and exclusive right to the flow of *all* the water, but only subject to the right of other riparian proprietors to the reasonable enjoyment of it; and consequently it is only for an unreasonable and unauthorised use of this common benefit that any action will lie.

Whether a riparian proprietor may use the water for the purpose of irrigation, if he again return it into the river, with no other diminution than that caused by the absorption and evaporation attendant on the irrigation, depends on the circumstances of each particular case.

To an action by the plaintiffs, the occupiers of a water grist mill, against the defendant, a riparian proprietor, for diverting the stream, the defendant pleaded, first, not guilty; fourthly, that at certain periods of the year, when the water was more than sufficient for the use of the mill, the defendant diverted small and reasonable quantities of the water for the purpose of irrigating certain closes belonging to her on the bank of the stream, which quantities of water except that which was absorbed and used in the irrigation, were returned into the stream above the mill; that the diversion was not continuous, but only intermittent; that the quantity of water absorbed and lost was small and "inappreciable;" and that the diversion caused no damage to the plaintiffs' mills. Replication, *de injuriâ*, and issue thereon. At the trial, it was proved that the diversion was not continuous, and that it caused no diminution of the water cognizable by the

No. 10. — Embrey v. Owen, 6 Exch. 353, 354.

senses. The Judge, in directing the jury, left it to them, with respect to the issue on not guilty, to say whether there was any sensible diminution of the water by reason of the diversion; and with respect to the other issue, he told them that he had a difficulty in affixing a legal meaning to the term "inappreciable," but suggested that it might mean a quantity so inconsiderable as to be incapable of value or price.

Held, that this was not, under all the circumstances, such an unreasonable use of the water as to be prohibited by law, and therefore that the issue on not guilty was rightly found for the defendant.

At the suggestion of the Court, who indicated the view that the word "inappreciable" meant "incapable of being estimated or valued," and that in this sense the fourth plea was not proved, the verdict was entered on this issue for the plaintiff; but this issue was, in effect, immaterial; the plaintiff's right being only to a flow of the water without sensible diminution.

Case. — The first count of the declaration stated, that the plaintiffs, before and at the time of the committing of the grievances, were lawfully possessed of certain water grist mills, and of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of a certain stream or watercourse, which had been used to run and flow, and during all that time of right ought to have run and flowed, and still of right ought to run and flow unto the said mills, for the supplying the same with water for the working thereof, save and except at such times and on such occasions when it might be reasonable and necessary to irrigate or water certain closes of the defendant, situate and being on the southern side of the said stream or [* 354] watercourse, and near * to the same, with reasonable quantities of the water thereof. Yet the defendant, intending to injure the plaintiffs, at times when it was not reasonable or necessary to irrigate or water the said closes of the defendant, to wit, on &c., and for divers, different, and other purposes than the irrigating or watering the same, wrongfully and injuriously cut, dug, made, and erected, in, upon, and near to the sides and banks of the said stream or watercourse, and at a part thereof above the said mills, divers sluices, trenches, channels, aqueducts, and cuts, and kept and continued the same for a long time, &c., and thereby unlawfully and wrongfully diverted and turned divers large quantities of the water of the said stream, &c., out of and away from the said mills, and stopped, prevented, and hindered the water of the said stream or watercourse from running or flowing along its usual course to the said mills, and from supplying the same with

the necessary water for the working thereof, as the same of right ought to have done and otherwise would have done; and by reason thereof, the water of the said stream or watercourse, sufficient for the supplying of the said mills, could not run or flow to the same; and the plaintiffs thereby, for want of such sufficient water, could not during that time use the said mills, or follow, use, or exercise their trade or business therein, in so large, extensive, and beneficial a manner as they might and otherwise would have done, &c.

The declaration contained two other counts, which it is not necessary to state.

The defendant pleaded (*inter alia*) first, not guilty; fourthly, to the first count, that one John Jones, before and at the several times when, &c., was lawfully possessed of divers, to wit, four closes, situate and being on the bank of, and next adjoining to, and extending to the middle of the said stream or watercourse, to wit, on the north side thereof, and at a part of the said stream or watercourse above the said mills and premises, and which
* said closes were and are other than the closes on the [* 355]
southern side of the said stream or watercourse in the first
count mentioned, and part of which said several closes, whereof the said J. Jones was so possessed as aforesaid, to wit, up to the middle of the said stream or watercourse, hath, from the time whereof the memory of man runneth not to the contrary, been, and at the several times when, &c., was, and still is, covered with the water of the said stream or watercourse; which said stream or watercourse, from the time whereof the memory of man is not to the contrary, hath been used and accustomed to run and flow in its usual flow, stream, and current, over part of and unto and by the said last-mentioned closes, for the watering, fertilization, and general benefit and advantage thereof; that it is at certain intermittent periods and times, during certain months of the year, to wit, January, February, and March, the said periods and times being periods and times when the waters of the said stream or watercourse are most abundant, and flow in great quantities and abundance, and are more than sufficient or necessary, and flow in greater quantity than can be used, for the due and proper working of the said mills and premises, right and proper, and fit and necessary and requisite to water and irrigate the first-mentioned closes with the water of the said stream or watercourse, for the more convenient enjoyment and occupation and substantial improvement

and cultivation of the said closes, and for rendering the same fertile and productive and conducive to the public and general weal and advantage. Wherefore the defendant, at the said several times when, &c., the same being reasonable and proper times in that behalf respectively, and during the said months of January, February, and March, and the waters of the said stream or watercourse then being most abundant and then flowing in great quantity and abundance, and being more than sufficient or necessary, and flowing in a greater quantity than could be used for the due [* 356] and * proper working of the said mills and premises, as the servant of the said J. Jones, and by his command, diverted and turned divers small quantities of the water of the said stream or watercourse, the same being reasonable and fit and proper quantities in that behalf, and not more than was necessary and convenient for the purpose of irrigating and watering the first-mentioned closes from and out of the said stream or watercourse, and then caused the same to flow in, over, and upon the first-mentioned closes, and which quantities of water, save and except such small portions and quantities thereof as were necessarily absorbed and used by and in the passing over the said closes, in and by course of the irrigating and watering thereof, as aforesaid, then fell, passed, flowed, and returned into and unto the said stream or watercourse, at divers parts and places above the mills and premises, and before the said stream or watercourse reached and arrived at the same mills and premises, and for the purposes aforesaid, the defendant, at the said several times when, &c., as the servant of the said J. Jones, and by his command, cut, dug, made, and erected in, upon, and near to the sides and banks of the said stream or watercourse, at a part of the said stream or watercourse above the said mills and premises of the plaintiffs, a certain sluice, trench, channel, or aqueduct, and kept and continued the same, and caused the same to be kept and continued, in, upon, and near to the said sides and banks of the said stream or watercourse, and thereby diverted and turned the said small quantities of the water off the said stream or watercourse in manner as in this plea aforesaid, as she lawfully might for the cause aforesaid, *quæ sunt eadem*, &c. — Averment, that the diversion and abstraction aforesaid was not nor is a continuous diversion, but only takes place at intermittent periods, and in manner in this plea aforesaid; and that the quantities of water so absorbed and used as aforesaid, and stopped,

prevented, and hindered from running and flowing * to the [* 357] said mills and premises, were and are very small and inappreciable quantities, and not more or greater than were and are necessary for the purposes in this plea aforesaid, and that the same were and are not required, and had at no time theretofore been appropriated by the plaintiffs for the purpose of working the said mills and premises, or any other purposes; and that the diverting, turning away, and abstracting, and stopping, hindering, and preventing the same from flowing to the said mills and premises did not at any time cause any damage, hinderance, or impediment to the due, proper, and necessary working and using of the said mills and premises. — Verification.

The seventh and tenth pleas were similar to the fourth, being respectively pleaded to the second and third counts of the declaration.

The plaintiffs joined issue on the first plea, and to the fourth, seventh, and tenth replied *de injuriâ*. Issue thereon.

At the trial, before TALFOURD, J., at the last Summer Assizes for Montgomeryshire, it appeared that the plaintiffs were occupiers of a water grist mill situate on the banks of the river "Rhiew," a mountain stream, in the parish of Berriew, in that county. The defendant Mrs. Owen was the owner of land on both sides of that river above the mill; and this action was brought against her for diverting part of the water of the river, for the purpose of irrigating certain meadows on the northern bank, which were in the occupation of her tenant John Jones. The water was diverted by means of an iron trough or aqueduct placed near a waste weir, from whence the surplus or waste water was carried into the trough or aqueduct, and by it over the river into the main and floating gutters of the meadows, when required for irrigation; at other times such surplus water was discharged from the trough or aqueduct direct into the bed of the river by means of an * iron flap or sluice in the middle side of the trough, so [* 358] constructed as to be opened for the latter purpose at pleasure. A portion of the water was lost by absorption and evaporation in the process of irrigation; the working of the plaintiffs' mill, however, was not in the least impeded; and the quantity thus lost was differently calculated by scientific witnesses on both sides, a witness for the plaintiffs estimating it at four or five per cent., and a witness for the defendant at only one-seventh per cent., even

in summer. All the witnesses concurred that there was no sensible diminution of the stream by reason of the diversion, that is to say, none cognizable by the senses, and that the amount of loss was ascertainable only by inference from scientific experiments on the absorption and evaporation of water poured out on the soil.

The learned Judge, with reference to the first issue, left to the jury the question, whether there was any sensible diminution of the natural flow of the water by means of the diversion; and with reference to the other issues above mentioned, he left it to them to say, in the terms of the pleas, whether the quantities of water absorbed and evaporated in the process of the defendant's irrigation were small and inappreciable quantities; intimating, however, that he felt great difficulty in fixing a legal meaning on this latter term, but suggesting that it might mean "so inconsiderable as to be incapable of price or value." Both the questions left to the jury having been answered by them in favour of the defendant, the former in the negative and the latter in the affirmative, the learned Judge directed that the verdict should be entered on the above issues for the defendant, reserving leave to the plaintiffs to move to enter it for them, with nominal damages.

Welsby, in last Michaelmas Term, obtained a rule *nisi* accordingly, and also to enter judgment for the plaintiffs, *non obstante veredicto*, on the fourth, seventh, and tenth issues.

[* 359] * Bramwell and E. Beavan showed cause at the sittings after Hilary Term (Feb. 11). — First, the defendant had a right to take the water for the purpose of irrigation, no sensible diminution in the stream being thereby caused. Rivers flow for the benefit of all persons through whose lands they pass, and not for the benefit of those persons only whose lands lie at the mouth of the stream. The plaintiff's claim of a right to all the water would go far to realise the dogma, "La proprieté c'est le vol." Every riparian proprietor is entitled to use the stream for all natural and normal purposes, domestic and agricultural, provided he does not interfere with the rights of other riparian proprietors. For instance, he may, either by himself, his family, or his cattle, drink the water; he may bathe in it, use it in his habitation, and for watering his garden. The law is thus stated in Starkie on Evidence, tit. Watercourse, Vol. 3, p. 1249, 3rd edit. "The water of a running stream is *publici juris*, which each successive proprietor has a right to use in passing, but which is the property

of no one; but if one of such owners appropriates the water by applying it to a particular purpose, he has a right to do so, provided he does not thereby prejudice any other owner in his previous use and appropriation of the water to other purposes." In Com. Dig. "Action upon the case for a nuisance" (C), it is said, that no action will lie "if a man use water in his own land out of a watercourse running through his land to the pond of B., whereby B.'s pond is not so full, if he do not divert the watercourse. — Per St. John, at Suffolk Ass. 1657, between *Smart* and *Stisted*." *Mason* v. *Hill*, 3 B. & Ad. 304, is also an authority that every riparian proprietor has an equal right to use the water which flows in the stream. [PARKE, B. — It has not yet been decided in this country that a riparian proprietor has a right to take the water for the purpose of irrigating his land. In America, a far more liberal use of * water is allowed; Angell on [*360] Watercourses, page 23. Assuming, therefore, that every proprietor has a right to use the stream for certain purposes, domestic and agricultural, is irrigation one of them? The point was raised in *Wood* v. *Waud*, 3 Exch. 748 (No. 13 *post*.), but it became unnecessary to decide it.] If the water may be used for some agricultural purposes, why not for others when the injury is inappreciable? In *Wood* v. *Waud*, the act of the defendant alone was one which might have occasioned actual damage. [ALDERSON, B. — There was a case of *Dakin* v. *Cornish* (Not reported), tried before me, at Leeds, 1845, where water was taken from the river Ayr to work a steam-engine: there was an artificial channel from the river to a reservoir in the yard of a mill; the water was there mixed with other water obtained from the earth; the whole was then used for the steam engine, and what remained was transferred into another tube and carried back to the river. The question was, whether that was an injury to some other mills lower down on the stream. I left it to the jury to say, whether the same quantity of water continued to run in the river, as if none of its water had entered the premises of the defendant; telling them, that if they were of that opinion, they should find a verdict for the defendant.] The law of America is thus stated in *Blanchard* v. *Baker*, 8 Greenl. (American Rep.) 253: — "The proprietor of the watercourse has a right to avail himself of its momentum as a power which may be turned to beneficial purposes. And he may make a reasonable use of the

water itself for domestic purposes, for watering cattle, or even for irrigation; provided it is not unreasonably detained or essentially diminished." The same law prevails in Scotland. In Hutcheson's Justice of the Peace, bk. 4, c. 2 vol. 2, p. 391, it is said, "But if the same person be proprietor of the grounds on both sides [* 361] of the river, he can * change its channel as he pleases, provided he restores it to its old channel before it leaves the ground. The superior proprietor cannot take away any part of the water, so as to make the run less when it enters the ground of the inferior proprietor. However, as much water may be taken from a river by a pipe as can be used by the family and cattle: but not so much as to supply a distillery." The law is stated in similar terms in M'Callem's "Lawyer." And in the case of *The Magistrates of Linlithgow* v. *Elphinstone*, 3 Kames' Decisions, p. 331, which was an action for diverting from the lakes of Fanyside water, which descended naturally to the river Aven, Lord Kames says: "At advising this cause, much darkness was occasioned by a notion which some of the Judges unwarily adopted, as if a river could be appropriated like a field or a horse. A river, which is in perpetual motion, is not naturally susceptible of appropriation; and were it susceptible, it would be greatly against the public interest that it should be suffered to be brought under private property. In general, by the laws of all polished nations, appropriation is authorised with respect to every subject that is best enjoyed separately; but barred with respect to every subject that is best enjoyed in common. Water is scattered over the face of the earth in rivers, lakes, &c., for the use of animals and vegetables. Water drawn from a river into vessels or into ponds becomes private property; but to admit of such property with respect to the river itself, considered as a complex body, would be inconsistent with the public interest, by putting it in the power of one man to lay waste a whole country." Then, after explaining how the same reasoning concludes equally against the subjecting a river to servitude, Lord Kames proceeds: "Laying then aside arguments from property or servitude, the principles that govern this case are as follow. A river may be con- [* 362] sidered as the common * property of the whole nation; but the law declares against separate property of the whole or part. 'Et quidem naturali jure communia sunt hæc, aer, aqua profluens, et mare.' — 1 Instit. de Rerum Divisione. A river is a

subject composed of a trunk and branches. No individual can appropriate a river, or any branch of it; but every individual of the nation, those especially who have land adjoining, are entitled to use the water for their private purposes."

Secondly. It is found as a fact, that the quantity of water diverted was "inappreciable;" and therefore the defendant is entitled to retain the verdict on the general issue. "Not guilty" puts in issue the taking of an injurious quantity of water. The maxim "de minimis non curat lex" applies. A person who keeps a large fire burning a mile distant from the house of another, in some degree destroys the oxygen; but that is clearly not an injury for which an action would lie. [MARTIN, B., referred to the note to *Mellor* v. *Spateman*, 1 Wms. Saund. 346 a.] The only authority which militates against the view contended for, is a case mentioned in Starkie on Evidence, Vol. 3, p. 1250, n. (*y*), as tried "before WOOD, B., at Carlisle, where the water, having been used for the purpose of irrigation, was afterwards returned into the ordinary channel; the learned Judge nonsuited the plaintiff; but as it appeared that by so doing a portion was lost in consequence of absorption and irrigation, the Court of King's Bench, as I am informed, afterwards set aside the nonsuit." There, however, it does not appear what quantity of water was taken, nor on what ground the judgment of the Court proceeded. — They also referred to Gale on Easements, pp. 132, 133, 333, 335.

Welsby, Foulkes, and Wynn, in support of the rule. — That branch of the rule which seeks to enter the verdict * for the plaintiffs on not guilty, and that which seeks to [* 363] enter judgment for them notwithstanding the verdict on the other issues, both depend on the general question, which, although not hitherto expressly determined, must, since the case of *Mason* v. *Hill*, be considered as decided in principle. The right to flowing water, like the right to light or air, is *publici juris*, so that every riparian proprietor has a right to have the stream flow on in its full, natural, and unimpeded current, subject only to those small and uninjurious exceptions which the common law has introduced, viz. — that every person, whether riparian proprietor or not, may take from it, as it flows, water for domestic purposes, or by the mouths of his cattle, — purposes which in no degree disturb or change the natural course of the stream, or prejudicially alter its character. No other exception is engrafted

by the law of England on the general right, and it is not easy to apply to that law any modification of the right, which America with its large rivers, may have conveniently adopted. It follows, that every disturbance of this right, by any other than the excepted means, — that is, every act by which the water is diverted out of its natural course, or by which, while flowing in its natural course, it is fouled or heated, or its quality is otherwise deteriorated, — even though by such act no pecuniary damage is sustained, — is the subject of an action, on the ground that a continued disturbance of the right by such means would establish an easement, and so create an adverse right: *Ashby* v. *White*, 2 Ld. Raym. 938, *Williams* v. *Mostyn*, 4 M. & W. 145. And if, by diversion of the water for the purpose of irrigation or otherwise, some be abstracted, or by user of the water in its natural course its character is prejudiced, although the quantity abstracted be ever so small, or the prejudice to its character be ever so minute, the right of action still subsists, because there is an injury [*364] to the *right; and it is no element in the case whether the amount abstracted be sensible and appreciable, or not; *Bower* v. *Hill*, 1 Bing. N. C. 549; 1 Smith, L. C., 131; 2 Wms. Saund. 114 b; *Moore* v. *Browne*, Dyer, 319 b, p. 17; Vin. Abr. tit. "Watercourse," (C) 3; *Weller* v. *Baker*, 2 Wils. 414; *Marzetti* v. *Williams*, 1 B. & Ad. 415. If this defendant were allowed to take an inappreciable quantity of water for the purpose of irrigation, fifty other persons might do the same, and thus an appreciable, nay, a considerable, quantity would be taken, by which actual pecuniary damage might be done, and yet for which no one would be liable; and in time an adverse right would be established by all those parties. The law is thus stated by Bracton, lib. 4, fol. 221: — "Eodem modo imponitur [servitus] quandoque a jure, et nec ab homini nec ab usu, scilicet ne quis faciat in proprio per quod damnum vel nocumentum eveniat vicino. Nocumentum enim poterit esse justum, et poterit esse injuriosum. Injuriosum, ubi quis fecerit aliquid in suo injuste, contra legem vel contra constitutionem, prohibitus a jure. Si autem prohiberi a jure non possit ne faciat, licet nocumentum faciat et damnosum, tamen non erit injuriosum; licitum est enim unicuique facere in suo quod damnum injuriosum non eveniet vicino; ut si quis in fundo proprio construat aliquod molendinum, et sectam suam et aliorum vicinorum substrahat vicino, facit

vicino damnum et non injuriam: cum a lege vel a constitutione prohibitus non sit ne molendinum habeat vel construat. Item a jure imponitur servitus prædio vicinorum, scilicet ne quis stagnum suum altius tollat per quod tenementum vicini submergatur. Item ne faciat fossam in suo per quam aquam vicini divertat, vel per quod ad alveum suum pristinum reverti non possit in toto vel in parte. Item ne quid faciat in suo, quo minus vicinus suus omnino uti possit servitute impositâ vel concessâ, vel quo minus *commode utatur, loco, tempore, [*365] numero vel genere, qualitate vel quantitate. Et non refert utrum hoc omnino fecerit vel quod tantundem valeat." In Gale on Easements, p. 137, it is said: "The right principle to be collected from the authorities appears to be, that continued beneficial enjoyment of a running stream is evidence of the right to have the stream run on in its accustomed course; and that no one can interfere with such accustomed course, unless justified by an easement to do so." *Wood* v. *Waud* is, in effect, an authority which disposes of the present case; for there the defendant had fouled the water of the natural stream, but that pollution had done no actual damage to the plaintiff; and the defendant had also abstracted an insensible quantity of water from another watercourse. The American authorities do not conflict with the view now contended for. Mr. Justice STORY, in his elaborate judgment in the case of *Tyler* v. *Wilkinson*, 4 Mason's U. S. Rep. 400, says: "*Primâ facie*, every proprietor upon each bank of a river is entitled to the land covered with water in front of his bank, to the middle thread of the stream, or, as it is commonly expressed, *usque ad filum aquæ*. In virtue of this ownership, he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself, but a simple use of it while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial whether the party be a proprietor above or below in the course of the river, the right being common to all the proprietors on the river; no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above." Again, in *Blanchard* v. *Miller*, 8 Greenl. (American Rep.) 268, the Court say, "A mill privilege not yet occupied is valuable

[*366] for the * purposes to which it may be applied. It is a property which no one can have a legal right to impair or destroy, by diverting from it the natural flow of the stream, upon which its value depends, although it may be impaired by the exercise of certain lawful rights, originating in prior occupancy. If an unlawful diversion is suffered for twenty years, it ripens into a right which cannot be controverted. If the party injured cannot be allowed, in the meantime, to vindicate his right by action, it would depend upon the will of others, whether he should be permitted or not to enjoy that species of property." The case cited from Lord Kames's decisions is entirely to the same effect. Whether a person could maintain an action before he has applied the water of the stream to some profitable purpose has, indeed, been doubted. That point is adverted to by Lord Denman, C. J., in delivering the judgment of the Court in *Mason* v. *Hill*, 5 B. & Ad. 1, where, after commenting on the cases of *Palmer* v. *Keblethwaite*, 1 Show. 64; Skin. 65, nom. *Palms* v. *Heblethwait*; and *Glynne* v. *Nichols*, 2 Show. 507; Comb. 43, nom. *Glyn* v. *Nichols*, he observes that "it must not therefore be considered as clear that an occupier of land may not recover for the loss of the general benefit of the water, without a special use or special damage shown." But the authorities clearly establish this principle, that, wherever there is an injury to a right, which, if acquiesced in, would in the course of time create an adverse right in the wrongdoer, there an action is maintainable without proof of any specific injury: *Hobson* v. *Todd*, 4 T. R. 71 (2 R. R. 335); *Pindar* v. *Wadsworth*, 2 East, 154 (6 R. R. 412).

But, at all events, the plaintiffs are entitled to the verdict on the special pleas. The term "inappreciable" does not mean "incapable of being estimated or valued," but it means "not measur-
[*367] able;" and the evidence showed that * the quantity of water taken was measurable; the pleas therefore were not proved. *Cur. adv. vult.*

The judgment of the Court was now delivered by

Parke, B. (after stating the pleadings and facts). — We are not prepared to say that the learned Judge at *Nisi Prius* was correct in his interpretation of the word "inappreciable" when connected with the word "quantity," nor sure that he was not; for the word "inappreciable" or "unappreciable" is one of a new coinage, not to

be found in Johnson's Dictionary or Richardson's. The word "appreciate" first appears in our dictionaries in the last edition of Johnson, by Todd, 1827, with the explanation "to estimate," "to value;" and assuming that to be the true meaning, which we suppose it is, the compound adjective signifies that the quantities were not capable of being estimated or valued, and in that sense the fourth plea was not proved. It is, however, a matter of little importance; for assuming that the word was wrongly explained, the only consequence would be, that a question would arise, whether the fourth issue and the others involving the same terms ought not to have been found for the plaintiffs, a question we need not decide; for if the issue on not guilty remains as it now is found for the defendant, as we think it ought to be, there should be no new trial, if the defendant consents, as she probably will, that the fourth and other corresponding issues should be found for the plaintiffs. This course was adopted in *Stead* v. *Anderson*, 4 C. B. 836.

The important question is that which arises on the plea of not guilty, the jury having found that no sensible diminution of the natural flow of the stream to the plaintiff's * mill [* 368] was caused by the abstraction of the water. That the working of the mill was not in the least impeded was clear on the evidence. On that finding we think the verdict was properly ordered to be entered for the defendant.

It was very ably argued before us by the learned counsel for the plaintiffs, that the plaintiffs had a right to the full flow of the water in its natural course and abundance, as an incident to their property in the land through which it flowed; and that any abstraction of the water, however inconsiderable, by another riparian proprietor, and though productive of no actual damage, would be actionable, because it was an injury to a right, and, if continued, would be the foundation of a claim of adverse right in that proprietor.

We by no means dispute the truth of this proposition, with respect to every description of right. Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage; *injuria sine damno* is actionable, as was laid down in the case of *Ashby* v. *White*, 2 Ld. Raym. 938, by Lord Holt, and in many subsequent cases, which are all referred to, and the truth

of the proposition powerfully enforced, in a very able judgment of the late Mr. Justice STORY in *Webb* v. *The Portland Manufacturing Company*, 3 Sumn. Rep. 189. But in applying this admitted rule to the case of rights to running water, and the analogous cases of rights to air and light, it must be considered what the nature of those rights is, and what is a violation of them.

The law as to flowing water is now put on its right footing by a series of cases, beginning with that of *Wright* v. *Howard*, 1 Sim. & S. 190 (24 R. R. 169), followed by *Mason* v. *Hill*, 3 B. & Ad. 304; 5 B. & Ad. 1, and ending with that of *Wood* v. *Waud*, 3 Exch. 748, and is fully settled in the * American courts: see 3 Kent's Comm., Lect. 52, pp. 439–445.

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The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only: see 5 B. & Ad. 24. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it.

This right to the benefit and advantage of the water flowing past his land, is not an absolute and exclusive right to the flow of all the water in its natural state; if it were, the argument of the learned counsel, that every abstraction of it would give a cause of action, would be irrefragable; but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence.

It is only therefore for an unreasonable and unauthorised use of this common benefit that an action will lie; for such an use it will; even, as the case above cited from the American Reports shows, though there may be no actual damage to the plaintiff. In the part of Kent's Commentaries to which we have referred, the law on this subject is most perspicuously stated, and it will be of advantage to cite it at length: — "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the

water which flows in the stream adjacent to his lands, as it was wont to run, (*currere solebat*), without diminution or alteration. No proprietor has a right to use * the water to the [* 370] prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere* is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant, or an uninterrupted enjoyment of twenty-years, which is evidence of it. This is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application. The owner must so use and apply the water as to work no material injury or annoyance to his neighbour below him, who has an equal right to the subsequent use of the same water; nor can he, by dams or any obstruction, cause the water injuriously to overflow the grounds and springs of his neighbour above him. Streams of water are intended for the use and comfort of man; and it would be unreasonable and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex*, and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of the party by or over whose land a stream passes, is, that he should use the water in a reasonable manner, * and so as not to destroy, or render useless, or materially [* 371] diminish or affect the application of the water by the proprietors above or below on the stream. He must not shut the gates of his dams and detain the water unreasonably, or let it off in

unusual quantities, to the annoyance of his neighbour. Pothier lays down the rule very strictly, that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below. But this rule must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned, otherwise rivers and streams of water would become utterly useless, either for manufacturing or agricultural purposes. The just and equitable principle is given in the Roman law: — 'Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat.'"

In America, as may be inferred from this extract, and as is stated in the judgment of the Court of Exchequer in *Wood* v. *Waud*, a very liberal use of the stream for the purposes of irrigation and for carrying on manufactures is permitted. So in France, where every one may use it "en bon père de famille, et pour son plus grand avantage:" Code Civil, art. 640, note a, by Pailliet.[1] He may make trenches to conduct the water to irrigate his land, if he returns it with no other loss than that which irrigation caused. In the above cited case of *Wood* v. *Waud*, it was observed, that in England it is not clear that an user to that extent would be permitted; nor do we mean to lay down that it would in every case be deemed a lawful enjoyment of the water, if it was again returned into the river with no other diminution than that which [* 372] was caused * by the absorption and evaporation attendant on the irrigation of the lands of the adjoining proprietor. This must depend upon the circumstances of each case. On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil, abutting on one part of the stream, could be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose; on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream, in order to water his garden, or allow his family or his cattle to drink it. It is entirely a question of degree, and it is very difficult, indeed impossible, to

[1] See his Manuel de Droit Français. Paris, 1838.

define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not; and in this we think, that as the irrigation took place, not continuously, but only at intermittent periods, when the river was full, and no damage was done thereby to the working of the mill, and the diminution of the water was not perceptible to the eye, it was such a reasonable use of the water as not to be prohibited by law. If so, it was no infringement of the plaintiff's right at all; it was only the exercise of an equal right which the defendant had to the usufruct of the stream.

We are therefore of opinion that there has been no injury in fact or law in this case, and consequently that the verdict for the defendant ought not to be disturbed.

The same law will be found to be applicable to the corresponding rights to air and light. These also are bestowed by Providence for the common benefit of man; and so * long [* 373] as the reasonable use by one man of this common property does not do actual and perceptible damage to the right of another to the similar use of it, no action will lie. A man cannot occupy a dwelling and consume fuel in it for domestic purposes, without its in some degree impairing the natural purity of the air; he cannot erect a building, or plant a tree, near the house of another, without in some degree diminishing the quantity of light he enjoys: but such small interruptions give no right of action; for they are necessary incidents to the common enjoyment by all.

Rule discharged, the defendant consenting that the verdict on the fourth, seventh, and tenth issues be entered for the plaintiffs.

Miner v. Gilmour.[1]

12 Moore P.C. 131–157. (S. C. 7 W. R. 328.)

Riparian Proprietors. — Natural Rights and Obligations.

Rights of a riparian proprietor to use of water defined flowing past his [131] land explained and defined.

[1] Present at the hearing on the 18th and 19th of June, 1858: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. The Lord Justice Knight Bruce, and the Right Hon. The Lord Justice Turner.

Present at the re-argument on the 2nd of December, 1858: The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

No. 11. — Miner v. Gilmour, 12 Moore P. C. 131, 132.

Every riparian proprietor has a right to the reasonable use of the water flowing past his land, namely, for his domestic purposes and for his cattle, and this, without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. He has, also, the right to the use of the water for any other purpose, provided he does not thereby interfere with the rights of other proprietors, either above or below him.

Subject to this condition, a riparian proprietor may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury.

Where a party purchased a piece of land with the right to use the water of a river in Lower Canada, subject to a preference in favour of a mill thereafter to be built, and which preference was to be exercised in a particular mode, such purchaser is not bound by its exercise in a different mode, and in favour of a different mill.

The purchase of the right to the use of a portion of the water of a river cannot prevent a subsequent purchaser from the same vendor of another portion, from diverting the water by virtue of a right which existed prior to the first purchase.

There is no difference between the law of Lower Canada and the English law upon these points.

This was an appeal from the judgment of the Court of [*132] Queen's Bench of Lower Canada, which reversed *a judgment of the Superior Court of Lower Canada, so far as regarded the rights of the appellant and respondent to the use of the water in the Yamaska, otherwise Granby River, flowing by their respective lands on the banks of that river.

The appellant was the owner of a plot of ground situate on the south bank of the Yamaska, and at the south end of a dam across the river he had erected a tannery. The respondent was the owner of a plot of ground on the north side of that river, opposite the appellant's land; he was also owner of a piece of land on the same side lower down the river, on which was erected a grist-mill worked by water power afforded by the river. A dam had been erected across the river from the land of the appellant to the land of the respondent, and in this dam there was a flume for the purpose of conveying the water held back by the dam to the appellant's tannery. In the northern half of this dam there was a sluice, or gate, by opening which the water was drawn away from the dam, and from the appellant's tannery, and was sent down the channel of the river. The respondent claimed the right to open the gate on the north side, over which he had control, and

by which means the water was diverted from the appellant's tannery. In consequence of the scarcity of water during periods of dry weather, and the respondent keeping the sluice in his part of the dam open, to allow the water to flow down to his mill at the lower dam, the rest of the water at the upper dam was insufficient for the use of the appellant's tannery. The appellant, deeming this injurious to his rights, commenced an action against the respondent in the Superior Court of Lower Canada.

The declaration set out the appellant's *title under a con- [*133]
veyance, dated the 13th of July, 1835, from one Horner, and alleged that the respondent afterwards became entitled to the upper dam, except the portion thereof sold to the appellant; and that the respondent, intending to prevent the appellant from using and enjoying the water privilege so sold to him, and to deprive him of his just rights, wrongfully and illegally caused to be raised and kept open the gate in that portion of the dam which had belonged to, and been in possession and under the control of, the respondent; through which gate, so raised and kept open by the respondent, the water of the river collected above the dam, flowed and ran to waste, and had continually and constantly so run to waste during the period of ten years; that the appellant was thereby deprived of the use of the water for the purpose of propelling and moving the wheels and machinery of the tannery; and his privilege had been during the same period, and then was, by the illegal and wrongful acts of the respondent, rendered almost useless, and entirely so during dry seasons. That the respondent, by raising and opening the gate and drawing off the water, had, from time to time, caused a great quantity and weight of ice and other heavy bodies in the river to settle and rest down upon the dam, thereby breaking the supporters and timbers of the dam, and causing it to settle down and move from its position, and to crack and become leaky and insufficient to retain the water, so as to enable the appellant to use the same for the purpose of moving and working his wheels and machinery in and about the tannery; and that in consequence of the wrongful and illegal acts of the respondent, the bark-mill and other machinery in his *tannery had been idle for a great part [*134]
of the time for several years then past, to the great damage of the appellant; that the respondent had suffered to run to waste through the gate a much larger quantity of water than

would be sufficient for the driving of a grist-mill or the carrying on of its operations. That by law the appellant, being the proprietor of land on the bank of the river, and of the water privilege and premises mentioned in the deed of sale to him, had a right to use the water of the river for manufacturing and other purposes while the same flowed adjacent to and over his lands and premises, but that he had been, and was, prevented from so doing by the acts of the respondent. The declaration also complained of an injury to the appellant's water-power, by reason of the respondent having raised the level of the water at the lower dam.

The respondent, by his plea, claimed title through a conveyance, dated the 15th of March, 1831, from Horner to one Douglas, and of another conveyance dated the 21st of July, 1835, from Horner to Louis Guerout, to the portion of the upper and lower dam, and the grist-mill on the latter, described in and conveyed by those deeds; and alleged, that the respondent and his *auteurs* had for more than thirty years been in possession and occupation as proprietors of the grist-mill; that the upper dam was, in fact, in existence and in use for the mill at and before the deed of sale from Horner to the appellant; that the appellant's purchase was with full knowledge on the part of Horner and of the appellant, of the right of the respondent and his *auteurs* to the use and maintenance of the dam for the purposes of the mill; and that the pretended rights of the appellant so subsequently

[*135] *acquired could not interfere with, affect, or diminish the rights of the respondent and of his *auteurs* to the mill and mill-dam; that it was true that the respondent opened the gate in the dam, from time to time, as necessary for the supply of water for his grist-mill, and had a right so to do; that the gate had in fact been made, and was in existence and used openly by all the *auteurs* of the respondent for more than twenty years previous to the purchase by the appellant from Horner of the emplacement in the appellant's declaration described, and previous to the erection of the dam, as well as by Horner, the *auteur* of the appellant, and others from whom Horner derived title. That the appellant purchased the emplacement with the full knowledge of the existence of such gate, and that the water of the river retained by the dam flowed through the gate for the use of the mill, then owned by the respondent; and that by law the appellant had no right to complain of the respondent in raising

the gate, from time to time, for the use and working of the mill. That, inasmuch as at certain seasons of the year and for several months of the summer, during dry seasons, there was a great scarcity of water in the river, the respondent had always been willing and disposed so to use the water as to prevent the waste thereof, and had not at any time wasted the same, but that the respondent was entitled to open the gate so as to permit the water of the river to flow through the dam, and the appellant had no right to complain of the acts of the respondent. That without such gate, and the free use of it for the working of his mill, the respondent would for several months in each year be prevented from using his mill for want of water, as, from the
* situation of the land above the upper dam, the water of [* 136]
the river would not so accumulate at the dam as readily to overflow the dam and thereby reach respondent's mill, but would be spread over an immense flat, pond, and swamp, extending for some miles above the dam.

The appellant replied, that the respondent could only claim the right of drawing the water from the gate and dam through a flume; whereas, he had never constructed or had any flume connected with the upper dam, through which to convey the water to his grist-mill below, but had always, since he possessed the gate, drawn off the water through the gate into the open river and caused the same to run to waste, and had injured and damnified the appellant as complained of in the declaration.

Witnesses were examined on behalf of the appellant and respondent respectively, from whose evidence it appeared, that the upper dam was built after the sale by Horner to Douglas of the grist-mill, and about a year before the transfer of it to Guerout, and that for many years the water had been allowed to flow through the gate in the upper dam to drive the grist-mill. From the evidence of Horner, it appeared that he built the dam for supplying water-power to the tannery of the appellant, and to a saw-mill, then intended to be built above a bridge, and that the dam was not intended for supplying water to mills below the bridge; that the gate in the dam was built with the intention of having a flume connected with it to convey the water to the saw-mill intended to be built below the dam; but that no such mill had ever been built. That about 192½ yards below this dam there was another dam, which crossed the river, and a

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[*137] *bridge lay between the dams, which were called the upper dam and the lower dam. Adjoining the lower dam was situated the grist-mill of the respondent, which was worked by water-power, derived from the river by means of the lower dam and a flume connected therewith. It further appeared from the evidence, that on the 15th of March, 1831, Horner conveyed this mill to Douglas, subject to the keeping and upholding in repair one-third of the mill dam, for the use of the mill. By Douglas the mill was conveyed to Guerout on the 17th of November, 1835, and by Guerout it was conveyed to the respondent on the 5th of March, 1850. Besides being the owner of the mill, the respondent, on the 5th of March, 1850, became the owner also of the plot of ground, formerly of Horner, on the north side of the river, opposite to the appellant's tannery, extending to the mid-stream of the river there, and including the northern moiety of the upper dam. The title to this plot, as appeared from the documentary evidence, was as follows: — On the 21st of July, 1835, Horner conveyed it to Guerout, with the dam thereon erected and water privilege thereunto belonging, also with the right of drawing or carrying water in a flume across the tract thereby lastly reserved and mentioned, with the right and privilege of flowing such parts and parcels of certain lots in the conveyance specified, and of any other tracts of land then covered with water, flowing back from the said dam, but subject to the support and maintenance of the dam along with the appellant. It appeared that on the 2nd of June, 1837, this conveyance was confirmed by a conveyance made to Guerout, by the Sheriff of the District of Montreal, under a writ of execution against [*138] Guerout; and ultimately, *on the 5th of March, 1850, the plot was conveyed by Guerout to the respondent by the same instrument by which the mill was conveyed to him as above mentioned. It also appeared that the mill was in existence in 1831, and some time previous; that in 1831, when sold by Horner to Douglas, it had two runs of stones, which had by the respondent been increased to four runs of stones. Horner, in his evidence, further stated that he built the lower dam, and Douglas, in his evidence, stated that he had no water right above the bridge. No objection appeared to have been raised to the erection of the upper dam.

The Superior Court, on the 22nd of May, 1855, gave judgment,

holding that the appellant had established by evidence the material allegations of his declaration, so far as the same related to the right of the appellant to the use of the water of the river to be taken through the flume in the south end of the upper dam for the use of his tannery and all things thereunto belonging; and to the respondent having caused to be raised and opened the gate in the upper dam lying north of the flume of the plaintiff, whereby the appellant was deprived of the use of the water of the river collected above the upper dam for his tannery; and the Court declared, that the respondent had not at any time any right by law to raise or open the gate in the upper dam and draw the water of the river through the gate, so as to deprive the appellant of the use thereof for his tannery, and ordered, that the respondent should thereafter cease from drawing the waters of the river through the gate, and from depriving the appellant of the use thereof.

The respondent appealed from this judgment to the Court of Queen's Bench of Lower Canada.

*The Court of Queen's Bench, consisting of Sir H. [*139] L. Lafontaine, Chief Justice, and the Puisne Judges, Aylwin, Duval, and Carow, on the 12th of January, 1857, reversed the judgment of the Lower Court and dismissed the action, on the following grounds: — That Horner, by his act of the 15th of March, 1831, having sold to Douglas two lots of land in the village of Granby, and the grist-mill then erected in the river Granby, with all its dependencies, there was comprised in the sale the privilege of the flow of water for the use of the mill; that subsequently Horner, having by an act of the 13th of July, 1835, sold to the appellant a little piece of land situate at the south end of the dam then erected by the vendor across the river, at some distance above the grist-mill, with the right to employ the water through a channel then made in the southern end of the dam, sufficient for the use of a tannery; but, nevertheless, by a stipulation expressed in the act of the 13th of July, 1835, the privilege thus ceded was subordinate to the vendor using the water for a grist-mill, which was to have the preference, that is to say, the use of the water retained by the dam in preference to that which the appellant obtained permission to employ for his tannery; that the preference could be applied to any grist-mill whatever that Horner could acquire, even already constructed within the limits

of the water-flow which was the subject of the stipulation, as also to any new grist-mill which he might construct within the same limits; that, in consequence, the stipulation might be applied to the grist-mill which Horner had sold to Douglas, in case Horner should become anew the proprietor of it; that in virtue of the act of sale of the 21st of July, 1835, from Horner to
[* 140] Guerout, * the latter stood in the place of his vendor in relation to the appellant as regarded the act of the 13th of the same month, and that by another act of the 17th of September, 1835, Guerout had acquired of Douglas the grist-mill which the latter had acquired of Horner, and in consequence the stipulation of preference in the act of the 13th of July, 1835, ought to be applied to the mill from the moment that it had been acquired by Guerout; that the respondent stood, by the deed of the 5th of March, 1850, in the place of Guerout with his rights as above expressed, and that, in consequence, he was justified, whilst the state of the water rendered it necessary, in taking advantage of the stipulation of preference which Horner had inserted in the act of sale to the appellant of the 13th of July, 1835; that it was not established by the evidence in the cause that the respondent had abused his right to use the water retained by the dam, though the volume of water necessary for the tannery of the appellant had sometimes been diminished in a manner prejudicial to its business.

The appeal was from this judgment.

The case was twice argued by the same counsel: First on the 18th and 19th of June, 1858, and afterwards, by direction of their Lordships, on the 2nd of December, 1858.

Mr. Wilde, Q. C., and Mr. Unthank, for the appellant; and Mr. Manisty, Q. C., and Mr. Ayrton, for the respondent.

[* 141] The argument of the appellant was, that the * respondent and his *auteurs* never gained a right to the lower dam, so as to prevent him using the water flowing to his tannery, and that the respondent having control over the upper dam, had improperly kept the gate open and prevented the flow of the water; as the right to the use of the dam was, as between the appellant and respondent, regulated by conveyances dated the 13th of July, 1835, and the 21st of July, 1835, mentioned in the judgment appealed from.

On the part of the respondent it was contended, that Horner,

under whom both the appellant and respondent claimed, conveyed to the respondent his mill, with the requisite use of the water for the same, before the conveyance was made to the appellant of any right to the use of the water for his tannery. That the appellant's conveyance was made expressly subject to the right of water for a mill, which right had become vested in the respondent, and that the acts complained of were done in due exercise of such a right. That the respondent's mill was erected prior to the appellant's tannery, and the water had been used by the respondent in the manner complained of for a period of time sufficient to confer a right thereto.

The authorities referred to as bearing upon the question of the respective right of the parties to the use of the water of the river Granby were: By the law of Lower Canada, Douet's Princ. of the Law of Lower Canada, art. 186, pp. 189, 265; Pandects of Jus., Lib. 43, tit. 13, art. 1; Pothier, Tome 17, p. 520 (edit. Paris, 1823).

The following English authorities were also referred
* to: *Embrey* v. *Owen*, 6 Ex. 353 (p. 179, *ante*); *Liggins* v. [* 142]
Inge, 7 Bing. 682; *Wood* v. *Waud*, 3 Ex. 748 (No. 13, p. 226, *post*); *Greatrex* v. *Hayward*, 8 Ex. 291; *Bealey* v. *Shaw*, 6 East. 208, (8 R. R. 466); *Mason* v. *Hill*, 3 B. & Ad. 304; *Wright* v. *Howard*, 1 Sim. & Stu. 190, (24 R. R. 169), Gale "On Easements," pp. 132–37; Woolwych "On Waters," pp. 263–267. And, by the American Law, 3 Kent's Comm., p. 544; *Tyler* v. *Wilkinson*, 4 Mason's U. S. Rep. 400.

The consideration of the judgment was postponed, and was now delivered by

Lord KINGSDOWN.

In this case, Miner, the appellant, is the owner of a piece of land on the south side of the river Yamaska, upon which land a tannery has been constructed. The respondent is the owner of a piece of land on the north side of the river immediately opposite to the land of the appellant; and he is also the owner of a piece of land on the same or north side of the river lower down the stream, on which a grist-mill stands, which is worked by means of the water-power afforded by the river. Across the river, from the land of the appellant to the land of the respondent, a dam has been erected, and in this dam there is what is termed a flume, or conduit, for the purpose of conveying the water held back by the

dam to the appellant's tannery. In the northern half of this dam there is a sluice or gate, by opening which the water is drawn away from the dam, and from the appellant's tannery, and is sent down the channel of the river. The appellant insists, that the respondent, having the control over this gate, has improperly opened it, and kept it open, and has thereby
[* 143] * wrongfully withdrawn the water from the tannery, to the great injury of the appellant.

The Court before which the case came in the first instance decided that the respondent had no right so to open the gate to the injury of the appellant, and made a declaration to that effect, followed by an order restraining the respondent from the like acts in future.

From this decision an appeal was brought to the Court of Queen's Bench of Lower Canada, which reversed the order complained of, and dismissed the appellant's action. From this last decision the case has been brought by appeal to Her Majesty in Council.

The titles of the parties appear to stand thus: —

In the year, 1831, Horner was the owner of all the lands now in question, whether belonging to the appellant or respondent. Previously to that year the grist-mill, now belonging to the respondent, had been erected, with a dam of a certain height, across the stream, by means of which the water was employed to work the mill.

On the 15th of March, 1831, Horner sold and conveyed to Douglas, amongst other things, this grist-mill, with what is termed in this conveyance the " water-privilege " on the lot on which it stood, and the machinery and yard thereunto belonging or in any wise appertaining, and all his estate and interest therein.

In 1834, Horner erected the dam which is the subject of the present dispute, and which is higher up the stream than the dam of the grist-mill; and on the 13th of July, 1835, he conveyed to Miner the lot of land now belonging to him, which is described in the conveyance as a lot of land situate at the south
[* 144] * end of the dam erected across the river, together with the right and privilege of water to be taken through the flume now erected on the south end of the said dam sufficient to supply a tannery and all things thereunto belonging.

It seems that at this time, Horner contemplated the erection of

a grist-mill on the opposite side of the river, on the land there now belonging to the respondent, and that mill was to be worked by means of the water collected at the dam, which was also to serve the tannery, and that he intended that the grist-mill so to be erected should have a preference with respect to the supply of water over the tannery, and accordingly the conveyance to Miner, after referring to such intention, provides that the taking of water for the use of the tannery shall in no case ever interfere with, or impede, the working of the grist-mill so intended to be erected, and that the grist-mill shall at all times have the preference of water to carry on its works and all things thereunto belonging. The deed then provides that Miner shall at all times keep a tight flume, and shall support and keep in repair so much of the said dam as shall be found south of the said flume.

On the 21st of July, 1835, Horner sold to Louis Guerout the piece of land on the north side of the river, with the right of drawing water from the dam by means of a flume across certain lands belonging to Horner, but not included in the conveyance to Guerout; and Guerout bound himself to maintain and keep in repair so much of the dam as Miner, by his deed, was not bound to support.

It is material to consider, what at this time were * the [* 145] several rights of Douglas, of Miner, and of Guerout, all claiming under Horner, on the assumption that Horner had a right, before the execution of any of these deeds, to deal with the water of the river as he pleased. Having sold and conveyed to Douglas, in the first instance, the mill and the right to the use of the stream for the purpose of working it, he could not afterwards derogate from that grant by a subsequent conveyance to other persons interfering with it. No diversion or interruption of the stream could be made by Horner which would prejudicially affect the mill in the state in which it was sold by him to Douglas, nor could he convey to others the right of doing what he could not do himself.

On the other hand, as between Miner and Guerout, each was bound to maintain his share of the dam; each was entitled to the use of the water, the one for a grist-mill, the other for a tannery; but the right of the tannery to the use of the water was to be subject to a preferential right on the part of the owner of the grist-mill.

Douglas was an entire stranger to the conveyances made to Miner and Guerout; he could claim nothing under them, he could suffer nothing from them; he had a clear right to insist that neither the use of the water for the new grist-mill, nor the use of the water for the tannery, should interfere with the regular supply of the water for his mill in its then state, which had been granted before either Miner or Guerout had any title to their several estates. The obligations of Miner and Guerout to each other, and to Horner, as to maintaining the dam, in no degree
[* 146] affected the right of Douglas to insist that, * whether kept in repair or not, it should not be so used as to damage his mill.

Such being the rights of the parties, on the 17th of November, 1835, Douglas sold and conveyed his property in the grist-mill to Guerout, and this conveyance seems to have been confirmed by a subsequent deed of the 2nd of June, 1837, the particulars of which are not important to the present purpose.

Guerout then stood in the position of Douglas, and, as claiming under him, he had a right to insist that the upper dam should not be so used as to injure the fair working of the old mill.

Miner could not possibly acquire a better right for his tannery, by reason of Guerout being the purchaser of Douglas' mill, than he would have had if any stranger had purchased it. On the other hand, Guerout, by being the owner of the upper dam, or of that portion of it in which the gate was placed, could not acquire any greater right to have it opened and kept open, than he would have had if it had belonged to a stranger; he had a greater facility of opening it, because it was under his own control, but his right was not altered. As owner of Douglas' mill, he had a right to remove any obstruction to the flow of the water for the fair use of his mill. As the owner of the gate, he had the means, by opening it, of removing that obstruction without violence, or the necessity of applying to any third person.

Again, as claiming under Horner, Guerout was bound to keep his side of the dam in repair, and not to permit the water to leak or to run to waste, so as to prejudice the appellant's tannery.
[* 147] * On the 5th of March, 1850, all the rights of Guerout in the lands in question were transferred to Gilmour, the respondent. No grist-mill was ever erected by Guerout, or by Gilmour, on the plot of land conveyed to Guerout by Horner in

1835, nor was any flume constructed for the purpose of drawing away the water from the dam erected above that plot. But it appears that two pair of stones were added to the grist-mill on the lower part of the stream, which had become the property of Guerout, in the manner already described.

Both the tannery and the grist-mill continued to be used by their respective owners, without any dispute which led to litigation, until the institution of the suit out of which the present appeal arises. During all this period, it is alleged by the respondent that he had been in the constant habit of opening the gate in the upper dam, whenever it was requisite to do so, for the purpose of working the grist-mill. In the month of September, 1853, the action in this case was commenced by the appellant, Miner, against the respondent; and it will be desirable to examine, with some minuteness, the pleadings in the action, and the judgments, in order to see what questions, and what questions alone, are open to consideration by their Lordships on the present appeal.

The appellant, in his declaration, after stating the conveyance to him by Horner, and the establishment of his tannery, and that the respondent had become the owner of the opposite plot of land, and that no grist-mill had ever been erected on the plot, alleges, that the defendant has, "nevertheless, illegally, unjustly, and maliciously, during several years last past, to wit, for a period of ten years, opened, and caused * to be kept open, a cer- [* 148] tain gate, which was, and is, in that portion of the said dam lying north of the said flume which has been, and now is, in the possession and under the control of the defendant, through which gate so raised and kept open by the said defendant as aforesaid, the water of the said river, collected above the said dam, flows and runs to waste, and has continually so run to waste during the aforesaid period of ten years; and that the plaintiff has been, and is thereby, deprived of the use of the said water, for the purpose of propelling and moving the wheels and machinery of the said tannery, and his said privilege has been during the said period, and now is, by the said illegal and wrongful acts of the said defendant, rendered almost useless, and entirely so during every dry season." He then alleges that the dam itself is injured and broken by the ice brought down upon it in winter by means of the water being so drawn off, and proceeds: — "That the

said respondent has wrongfully and illegally, during the period of ten years, drawn off, and caused and suffered to run to waste, as aforesaid, through the said gate, as well as through the leaks, cracks, and openings caused by the defendant, as aforesaid, in the said dam, a much larger quantity of water than would be sufficient for the driving of a grist-mill or the carrying on its operations. That by law, the plaintiff, being the proprietor, as aforesaid, of lands on the banks of the river, and of the water privileges and premises mentioned in the said deed of sale, hath a right to use the water of the said river for manufacturing and other purposes while the same flows adjacent to and over [* 149] his said lands and premises, but that he has * been, during the ten years aforesaid, and is, prevented from so doing by the aforesaid wrongful and unjust acts of the defendant." He then alleges that he has sustained damage by these acts to the extent of £225 currency, and prays that he may be paid the amount of these damages, and that it may be declared that the defendant has no right to raise or open the said gate in the said dam, above-mentioned, and to draw the water through the said gate, and to deprive the plaintiff of the use thereof, and that the defendant may be ordered to desist from drawing water through the said gate, and from depriving the plaintiff of the use thereof. He made another complaint against the defendant, of his having raised the lower dam to the prejudice of the plaintiff, but this matter was decided in favour of the defendant, and is not the subject of appeal.

In February, 1854, the respondent filed his plea or answer to this declaration, and thereby, after stating his title under the deeds already mentioned, he alleges — "That the defendant and his *auteurs* have, for more than thirty years past, had in possession and occupation, as proprietors, the grist-mill and premises in the plaintiff's declaration referred to, which mill is situated at a distance of thirty-seven perches below the dam in the plaintiff's declaration referred to;" and he annexed a diagram showing the situation of the two dams. That the dam at the defendant's mill was built about thirty-nine years since for the use of the mill and other works therewith connected and adjoining thereto, and has been constantly ever since kept and maintained by the defendant and his *auteurs* in possession of the mill and premises [* 150] * therewith connected, and says it was in existence when the plaintiff's tannery was erected.

With respect to the upper dam, he says, " That he has always hitherto done and performed all such acts, and made such repairs, and such only, as were necessary for the maintenance of the dam, and which the defendant was bound to perform and do under his said title; that the defendant hath never contested nor interfered with plaintiff in the exercise of his rights under the title, nor with his, the plaintiff's, right of taking or using the water at the dams for the use of the plaintiff's tannery and other works; nor hath he at any time injured the said dam, or done any other matter or thing whereby damage could be or was incurred by the dam or plaintiff's works;" and he further says, " That true it is, that said defendant opened a certain gate in said dam from time to time as was necessary for the supply of water for his said grist-mill, and had and hath a right so to do; that the said gate had, in fact, been made, and was in existence, and used openly by all the said *auteurs* of the said defendant, for many years, to wit, for more than twenty years, previous to the purchase by the plaintiff from said John Horner, of the emplacement in plaintiff's declaration described, and previous to the erection of the said dam, as well by the said Horner, the *auteur* of the plaintiff, as others from whom the said Horner derived title. That the plaintiff purchased the said emplacement with the full knowledge of the existence of said gate, and that the waters of the river retained by the said dam flowed and must flow through the said gate for the use of the said mill, now owned by the said defendant, *and that thereby, and by law, the plaintiff [*151] hath no right to complain of the defendant in raising the said gate from time to time, and at all times, necessary for the use and working of his said mill; that inasmuch as at certain seasons of the year, and for several months of the summer, during dry seasons, there is a great scarcity of water in said river, the defendant hath always been willing and disposed so to use the said water as to prevent the waste thereof, and hath not at any time wasted the same, but the said defendant was, by reason of the premises and his said titles, and is now, entitled to open the said gate as to permit the water of the river to flow through the said dam, and the plaintiff hath no right to complain of such acts of the defendant, nor can he obtain the conclusions of his said declaration in reference to said gate. That without such gate, and the free use of it to the defendant, for the working of his said

mill, he, the defendant, would for several months in each year be prevented from using his said mill for want of water, inasmuch as, from the peculiarity and situation of the land above said upper dam, the waters of said river would not so accumulate at said dam as readily to overflow the said dam, and thereby reach the defendant's mill, but would be spread over an immense flat and pond and swamp, extending for some miles above said dam, of all which the plaintiff was, and has been, well aware."

The defendant, therefore, did not deny his liability to keep his part of the upper dam in repair, but he alleged that he had done so. He did not insist on any right to waste the water, or to take more than was necessary for his mill, but he denied that he had done so. He rested his right to open the gate, not [* 152] * exclusively (if at all) on the preferential right to water reserved to a grist-mill in the conveyances by Horner to the appellant Guerout, but on the general law, and the fact that his mill had been built and was in use, with the necessary flow of water, long before the appellant had any right or interest in the matter.

To this plea the appellant, on the 10th of February, 1854, filed a replication, in which he insisted that the respondent could make no defence under the conveyance from Horner to Guerout. He denied that the respondent had kept his part of the upper dam in proper repair, or that the respondent and his *auteurs* had been accustomed to open the gate for the purposes of the grist-mill; but he did not allege that any alteration had been made in the grist-mill, or that by reason thereof, or for any other reason, the defendant, as owner of the grist-mill, had lost or prejudiced any right to whatever use of the water could originally have been claimed in its favour.

The cause being at issue, a great many witnesses were examined, and documents produced on each side; and on the 22nd of May, 1855, the Superior Court, in which the action was brought, pronounced its judgment, by which it declared, in effect, that the plaintiff (the present appellant) had established the material allegations of his declaration, so far as the same relate to the right of him, the plaintiff, to the use of the water Yamaska to be taken through the flume on the south end of the upper dam, in the said declaration described, for the use of his tannery, and all things thereunto belonging, in the manner by the plaintiff in his

declaration set forth; and to the defendant (the present respondent) having caused to * be raised and opened, and [* 153] kept open, the gate in the upper dam lying north of the flume of the plaintiff, whereby the plaintiff was and is deprived of the use of the water of the river collected above the upper dam for the tannery, and the whole as set forth in the declaration; and it is, therefore, adjudged and declared that the defendant hath not, nor had he at any time, right, by law, to raise or open the gate in the upper dam, and to draw the water of the river through the gate, so as to deprive the plaintiff of the use thereof for his tannery and all things thereunto belonging; and it is ordered that the defendant shall hereafter cease and desist from drawing the waters of the river through the gate, and from depriving the plaintiff of the use thereof. The Court then decides that the plaintiff is not entitled to any damages, inasmuch as the rights of the parties had not been theretofore ascertained and settled by judicial decision.

The Court, therefore, determined that the defendant had no right for any purpose to open the gate in the dam so as to withdraw the water from the plaintiff's tannery; but it must have held that as to any wrongful or malicious exercise of the right, if the right existed, any excessive use of the water, or waste of it by leakage of the dam occasioned by the defendant, or by reason of other wrongful acts of his, no case had been made out: otherwise, of course, the plaintiff would have been entitled to damages.

From this part of the decision there was no appeal; but the defendant appealed to the Court of Queen's Bench from so much of the judgment as established the right of the plaintiff to prevent the gate from being opened by the defendant.

* On hearing this appeal, the Court, confining itself to [* 154] the question of right, which alone was before it, reversed the decision of the Court below, and dismissed the plaintiff's suit. The Court appears to have founded its opinion on the effect of the conveyances by Horner to Miner and Guerout, and to have held, that the preference of the right to water reserved out of the grant to Miner, might be exercised by Horner, or the respondent claiming under him, in favour either of any grist-mill which might be built, or of any such mill which, being already built, might come into the hands of the same proprietor, with the plot of land sold to Guerout.

No. 11. — Miner v. Gilmour, 12 Moore P. C. 154, 155.

There appears to their Lordships to be considerable difficulty in maintaining this decision upon the grounds on which it has been rested below. It is very true that the conveyance to Guerout does not confine the right to draw the water from the upper dam to any particular grist-mill thereafter to be built, and it may be, and probably is, quite true, that the injury to the appellant's tannery would be as great if the water were drawn away from it by means of the flume contemplated by the deed to Guerout, as it is by the withdrawal of it by means of the gate which is actually opened; indeed some of the respondent's witnesses state that the injury would be greater. But it appears to their Lordships, that the appellant having purchased the right to use the water, subject only to a preference in favour of a mill thereafter to be built, and which preference is to be exercised in a particular mode, cannot be bound by its exercise in a different mode and in favour of a different mill.

[*155] The question, therefore, must depend on the general *rules of law as applied to the facts appearing in the case. The titles of the respective parties have already been stated, and the question being one merely of right, the evidence is material only as it bears upon that question.

The evidence appears to their Lordships to show, on the one hand, that the tannery may be, and in fact often is, deprived of the water necessary for its supply by the opening of the gate in the dam, as practised by the defendant (the respondent); and, on the other hand, that unless the gate be so opened, the respondent's mill must suffer great inconvenience, and cannot, in dry weather, be worked at all, and, indeed, must be stopped for several months in the year.

With respect to the usage which has prevailed, it appears to their Lordships, that the result rather shows that this gate has always been kept open whenever the use of the grist-mill required it, and that though no such usage has been proved as to constitute in itself a prescriptive right in favour of the mill, there is abundantly sufficient to show that there never has been any acquiescence, by the owner of the grist-mill, in any obstruction created by the upper dam, nor any compromise or abandonment of his right to the use of the water, whatever that right may originally have been.

It being necessary, therefore, that the tannery should suffer if

the gate be opened, and that the mill should suffer if the gate be closed, the question for determination is, whether the appellant, the plaintiff in the action, has established a right to have the gate kept closed, and has proved that the respondent (the defendant) is a wrong-doer in opening it. The *onus* is upon him.

The law upon the subject, which is the French law prevailing in Lower Canada, was examined and dis- [* 156] cussed by the counsel at the bar, in the course of the two arguments which their Lordships found it expedient to require, with great learning and ingenuity. It did not appear that, for the purposes of this case, any material distinction exists between the French and the English law.

By the general law applicable to running steams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But, he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury.

Now, it being established by the evidence, that the closing of this dam does inflict a most serious injury upon the respondent, upon what grounds can the appellant insist that he has a right to close it?

He cannot say that the use of the water by the respondent for his mill is not a lawful use; for such rights as he has, were acquired from the person under whom the respondent claims, and with knowledge of the previous grant made to the respondent.

It is not necessary to discuss any doubtful principles of law, or to inquire whether, under other circum- [* 157] stances, the appellant could or could not insist, as against him, that the use of the water by the respondent for his mill is not a lawful use; it is sufficient here to say, that the case must be

dealt with as if it arose between Horner and Douglas, before the sales to either Miner or Guerout. Could Horner, having sold the mill with the use of the water to Douglas, have afterwards insisted on a right to intercept the regular flow of the water to the prejudice of that mill? Their Lordships are of opinion that he could not. The questions as to the stones added to the mill, and the injury done to the upper dam, and the neglect on the part of the respondent to keep it in repair, are removed from consideration for the reasons already assigned. The sole question is, whether the appellant, the plaintiff in the action, has, in this suit, established a right to obstruct the flow of the water to the prejudice of the respondent; if he has not such right, the respondent was justified in removing the obstruction, doing no unnecessary injury to the appellant. Their Lordships think that the appellant has failed to establish his right to maintain such obstruction, and that his suit has, therefore, properly been dismissed. They must advise Her Majesty to affirm the judgment complained of; but in consequence of the great difficulty of the case, and of the affirmance proceeding upon different grounds from those on which the judgment appealed from was pronounced, they will recommend that the affirmance should be without costs.

ENGLISH NOTES.

Three kinds of riparian rights exist in natural streams, viz.: —

1. The right to have the water flow in its usual and accustomed manner, and in its ordinary course. Therefore, where the defendant had erected a dam by which the water was diverted from its usual course, though it was returned to its accustomed course before reaching the plaintiff's mill — the effect of the diversion being occasionally to delay the plaintiff in working his mill on account of the detention of water — it was held that the plaintiff had a good cause of action. *Shears* v. *Wood* (1834), 7 Moore, 345, 1 L. J. C. P. 3.

In *Bickett* v. *Morris* (1866), L. R., 1 Sc. App. 47, 14 L. T. 835, the appellant and respondent were owners of property on the opposite banks of a stream. The respondent consented to the appellant building to a certain distance on the bed of the stream; but the appellant began to build contrary to the terms of the agreement. The respondent thereupon sought the aid of the Court to restrain the appellant from building on the bed of the river beyond the agreed line. It was decided that a riparian owner is not entitled to erect a building or make any changes in the *alveus* of a stream without the consent of the opposite

proprietor. For, although the opposite proprietor may be unable to prove any actual damage, yet, if the encroachment is of a substantial description, the alteration must always involve some risk of injury.

But the defendant is not bound to remove an obstruction erected by a stranger without his permission, provided he gives the plaintiff an opportunity of removing it. *Saxby* v. *Manchester and Sheffield Railway Co.* (1869), L. R., 4 C. P. 198, 38 L. J. C. P. 153, 19 L. T. 640, 17 W. R. 293.

2. Right to make a reasonable use of the water of the stream. What is a reasonable use depends on the particular circumstances of each case, as the principal cases show. In the *Medway Navigation Co.* v. *Earl of Romney* (1861), 9 C. B. (N. S.) 575, 30 L. J. C. P. 236, 7 Jur. (N. S.), 346, 9 W. R. 482, the decision of the Court was put on the ground that the use of the water of a stream to supply a lunatic asylum and a gaol was more extensive than that for which a riparian proprietor as such could insist upon appropriating the stream as it passed by his land. So in *Swindon Waterworks Co.* v. *Wilts and Berks Canal Co.* (1874), L. R., 9 Ch. 451; 43 L. J. Ch. 393; 30 L. T. 443; 22 W. R. 444, it was held that the defendants who were incorporated as a water company, but whose only right in the waters of a stream was that of riparian proprietors, were not entitled to use and divert the water for the use of the considerable and growing town of Swindon. This decision was substantially affirmed by the House of Lords. *Swindon Waterworks Co.* v. *Wilts and Berks Canal Co.* (1875), L. R., 7 H. L. 697; 45 L. J. Ch. 638; 33 L. T. 513; 24 W. R. 284.

In the *Earl of Sandwich* v. *Great Northern Railway Co.* (1880), 49 L. J. Ch. 225, Bacon, V. C., held that the defendant company who were riparian owners were entitled to take water to supply their engines, and for the general purposes of their railway station.

Whether a riparian owner may use the water of a stream to irrigate his land, depends upon the quantity of water he requires and the injury he inflicts upon other riparian owners. The principal cases; *Wood* v. *Waud* (No. 13, *infra*); *Sampson* v. *Hoddinott* (1857), 1 C. B. (N. S.) 603, 26 L. J. C. P. 148, 3 Jur. (N. S.), 243.

Use of the waters of a stream for manufacturing purposes is justifiable where the quantity and purity of the water is not altered to a sensible degree to the prejudice of other riparian owners. In *Ormerod* v. *Todmorden Joint Stock Mill Co.* (C. A. 1883), 11 Q. B. D. 155, 168; 52 L. J. Q. B. 445, 450; 31 W. R. 759. Brett, M. R., said: "It is suggested that the plaintiffs are entitled to recover, even though the defendants are riparian owners, because the use of the water of this river for manufacturing purposes is an extraordinary use of the water within the definition given by Lord Kingsdown in *Miner* v. *Gilmour*, and

therefore that it does not signify whether the use of the water was reasonable or not, because the defendant would in such a case be bound so to use the water as to send it on to another riparian owner sensibly diminished in either quantity or quality. If I were clear that the use of the water by the defendants was an extraordinary use within the principle laid down by Lord KINGSDOWN, I might be able to deal with the case on that footing; but the argument for the defendant strikes me as forcible, and I agree that it is impossible to negative the proposition that a use which may at one time have been extraordinary, may by changes in the conditions of things become ordinary, and that a use of water which might be extraordinary in an agricultural district may not be extraordinary in a manufacturing district; and I am not prepared to hold that in such a district, where the use of water for the purpose of drinking or of irrigation has become obsolete, the use of water for manufacturing purposes may not be an ordinary use."

3. Right to the purity of the water. See Rule, p. 226, *infra*.

Riparian owners along the banks of a navigable and tidal river have the same rights as the owners along the banks of a private stream, subject, however, to the public rights of navigation. *Lyon* v. *Fishmonger's Company* (1876), 1 App. Cas. 662, 46 L. J. Ch. 68, 35 L. T. 569, 25 W. R. 165.

The statement of the general law by Lord KINGSDOWN in the principal case of *Miner* v. *Gilmour*, at p. 213, *ante* (12 Moore P. C. 156) is cited in the judgment of the Judicial Committee in *Commissioners of French Hoek* v. *Hugo* (1885), 10 App. Cas. 336, 54 L. J. P. C. 17, 54 L. T. 92, 34 W. R. 18, a case which also bears out the proposition that the easement to water running in an artificial channel may be acquired by prescription, if the original diversion was presumably for an object of a permanent nature.

AMERICAN NOTES.

This doctrine is almost universally accepted in this country. It is well expressed in *Johnson* v. *Jordan*, 2 Metcalf (Mass.), 234; 37 Am. Dec. 85, by Chief Justice SHAW, as follows: "Every person through whose lands a natural watercourse runs has a right, *publici juris*, to the benefit of it, as it passes through his land, to all the useful purposes to which it may be applied; and no proprietor of land on the same watercourse, either above or below, has a right unreasonably to divert it from flowing into his premises, or obstruct it in passing from them, or to corrupt or destroy it. It is inseparably annexed to the soil, not as an easement, nor as an appurtenance, but as parcel." See *Brown* v. *Bowen*, 30 New York, 519; 86 Am. Dec. 406; *Evans* v. *Merriweather*, 3 Scammon (Illinois), 492; 38 Am. Dec. 106; *Gardner* v. *Trustees*, 2 Johnson Chancery (New York), 162; *Campbell* v. *Smith*, 3 Halsted (New Jersey), 140; 14 Am. Dec. 400; *Pugh* v. *Wheeler*, 2 Devereux & Battle Law (No. Car.), 50;

Davis v. *Fuller*, 12 Vermont, 178; 36 Am. Dec. 334; *Hendricks* v. *Johnson*, 6 Porter (Alabama), 472; *Wadsworth* v. *Tillotson*, 15 Connecticut, 366; 39 Am. Dec. 391; *McCoy* v. *Danley*, 20 Penn. St. 85; 57 Am. Dec. 680; *Blanchard* v. *Baker*, 8 Maine, 253; 23 Am. Dec. 504; *M'Cord* v. *High*, 24 Iowa, 342; *Webb* v. *Portland Manuf. Co.*, 3 Sumner (U. S. Circ. Ct.), 189; *Holsman* v. *Boiling Spring Co.*, 1 McCarter (New Jersey), 335.

The principal cases are much cited by Washburn on Easements, and by Gould on Waters, and there is nowhere any dissent from their principles (except as hereinafter set forth), but a great deal of discussion is had upon the question what constitutes a reasonable use. More recent examinations of the subject may be found in *Dumont* v. *Kellogg*, 29 Michigan, 420; 18 Am. Rep. 102; *Gerrish* v. *Clough*, 48 New Hampshire, 9; 2 Am. Rep. 165; *Tuthill* v. *Scott*, 43 Vermont, 525; 5 Am. Rep. 301; *Macomber* v. *Godfrey*, 108 Massachusetts, 219; 11 Am. Rep. 349; *Pool* v. *Lewis*, 41 Georgia, 162; 5 Am. Rep. 526; *Clinton* v. *Myers*, 46 New York, 511; 7 Am. Rep. 373; *Lee* v. *Pembroke Iron Co.*, 57 Maine, 481; 2 Am. Rep. 59; *Garwood* v. *N. Y., &c. R. Co.*, 83 New York, 400; 38 Am. Rep. 452; *Shaw* v. *Oswego Iron Co.*, 10 Oregon, 371; 45 Am. Rep. 146; *Lord* v. *Meadville Water Co.*, 135 Penn. St. 122; 20 Am. St. Rep. 864; *Lembeck* v. *Nye*, 47 Ohio State, 336; 21 Am. St. Rep. 828 (Lake); *Garwood v. New York, &c. R. Co.*, 83 New York, 400; 38 Am. Rep. 452; *Barnard* v. *Sherley*, 135 Indiana, 547; 41 Am. St. Rep. 454; *Ulbricht* v. *Eufaula W. Co.*, 86 Alabama, 587; 4 Lawyers' Rep. Annotated, 572.

These adjudications forbid the deprivation, deterioration, and unreasonable detention of such waters, by individuals, by corporations, and by municipalities, and prohibit every use thereof that may be injurious to any riparian proprietor.

The upper proprietor may consume all the water for domestic uses, for necessary, but not for manufacturing purposes. *Clark* v. *Penn. R. Co.*, 145 Penn. St. 438; 27 Am. St. Rep. 710.

The owner of a mill-dam on an unnavigable stream, who does not own the bed of the stream above the dam, may not unnecessarily draw down the pond and thus destroy the ice formed thereon, to the injury of the riparian owner. *Stevens* v. *Kelley*, 78 Maine, 445; 57 Am. Rep. 813.

It is commonly held, however, that the common-law doctrine of riparian rights is inapplicable to the physical condition of the Pacific States, and the right to such waters in those States is determined by prior appropriation. The ground of this departure is thus stated in *Coffin* v. *Left-Hand Ditch Co.*, 6 Colorado, 443: "It is contended by counsel for appellants that the common-law principles of riparian proprietorship prevailed in Colorado until 1876, and that the doctrine of priority of right to water by priority of appropriation thereof was first recognized and adopted in the Constitution. But we think the latter doctrine has existed from the date of the earliest appropriations of water within the boundaries of the State. The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive. Except in a few favored sections, artificial irrigation, for agriculture, is an absolute necessity. Water in the various streams thus acquires a value unknown in moister climates. Instead of being a mere incident to the soil, it arises, when appropri-

ated, to the dignity of a distinct usufructuary estate or right of property. It has always been the policy of the national as well as the territorial and State governments to encourage the diversion and use of water in this country for agriculture and vast expenditures of time and money have been made in reclaiming and fertilizing, by irrigation, portions of our unproductive territory. . . . The right to water in this country, by priority of appropriation thereof, we think it is, and has always been, the duty of the national and State governments to protect. The right itself, and the obligation to protect it, existed prior to legislation on the subject of irrigation. It is entitled to protection, as well after patent, to a third party, of the land over which the natural stream flows, as when such land is a part of the public domain, and it is immaterial whether or not it be mentioned in the patent, and expressly excluded from the grant."

In *Reno Smelting Works* v. *Stevenson*, 20 Nevada, 269; 19 Am. St. Rep. 364; 4 Lawyers' Rep. Annotated, 60, it was said: "From these authorities we assume that the applicability of the common-law rule to the physical characteristics of the State should be considered. Its inapplicability to the Pacific States, as shown in *Atchison* v. *Peterson*, 20 Wall. 510, applies forcibly to the State of Nevada. Here the soil is arid, and unfit for cultivation, unless irrigated by the waters of running streams. The general surface of the State is table-land, traversed by parallel mountain ranges. The great plains of the State afford natural advantages for conducting water, and lands otherwise waste and valueless become productive by artificial irrigation. The condition of the country, and the necessities of the situation, impelled settlers upon the public lands to resort to the diversion and use of waters. This fact of itself is a striking illustration and conclusive evidence of the inapplicability of the common-law rule."

The same rule was adopted in *Jones* v. *Adams*, 19 Nevada, 78; 3 Am. St. Rep. 788; *Fort Morgan, &c. Co.* v. *South P. D. Co.*, 18 Colorado, 1; 36 Am. St. Rep. 259. See also *Martin* v. *Bigelow*, 2 Aikens (Vermont), 184; 16 Am. Dec. 696.

But the prior appropriator may use no more water than is necessary for his purposes, and must allow the surplus to flow on. *Simmons* v. *Winters*, 21 Oregon, 35; 28 Am. St. Rep. 727.

No 12. — ARKWRIGHT *v.* GELL.

(1839.)

RULE.

A RIPARIAN owner on the banks of an artificial stream cannot acquire an easement of water or watercourse against the originator of the stream, if the circumstances are such as to show that the watercourse was made to serve a purpose not of a permanent nature.

No. 12. — Arkwright v. Gell, 8 L. J. Ex. 201.

Arkwright v. Gell.

8 L. J. Ex. 201–216 (s. c. 5 M. & W. 203).

Water. — Enjoyment. — Artificial Stream, Diversion of. — Mine. [201]

User of a stream of water produced by the artificial draining of a mine, for twenty years or upwards, gives no right to the party who has so used it, against the owners of the mine, or the persons who have constructed the watercourse, either at common law or under the Statute 2 & 3 Will. IV., c. 71, to have the stream continued in the same channel.

This was an action for diverting water. The facts and the nature of the contention between the parties sufficiently appear from the judgment of the Court delivered by — [213]

Parke, B. The plaintiffs in this case are the occupiers of certain cotton-mills at Cromford, in the county of Derby, and complain of an illegal diversion by the defendants of the water to which they were of right entitled, for the supply of their mills. The defendants, by their pleas, deny that right, and also insist that they have not been guilty of any illegal diversion. A special case was reserved on the trial, for the opinion of the Court, stating a great number of documents and facts, upon which the Court are not merely to give their judgment on matters of law, but to take the office of the jury, by determining whether any and what inferences of fact ought to be drawn from the facts stated. This course leads to one great inconvenience, as it tends to confound the rule of law, with an inference of fact only, which inference might have been varied by a very slight circumstance. From the facts and documents, however, the case appears to be this: — In the beginning of the last century, certain adventurers had in part constructed, and were proceeding to continue a sough, now called the Cromford Sough, for the purpose of draining a portion of the mineral field, in the wapentake of Wirksworth. How they acquired the right to make that sough, is not stated; it was, however, without doubt, either by virtue of the custom of mining there prevalent, or by the express licence of the owner of the soil through which it was made. The adventurers received their remuneration, in the shape of a certain portion of the ore raised from the mines, within the level lying above and benefited by the sough, (technically called, within the title of the

sough), in consequence of an agreement with the proprietors of the mines.

The right to this easement, with its accompanying advantages, appears to have been the subject of sale and conveyance in that district; for in 1738, the proprietors leased it for 999 years, for a pecuniary consideration, with a reservation, by way of rent, of a part of the profits.

Mr. Arkwright, under whom the plaintiffs claim, and all whose rights they may be assumed to have had, by demise from him, when the cause of action accrued, became in 1836 the purchaser of the reversion expectant on the determination of that lease; and he also acquired a portion of the interest of the lessees, by a conveyance from some of them. It does not appear to us that this circumstance affects the question between the parties to this suit. After the sough had been constructed, and a constant flow of water thereby conducted from the mines, the late Sir Richard Arkwright, the father of Mr. Arkwright, obtained in the year 1771, a lease for eighty-four years from the lord of the manor of Cromford, (who, upon the special case, is alleged to have been the owner of the land through which the Cromford Sough was made, and also the owner of a piece of land between the mouth [* 214] of the sough and the brook into which the water * was conveyed), of that piece of land, the brook, and the "stream of water issuing and coming from Cromford Sough;" with the right of erecting mills on the piece of land. In 1772, Sir Richard Arkwright erected extensive cotton-mills thereon, and in April, 1789, he purchased that land, and the fee simple in the mills, and the manor of Cromford, including the lands through which the Cromford Sough was made.

In the meantime, another company of adventurers had begun to construct another mining sough, called the Meer Brook Sough, on a much lower level, in the adjoining township of Wirksworth. The defendants represent, and have all the rights of that company of adventurers; and must, like the proprietors of the Cromford Sough, be assumed to have acted, either by virtue of a mining custom, or by express licence of the owner of the soil, confirmed by the Cromford Inclosure Act in 1802, and also to have had the authority, prior or subsequent, of the owners of mines drained by that sough, and contributing a certain portion of the ore, by way of recompense. These facts are not distinctly found, but we

think we must infer that such was the case, and consequently that the defendants stand in the same relation to the plaintiffs as if the owners of those mines had themselves, with the consent of the owner of the soil, constructed the sough for the purpose of freeing their mines from water; for whether they make the sough themselves, or through the agency of the adventurers, is immaterial. In 1813, the defendants, being themselves proprietors of mines drained by it, extended the Meer Brook Sough, having made an agreement with the then proprietors of the Cromford Sough, and of other mines unwatered by it, and which appear to have been then worked down to the level of that sough, for the purpose of regulating their respective rights, and the recompense to be paid by the latter to the former set of adventurers, for the benefit to be derived by them, by the extension of this sough, and the unwatering by means of it of a further portion of their mineral field below the level of the former sough.

The new sough was therefore constructed, by the consent of some, if not all those mine-owners, who had formerly used the Cromford Sough, and in part for their benefit; and this circumstance places the defendants in the same position, in respect to the diversion of the surplus water, as if they themselves had been owners of part of the mineral field, formerly drained by the Cromford Sough, and were now proceeding to unwater a further portion of the same field, by means of the new sough. When the Meer Brook Sough was thus extended, the water was found to flow into it, and flood-gates were constructed at the end, the closing of which prevented the water from finding its way in that direction, but which, when opened, let off the water, which would otherwise have been discharged by the Cromford Sough; and thereby prevented it from flowing to the plaintiffs' mill.

In 1825, an arrangement was made for the mutual accommodation of Mr. Arkwright and the Meer Brook Sough proprietors, which was not to affect their rights: and which having been determined in 1836, left them in the same situation as if it never had been made; and the gates being removed, in order to carry the sough further in that direction, and the water thereby diverted from the plaintiffs' mills, the defendants are in the same situation as if no flood-gates had been made, and as if, in the construction of their sough, for the purpose of draining another portion of the mineral field, they had broken the natural barrier which pent

the water up, and made it flow through the Cromford Sough, and so caused the water to pass out at a lower level through the Meer Brook Sough; and the question is, whether the defendants, by so doing, are rendered liable to an action at the suit of the plaintiffs.

This question, which was most elaborately and ably argued during the last term, appears to us, strictly speaking, to be one as much of fact as of law, and when the situation of both parties is fully understood, does not appear to us to be one of much doubt or difficulty.

The stream upon which the mills were constructed, was not a natural watercourse, to the advantage of which, flowing in its natural course, the possessor of the land adjoining would [* 215] be entitled, according to * the doctrine laid down in *Mason* v. *Hill*, 3 B. & Ad. 312, 1 L. J. (N. S.) K. B. 107; 5 B. & Ad. 1, 2 L. J. (N. S.) K. B. 118, and in other cases. This was an artificial watercourse, and the sole object for which it was made was to get rid of a nuisance to the mines, and to enable their proprietors to get the ores which lay within the mineral field drained by it; and the flow of water through that channel was, from the very nature of the case, of a temporary character, having its continuance only whilst the convenience of the mine-owners required it, and in the ordinary course it would, most probably, cease when the mineral ore above its level should have been exhausted. That Sir Richard Arkwright contemplated the discontinuance of this watercourse, (if the question of his knowledge in this state of things can be material,) there is evidence, in the lease made in 1771, which contains a provision for a supply from the river, in the event of the stream being lessened, or taken away, by the construction of another sough; and also that such an event was not improbable, appears from the clause in the second Cromford Canal Act, 30 Geo. III. c. 56, s. 4. What, then, is the species of right or interest, which the proprietor of the surface, where the stream issued forth, or his grantees, would have in such a watercourse, at common law, and independently of the effect of user, under the recent statute, 2 & 3 Will. IV. c. 71? He would only have a right to use it for any purpose to which it was applicable, so long as it continued there. A user for twenty years, or a longer time, would afford no presumption of a grant of the right to the water in perpetuity; for such a

grant would, in truth, be neither more nor less than an obligation on the mine-owner not to work his mines by the ordinary mode of getting minerals, below the level drained by that sough, and to keep these mines flooded up to that level, in order to make the flow of water constant for the benefit of those who had used it for some profitable purpose. How can it be supposed, that the mine-owners could have meant to burden themselves with such a servitude so destructive to their interests; and what is there to raise an inference of such an intention? The mine-owner could not bring any action against the person using the stream of water, so that the omission to bring an action could afford no argument in favour of the presumption of a grant; nor could he prevent the enjoyment of that stream of water by any act of his, except by at once making a sough at a lower level, and thus taking away the water entirely; a course so expensive and inconvenient, that it would be very unreasonable, and a very improper extension of the principle applied to the case of lights, to infer from the abstinence from such an act, an intention to grant the use of the water in perpetuity as a matter of right. Several instances were put, in the course of the argument, of cases analogous to the present, in which it could not be contended, for a moment, that any right was acquired. A steam-engine is used by the owner of a mine to drain it, and the water pumped up flows in a channel to the estate of the adjoining land-owner, and is there used for agricultural purposes for twenty years. Is it possible from the fact of such a user, to presume a grant by the owner of the steam-engine of the right to the water in perpetuity, so as to burden himself and the assigns of his mine, with the obligation to keep a steam-engine forever, for the benefit of the land-owner? Or if the water from the spout of the eaves of a row of houses was to flow into an adjoining yard, and be there used twenty years by its occupiers for domestic purposes, could it be successfully contended, that the owners of the houses had contracted an obligation not to alter their construction so as to impair the flow of water? Clearly not. In all, the nature of the case distinctly shows, that no right is acquired as against the owner of the property, from which the course of water takes its origin; though as between the first and any subsequent appropriator of the watercourse itself, such a right may be acquired. And so in the present case, Sir Richard Arkwright, by the grant from the owner of the surface, for eighty-

four years, acquired a right to use the stream as against him; and if there had been no grant, he would by twenty years' user have acquired the like right as against such owner. But the user, even for a much longer period, whilst the flow of water was going on for the convenience of the mines, would afford no presumption of a grant at common law as against the owners of the mines.

[* 216] * It remains to be considered, whether the statute 2 & 3 Will. IV. c. 71, gives to Mr. Arkwright, and those who claim under him, any such right; and we are clearly of opinion that it does not. The whole purview of the act shows, that it applies only to such rights as would before the act have been acquired by the presumption of a grant, from long user. The act expressly requires enjoyment for different periods, "without interruption;" and, therefore, necessarily imports such a user as could be interrupted by some one "capable of resisting the claim;" and it also requires it to be "of right." But the use of the water in this case could not be the subject of an action at the suit of the proprietors of the mineral field lying below the level of the Cromford Sough, and was incapable of interruption by them at any time during the whole period, by any reasonable mode; and as against them it was not "of right;" they had no interest to prevent it, and until it became necessary to drain the lower part of the field, indeed, at all times, it was wholly immaterial to them what became of the water, so long as their mines were freed from it.

We, therefore, think that the plaintiffs never acquired any right to have the stream of water continued in its former channel, either by the presumption of a grant, or by the recent statute, as against the owners of the lower level of the mineral field, or the defendants, acting by their authority; and, therefore, our judgment must be for the defendants.

Judgment for the defendants.

ENGLISH NOTES.

From the judgment of the Court in the principal case, and in *Wood* v. *Waud*, the next principal case, where *Arkwright* v. *Gell* was considered and approved, it appears that, where the artificial stream has been made to serve a purpose of a permanent nature, an easement can be acquired as against its originators. Thus, where the natural flow of

water over land has been diverted or collected into an artificial channel for such purposes as irrigation of land or working of a mill, and the flow of water in this channel has been continued for more than twenty years, the same rights may be presumed in favour of the owners of land through which it flows as if it had been a natural stream. *Beeston* v. *Weate* (1856), 5 El. & Bl. 986, 25 L. J. Q. B. 115; *Sutcliffe* v. *Booth* (1863), 32 L. J. Q. B. 136; *Nuttall* v. *Bracewell* (1866), 4 H. & C. 714, 36 L. J. Ex. 1; *Holker* v. *Porritt* (1873 and Ex. Ch. 1874), L. R. 8 Ex. 107, 10 Ex. 59, 42 L. J. Ex. 85, 44 L. J. Ex. 52; *Roberts* v. *Richards* (1881), 50 L. J. Ch. 297, 44 L. T. 271. And similarly a neighbouring owner may acquire an easement to lead off a portion of the water from such artificial watercourse. *Beeston* v. *Weate, supra.*

AMERICAN NOTES.

The principal case is cited by Washburn on Easements, p. 419, and Gould on Waters, sects. 225, 340, and the same principle may be found in *Norton* v. *Volentine*, 14 Vermont, 239; *Fleming's Appeal*, 65 Penn. St. 445; *Prescott* v. *White*, 21 Pickering (Mass.), 341, 32 Am. Dec. 266; *Green* v. *Carotta*, 72 California, 267; *Freeman* v. *Weeks*, 45 Michigan, 335; *Murchie* v. *Gates*, 78 Maine, 300; *Adams* v. *Manning*, 48 Connecticut, 477; *Peter* v. *Caswell*, 38 Ohio State, 518; *Weatherby* v. *Meiklejohn*, 56 Wisconsin, 73; *Belknap* v. *Trimble*, 3 Paige (New York Chancery), 577; *Delaney* v. *Boston*, 2 Harrington (Delaware), 489; *Middleton* v. *Gregorie*, 2 Richardson (So. Car.), 638; *Mathewson* v. *Hoffman*, 77 Michigan, 420; 6 Lawyers' Rep. Annotated, 349; *Huston* v. *Bybee*, 17 Oregon, 140; 2 Lawyers' Rep. Annotated, 568.

In these cases, however, it is held that a very long enjoyment of the artificially constructed watercourse may grow into a prescription, and "become a natural watercourse prescriptively." Gould on Waters, sect. 225.

In *Norton* v. *Volentine*, *supra*, it was said that it was not necessary to discuss the question of this kind of prescription. "It is a case wholly dissimilar to the present one. And it is a case not without difficulty. The case of *Arkwright* v. *Gell*, Gale and Whately on Easements, 126, 130, is one, I think, which does not precisely involve this question. That case seems to have been decided upon the very ground that the flow of water, being from the use of mines, was in its very nature temporary, and must have been so understood by both parties. The discharge of an eave spout, or the drainage of lands or mines, or any other temporary flow of water, and where positive and artificial means were necessary to keep up the stream, if continued for more than fifteen years, might give the right to the dominant owner to flow the water upon the land of the servient owner. For the acquiescence in what would be a nuisance, unless done by permission for the term of fifteen years, will in law raise a presumption of a grant. But when this is for the benefit of the person doing it, and he has to make use of positive means to continue it, no presumption what-

ever arises that he has contracted to continue it. In the cases supposed, every reasonable man would expect the owner to remove his eave spout, or his house even, to discontinue the drainage of his land or of his mines, at will."

In *Watkins* v. *Peck*, 13 New Hampshire, 360, 10 Am. Dec. 156, it is said: "The adverse or exclusive use of water in a particular manner, for the term of twenty years, furnishes presumptive evidence of a grant. *Bullen* v. *Runnels*, 2 N. H. 255 [9 Am. Dec. 55]. And this is true in relation to water flowing through an aqueduct, for use at a house, as it is in relation to the water of a river, used for propelling machinery." In *Cary* v. *Daniels*, 5 Metcalf (Mass.), 238, it is said: "And it is immaterial whether the watercourse be natural or artificial, or whether the right is derived *ex jure naturæ*, or by grant or prescription."

Where one constructed an artificial channel, and allowed water to flow through it and over the land of another for more than twenty years, it was held that the other had acquired a prescriptive right to such flow of the water. *Shepardson* v. *Perkins*, 58 New Hampshire, 354; *Reading* v. *Althouse*, 93 Penn. St. 400. (See *Mitchell* v. *Parks*, 26 Indiana, 363; *Bowne* v. *Deacon*, 32 New Jersey Equity, 459, where twenty years' use was not shown, but the principle was recognized.)

No. 13. — WOOD *v.* WAUD.

(1849.)

RULE.

ALL riparian owners, whether on the banks of a natural or of an artificial stream, have a right to the purity of the water.

Wood v. Waud.

3 Exch. 748–781 (s. c. 18 L. J. Ex. 305, 13 Jur. 742).

Riparian Proprietors. — Right to Purity of Stream.

A riparian proprietor has a right to the natural stream of water flow- [748]
ing through the land in its natural state; and if the water be polluted by a proprietor higher up the stream, so as to occasion damage in law, though not in fact, to the first-mentioned proprietor, it gives him a good cause of action against the upper proprietor, unless the latter have gained a right by long enjoyment or grant.

Where the owner of land through which a stream flows has within twenty years built mills upon its bank, and applied the water of the stream to the working of them, he may recover upon an issue raised, by a traverse of an allegation that his right to the water was "by reason of the possession of the mills."

No. 13. — Wood v. Waud, 3 Exch. 748–752.

But no action will lie for an injury by the diversion of an artificial watercourse, where, from the nature of the case, it is obvious that the enjoyment of it depends upon temporary circumstances and is not of a permanent character, and where the interruption is by a person who stands in the nature of a grantor. Where water has flowed in an artificial and covered watercourse for more than sixty years from a colliery into an immemorial and natural stream, upon whose banks the plaintiff's mills are situated, the plaintiff, in such case, has no right of action for diversion of the water of such artificial watercourse against a party through whose land it passes, but who does not claim under the colliery owners. The case, however, would be different if the water were polluted. Where the right to flow of water exists, diminution to the extent of 5 per cent., or detention so as to cause inconvenience, is sufficient to prove injury.

Action on the case for heating and diverting water.

The first count stated that the plaintiff was possessed of certain mills, and that he was injured by the defendants in his enjoyment of a certain watercourse called the Bowling Beck by heating and fouling. The second count stated injury by diverting the water of the Bowling Beck. The third and fourth counts complained of the diversion and obstruction to the flow of water in two streams called Bowling Sough and Low Moor Sough respectively.

The defendants pleaded, first, not guilty; secondly, to the [751] first count, a denial of the plaintiffs being possessed of the said mills, &c.; thirdly, to the same, a denial that the plaintiffs, by reason of the possession of the said mills, &c., ought to enjoy the advantage of the water as alleged; fourthly and fifthly, to the second count, pleas similar to the second and third pleas; sixthly and seventhly, similar pleas to the third count; and eighthly and ninthly, similar pleas to the last count. On which pleas issues were joined.

At the trial, before Rolfe, B., at the Summer Assizes [752] for the county of York, 1845, a verdict was found for the plaintiffs on each count, with 1*s.* damages, his Lordship certifying under the statute for costs, subject to the following case, with liberty to turn the same into a special verdict, the Court or a Judge thereof to determine what facts should be stated in the special verdict.

The plaintiffs are extensive worsted-spinners at Bradford, in Yorkshire, carrying on their business in mills and other works of theirs upon their premises, which are situate upon the north-east bank of a natural watercourse or stream called Bowling Beck.

No. 13. — Wood v. Waud, 3 Exch. 752, 753.

The first of the plaintiffs' mills was erected about the year 1813; it was worked by means of a steam-engine of twenty-four horse power, and in or about the year 1819 that mill was enlarged, and another steam-engine of thirty horse power was added, for which latter one of eighty horse power was substituted in 1833. In 1824, another of their mills was erected, and another steam-engine of eighty horse power was set up to work it; and [*753] in 1845, another engine of sixteen horse *power was added. In 1836 and 1838, the plaintiffs made two reservoirs for the use of their mills on their premises at the north-east side of Bowling Beck, on which side their mills are situate. In 1838, they purchased from Samuel Hailstone a piece of land situate at the south-west extremity of their other premises, at the opposite bank of the Bowling Beck from the plaintiffs' mills. Upon the land so purchased from Mr. Hailstone, the plaintiffs have not erected or set up any mills; they have, however, used that land in manner hereinafter mentioned. The course of the Bowling Beck is nearly from south-east to north-west; it runs into another stream called the Bradford Beck, above 300 yards below the plaintiffs' premises; and there are three mills situate on the Bowling Beck, between the plaintiffs' premises and the confluence with the Bradford Beck. On the banks of the Bowling Beck, nearly opposite to the plaintiffs' mills, at the time of the trial, were worsted mills belonging to Messrs. Crossland & Co. Higher up the stream, and nearly adjoining the plaintiffs' premises, are mills belonging to Mr. William Greenwood, erected about the year 1835, and worked by an engine of about thirty horse power. The last-mentioned mills are situate on both sides of the Beck. Next to Mr. Greenwood's are the mills and weaving-sheds of the defendants. Adjoining the defendants', further up the stream, are the mills and premises of Messrs. Barker, Cutler, & Co., machine makers, erected in 1844, and worked by an engine of about thirty horse power; and next to Messrs. Barker, Cutler, & Co., are worsted mills called the Caledonian Mills, also situate on the Beck, erected about the year 1835, and worked by an engine of between thirty and forty horse power. Above the Caledonian Mills, situated on the Beck, are the dye-works of Messrs. Ripley & Co.; and above these there are other worsted mills situate on a small stream running into the Beck. All the before-mentioned mills, situate on the Bowling Beck, use

the Bowling * Beck for some one or more of the purposes [* 754] connected with their works respectively; and, in addition to such use, the common sewers of that part of Bradford which is situate adjacent to the Bowling Beck, empty themselves into that stream. A watercourse called the Bowling Sough runs into the Bowling Beck on the south-west side thereof, nearly opposite to where the plaintiffs' mills are situate. It is an underground sough or channel, until it runs into that Beck, and is of about the length of a mile. It commences at a point to the east of the Beck, subsequently crosses under the Beck several feet below it, at a point where the defendants' premises are situate on each side of the Beck, and then flowing for the distance of 150 yards on the west side of the Beck, and passing under the piece of land purchased by the plaintiffs from Mr. Hailstone, it ultimately joins the Beck on the west side thereof, near to the northernmost point of Messrs. Crossland & Co.'s premises. The Bowling Sough is more than sixty years old. It was originally made for the purpose of draining certain coal mines in the township of Bowling, or the neighbourhood thereof. The owners of these coal mines have always been called or known by the name of the Bowling Company, and the sough was constructed by them in or about the year 1768, the Bowling Company having made arrangements for that purpose with the owners of the land through which the sough was made. Such arrangements were by deeds, two of which bear date respectively 15th January, 1768, and 27th February, 1802. Prior to the year 1807, the Bowling Sough was used for draining a colliery of the Bowling Company, called the Lady Well Pit, the water during that time having been pumped out of that pit by aid of machinery. In that year the sough was carried to the mouth of another pit belonging to the same company, called the Spring Wood, and subsequently to that time it has been extended to a third pit, at both of which last-mentioned pits the water has been pumped up from time to time, as * the [* 755] occasion of the coal-owners required, and still continues to be pumped up by the aid of machinery, so as to flow into the sough; but at the Lady Well Pit the water has risen to a level with the sough, and for more than twenty years before the commencement of this action and the doing the acts complained of by the plaintiffs, the water has flowed naturally and without the aid of machinery through and along the sough into the Beck. The

Bowling Sough, at the point of junction with the Bowling Beck, is flagged at the bottom, and arched over at the top with masonry, and so continues for the length of about 400 yards. Above that, the stratum through which it passes is sufficiently strong to dispense with the necessity of arching, with the exception of two or three weak places, and in those places arching has been resorted to. At the distance of about 400 yards from the point of junction with the Bowling Beck, the Bowling Sough is about fifteen feet below the surface of the ground; in one place called Dudley Hill it is 117 yards below the surface of the ground, and it is twenty-one yards below the surface at Lady Well Pit. The Bowling Sough has always been cleaned out and repaired by the Bowling Company, and by no other persons. The mode of access, for the purpose of repairs and cleaning, is by the extremity where it joins the Bowling Beck, and by apertures called man-holes, which have been constructed with masonry from the surface of the ground down into the sough at different places along its course. About a quarter of a mile to the south, and above the plaintiffs' premises, another watercourse, similar in construction to the Bowling Sough, called the Low Moor Sough, runs into the Bowling Beck. This runs under ground until it joins the Beck close to the surface of the ground, and is of about the length of three miles. It runs nearly from south to north, and is altogether on the west side of the Beck up to its junction. This sough is also more than sixty years old. It was originally made by a [* 756] * company called the Low Moor Company, for the purpose of unwatering coal mines belonging to that company, and is at present used for that purpose by the same company, water being pumped out of the mines into the sough by the aid of machinery. In one pit, at which the workings were discontinued more than twenty years ago, the water has risen to a level with the sough, and for more than twenty years before the commencement of this suit and the doing of the acts complained of by the plaintiffs, the water has flowed naturally through and along the Low Moor Sough, and thence into the Beck, without the aid of machinery. The Low Moor Sough was new made and enlarged by the Low Moor Company about the year 1826, and it has always been repaired and cleansed by that company, and by no other persons; and of late, in consequence of the works of the Low Moor Company, and also of the Bowling Company, having been

respectively enlarged, the quantity of water artificially propelled through the Low Moor and Bowling Soughs respectively has considerably increased. At the place where the Low Moor Sough flows into the Bowling Beck, the premises on each side of the Beck belong to and are occupied by Messrs. Barker & Co., machine makers, who obtain a supply of water for the working of their manufactory from the Low Moor Sough, but return, in a heated state, into the sough so much thereof as has not been consumed by them. Prior to the year 1827, the plaintiffs obtained water for the supply of their mills from the Bowling Beck, having taken the same from a point about 118 yards below the place at which the Bowling Sough flows into the Bowling Beck; and from the year 1827 until the making of the reservoir in 1838, their water for the supply of their mills was obtained by the plaintiffs from the Bowling Beck, at a point about forty-three yards below its junction with the Bowling Sough. Those supplies were obtained by placing a clough, or sliding door, in and across the Bowling Beck, * immediately below the respect- [* 757] ive points from which the water was taken in order to pen back the water in the Beck. In the year 1838, the plaintiffs placed another clough, or door, in and across the Beck, at the south-west extremity of their premises, which are situate on the north-east of the Beck, and at a point higher than the junction of the Bowling Sough, for the purpose of filling their reservoirs with water from the Beck, for the use of their mills. In that year they also, for the same purpose, made a sluice or drain from a point in the Bowling Sough in the said piece of land which they had in that year purchased of Mr. Hailstone, a little above the junction of the sough with the Bowling Beck, in order to, and they did thereby, convey the water from that sough under the Beck to the same reservoirs; but prior to that time, the plaintiffs had not taken any water from the sough before its junction with the Bowling Beck. These cloughs, and the sluices or drains, have continued ever since. The manner in which the plaintiffs supplied their mills from these sources was to let down the cloughs at about ten o'clock at night, and thus to collect the water that flowed down between that time and about six o'clock the following morning, when the cloughs were raised again The water which ran down the Beck in the daytime was impregnated with dye wares, and other matter not suitable for the plain-

tiffs' purposes. By these means the mills were supplied with water; and, up to the year 1844, there was a sufficient supply for the plaintiffs' works, and the water thus obtained was sufficiently pure to be suitable for the plaintiffs. In that year, the water collected by the means above stated had become scarcer, not more than half the previous quantity, and not as much as was sufficient for the plaintiffs' works, although the plaintiffs have let down their cloughs at an earlier hour than formerly. In the early part of October in that year, the water also became much hotter, so much so as to cause a greater consumption of coal, and to [* 758] impede and * injure the working of the steam-engine of the plaintiffs, the plaintiffs' steam-engine requiring the water to be cold, and about five gallons of it per minute for every horse power, and which water, when it leaves the engine, is rendered of nearly a boiling state. At that time also, it became fouler than formerly, containing the suds made by wool combers washing and cleansing wool, and dye wares; and the reservoirs have, in consequence, required cleaning out more frequently than formerly.

The defendants are worsted spinners, wool combers, and manufacturers of worsted pieces, at Bradford. In 1836 they began to erect, on the west side of and adjoining the Bowling Beck, and between the places where it is joined by the Bowling Sough and the Low Moor Sough, a mill for their business, which was completed in 1838, and they soon afterwards placed a steam-engine in the mill, of 100 horse power, to work it. In 1844 they erected on the opposite side of the Beck, and adjoining it and their mill, several large weaving sheds, and soon afterwards placed another steam-engine in the weaving sheds, of forty horse power, to work them. The land on which the defendants' mills and weaving sheds stand is part of the close called Harry Walton's Close, mentioned in the deed of 1802, hereinbefore referred to. They have since then carried on their business by means of the mills and sheds. The hot water, after coming from their steam-engines, is turned into the Beck, 115 yards above the plaintiffs' premises, and about 100 yards below the junction of the Low Moor Sough, and very much heats the water of the Beck. They also cleanse wool on their premises with hot water and soap, and the water, after cleansing the wool, is impregnated with soap lees and combers' suds. This water is turned into the Beck above the

plaintiffs' premises, at the same place where the hot water coming from the defendant's steam-engines is turned into the Beck. In the course of 1844 the defendants also made a reservoir near and to the south of *the weaving sheds, and over [*759] the Bowling Sough. They then, by means of a tank and piping, conveyed the whole of the water of Low Moor Sough from a point below that at which Messrs. Barker, Cutler, & Co. return into the sough the water which they have taken therefrom at their works, into the said reservoir of the defendants, where it continues for some time until cooled and rendered fit for use. They also, about the same time, sunk two jackhead wells, one under each of their steam-engines, and made a drain communicating with the Bowling Sough from both those wells, and also another drain communicating with the Bowling Beck from those wells. By the former drain they have brought the water from the sough to use for the steam-engines, and by the latter drain they have brought it for the same purpose from the Beck. The defendants use at their works the water of the Bowling Beck, and of the Bowling Sough and Low Moor Sough. They also use the water of a very deep well, which they have sunk in their premises, and from which, by the aid of machinery, they pump daily 89,200 gallons. About 5 per cent. of the water used by the defendants is lost by evaporation; and, subject to such loss, they return all the water used by them daily into the Beck, at a point below the junction of the Low Moor Sough, and about 900 gallons of the quantity so daily returned is impregnated with soap lees and combers' suds. The water of the Beck above the defendants' premises is very foul, chiefly by reason of the dye wares which it receives from Ripley's dye-works. These works have been in operation for more than twenty years, but have been from time to time enlarged during that period, and in the year 1836 the plaintiffs complained of injury alleged by them to have been sustained by reason of these works. The Messrs. Ripley send all their heated water and all their dye stuff down the Beck. Besides, all the dye wares, soap lees, and combers' suds are also poured into the Beck above the plaintiff's premises. The year 1844 was an *unusually dry year; all the mill [*760] owners whose premises were situated below Messrs. Ripley were in want of water, by reason of the deficient supply; and in part of that year Messrs. Ripley used the whole of the water of the Bowling Sough.

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The heating of the water of the Beck, and the damage resulting therefrom, as alleged in the first count, have been caused by the defendants; and though the defendants have fouled the water of the Beck, in manner hereinbefore mentioned, they have not fouled it so as to cause any damage or injury to the plaintiffs. The defendants have not abstracted water from the Bowling Beck, as complained of by the plaintiffs. They have taken water from both the Bowling Sough and the Low Moor Sough, in manner hereinbefore mentioned, but the whole of the water so taken ultimately gets back and reaches the plaintiffs' mills. It however reaches them hotter than formerly, the increased heat having been caused by the act of the defendants.

In October, 1836, upon the plaintiffs hearing that the defendants were about to erect the mill, they served a written notice upon them, by which they informed them that, in case they should supply their mill with water from the Beck in such a way as to render it less serviceable to the plaintiffs, they would institute legal proceedings against them.

The questions for the opinion of the Court are, whether the plaintiffs are entitled to have the verdict to stand on any and which of the counts and issues, or any and what part thereof; or whether the defendants are entitled to have the verdict on any and which of the issues entered for them, or any and what part thereof; the Court to be at liberty to draw such inferences as a jury ought to draw, and to determine what facts should be alleged in the special verdict. The pleadings to be taken as part of the case, and to be referred to accordingly, as well as the deeds of the 15th of January, 1768, and the 27th February, 1802.

After argument and time taken for consideration, the [* 771] judgment of the Court was delivered by

Pollock, C. B. — (His Lordship, after stating the pleadings, proceeded :)— The first question to be disposed of is, in [* 772] what way the issue on not guilty is to be found, so far * as it applies to the first and second counts, which are framed to recover damages for obstructions and injuries to the natural watercourse, the Bowling Beck.

It is conceded by the plaintiffs' counsel, that the verdict must be found for the defendants, on the plea of not guilty on the second count. It is conceded by the defendants' counsel, that it must be found for the plaintiffs on so much of the general issue

as relates to the heating of the water. The only question, therefore, on this issue is, whether the remainder, which relates to the fouling of the water, is to be entered for the plaintiffs or the defendants.

The fact, as found by the jury, is, that the defendants (whose works have been erected within twenty years, and who have no right, by long enjoyment or grant, so to do) have fouled the water of the natural stream, by pouring in soap suds, wool combers' suds, &c. ; but that pollution of the natural stream has done no actual damage to the plaintiffs, because it was already so polluted by similar acts of mill-owners above the defendants' mills, and by dyers still further up the stream, and some sewers of the town of Bradford; that the wrongful act of the defendants made no practical difference, that is, that the pollution by the defendants did not make it less applicable to useful purposes than such water was before. We think, notwithstanding, that the plaintiffs have received damage in point of law. They had a right to the natural stream flowing through the land, in its natural state, as an incident to the right to the land on which the watercourse flowed, as will be hereafter more fully stated; and that right continues, except so far as it may have been derogated from by user or by grant to the neighbouring land-owners.

This is a case, therefore, of an injury to a right. The defendants, by continuing the practice for twenty years, might establish the right to the easement of discharging into the stream the foul water from their works. If the dye-works and other manufactories, and other sources of *pollution above the [*773] plaintiffs, should be afterwards discontinued, the plaintiffs, who would otherwise have had, in that case, pure water, would be compellable to submit to this nuisance, which then would do serious damage to them. We think, therefore, that the verdict must be entered for the plaintiffs on every part of not guilty to the first count.

The next question is, in what way the verdict is to be entered on the third and fifth issues to the first and second counts. These issues arise on a traverse of the plaintiffs' right to the watercourse "by reason of the possession of the mills." On the part of the defendants, it was contended, that, although the plaintiffs might have had a right to the stream of water running along their watercourse, in its natural state, as incident to the right to the land,

they had no right by reason of the possession of the mills, because they had not enjoyed those mills in their present condition for twenty years, and therefore had acquired no right in respect of them. For the plaintiffs it was insisted, that, if this argument were well founded, the plaintiffs would still be entitled to have so much of the issue as relates to the right in respect of the land found for them; to which we assent, not thinking that there is any distinction between this and the case of *Ricketts* v. *Salwey*, 2 B. & Ad. 360. That, however, would, if the defendants should insist upon it, require a special entry, finding a part only for the plaintiffs. The plaintiffs, therefore, contend that the whole ought to be found for them, because if they had a right to the water-course before the mill was constructed, without the obstruction by the defendants, and just before the commencement of the suit had appropriated the water to the use of the mill, they might have recovered for the injury to the mill, and might have stated that they were entitled to the use of the water for the mill by [* 774] reason of *the possession of the mill. The former proposition the defendants do not deny; the latter they dispute, and principally rely on the case of *Frankum* v. *Lord Falmouth*, 6 C. & P. 529, 2 A. & E. 452. We think that the plaintiffs are right on this point, and that the case of *Frankum* v. *Lord Falmouth* is distinguishable. There the claim, as may be collected from the report in Carrington & Payne, seems not to the flow of the water in its natural course for the supply of the mill, but to an easement to dam the water back *in alieno solo;* and, as the mill was not twenty years old, that claim could not be established.

The remaining questions relate to the two soughs called Bowling Sough and Low Moor Sough, and are very important, and also novel. Both of these differ from the Bowling Beck in three respects: that was an immemorial stream, a natural stream, and flowing above ground; these are not immemorial, they are artificial, and flowing under ground. They differ, also, between themselves in one respect: that one, the Bowling Sough, was constructed in the land now belonging to the plaintiffs, and part of the water thereof was used by them, by a direct communication between the sough and the plaintiffs' reservoirs, for the purposes of the mill, before the alleged diversion by the defendants; the other, the Low Moor Sough, only communicated with the Bowling Beck, and not in the plaintiffs' land. Both agreed in one respect,

that they were diverted before the waters flowing along them became part of the Bowling Beck stream. Under these circumstances, questions of considerable nicety arise; and the law on this subject was most ably discussed.

We agree with the learned counsel for the plaintiffs in his exposition of the principles which regulate the law as to natural streams, which are fully considered, and placed on their right footing, in the case of *Mason* v. *Hill*, 3 B. & Ad. 306, 5 B. & Ad. 1, and * the authorities there cited. Flowing [* 775] water, as well as light and air, are, in one sense, *publici juris*. They are a boon from Providence to all, and differ only in their mode of enjoyment. Light and air are diffused in all directions, flowing water in some. When property was established, each one had the right to enjoy the light and air diffused over, and the water flowing through, the portion of soil belonging to him; the property in the water itself was not in the proprietor of the land through which it passes, but only the use of it, as it passes along, for the enjoyment of his property, and as incidental to it.

The law is laid down by Chancellor KENT, in 3 Com. 439, thus: "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water. . . . He has no property in the water itself, but a simple usufruct as it passes along." "Aqua currit, et debet currere," is the language of the law; and Mr. Justice STORY, in *Tyler* v. *Wilkinson*, 4 Mason U. S. R. 397, cited in Gale and Whatley on Easements, p. 131, lays down the same law. In the judgment of Lord Chief Justice TINDAL, in the case of *Acton* v. *Blundell*, 12 M. & W. 324, he treats the right to waters flowing on the surface as arising from the acquiescence of neighbouring owners: though he also quotes the judgment of Mr. Justice STORY, above referred to, which treats the right as an incident to property; for Mr. Justice STORY says, "The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed by operation of the law to the land itself." Mr. Justice WHITELOCK also, in *Sury* v. *Pigott*, Poph. 169, reported 3 Bulst. 339, *nom. Shury* v. *Pigott*, and CREW, C. J., Poph. 172, and LEE, C. J., in *Brown* v. *Best*, 1 Wils. 174, treat the right as arising *ex jure naturæ;* and consequently it is not extinguished, as an easement *in alieno solo* would be, by unity.

And this seems to us to be the correct opinion, though [*776] *it is unnecessary to decide that point on the present occasion; for whether the right to natural streams be *ex jure naturæ*, or by acquiescence, and the presumed grant of neighbours, the result of this case will be the same. But the Bowling Sough and the Low Moor Sough being neither of them natural watercourses, — being under ground, and not immemorial, — a question of some nicety and difficulty arises as to the rights of the riparian proprietors upon these streams, or below their junction with the Beck. This question is not with respect to their rights as against the owners of those collieries which those soughs relieve from water, but as to the rights of those proprietors *inter se;* and it will be better to consider, in the first place, how they would stand if the streams were not under ground. With respect to a claim of right as against the colliery owners, if it be true that a right was gained to these streams by the riparian proprietors as against them, in consequence of their acquiescence for twenty years, by virtue of the presumption of a grant, or of Lord TENTERDEN'S Act (2 & 3 Will. IV. c. 71), there would be no difficulty as to the right of the riparian proprietors as against each other, or other persons. But Mr. Cowling admitted that a grant could not be presumed, and that he should have great difficulty in establishing the right under Lord TENTERDEN'S Act.

This Court, as then constituted, much considered that subject in the case of *Arkwright* v. *Gell*, 5 M. & W. 231 (p. 219, *ante*). We have again considered it, and are satisfied that the principles laid down as governing that case are correct, and were properly acted upon in it, by deciding that no action lay for an injury by the diversion of an artificial watercourse, where, from the nature of the case, it was obvious that the enjoyment of it depended upon temporary circumstances, and was not of a permanent character, and where the interruption was by the party who stood [*777] in the situation of the grantor. *The Court of Queen's Bench, in a subsequent case, *Magor* v. *Chadwick*, 11 A. & E. 571, supported a verdict for the plaintiff, for the disturbance of a right to the enjoyment of a stream, under circumstances somewhat similar; but in that case the action was not brought against the party in whose land the artificial watercourse commenced, nor any one claiming under him, and he had not put an end to it by altering the mode of working his mines; but, what is more impor-

tant, the action was not brought for abstracting, but for fouling the water, a species of injury which does not stand on the same footing; for, though the possessor of the mine might stop the stream, it does not follow that he, or any other, could pollute it whilst it continued to run; and besides, from the course which the cause took at Nisi Prius, the precise question which we have now to consider does not appear to have called for decision. The two cases are, therefore, distinguishable; and the expressions used by the learned Judges in that case, as to the similarity of natural and artificial streams, are to be understood as applicable to the particular case.

We entirely concur with Lord DENMAN, C. J., that "the proposition, that a watercourse, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been originally artificial, is quite indefensible;" but, on the other hand, the general proposition, that, under all circumstances, the right to watercourses, arising from enjoyment, is the same whether they be natural or artificial, cannot possibly be sustained. The right to artificial watercourses, as against the party creating them, surely must depend upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created. The enjoyment for twenty years of a stream diverted or penned *up by per- [*778] manent embankments, clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, and presumably of a temporary character, and liable to variation.

The flow of water for twenty years from the eaves of a house could not give a right to the neighbour to insist that the house should not be pulled down or altered, so as to diminish the quantity of water flowing from the roof. The flow of water from a drain, for the purposes of agricultural improvements, for twenty years, could not give a right to the neighbour so as to preclude the proprietor from altering the level of his drains for the greater improvement of the land. The state of circumstances in such cases shows that one party never intended to give, nor the other to enjoy, the use of the stream as a matter of right. If, then, this had been a question between the plaintiffs and the colliery owners, it seems to us that the plaintiffs could not have main-

tained an action for omitting to pump water by machinery (and in this the Court of Queen's Bench and Exchequer entirely agree in the case above cited). Nor, if the colliery proprietors had chosen to pump out the water from the pit, from whence the stream flowed continuously, and caused what is termed the natural flow to cease, could the plaintiffs, in our opinion, have sued them for so doing.

But this case is different. The water has been permitted to flow in an artificial channel by the colliery owners, and for sixty years. And the question is one of more difficulty, whether the plaintiffs can sue another person, a proprietor and occupier of the land above and through which the sough passes, not claiming under or authorized by them, for diverting the water.

The case of the Bowling Sough differs from the Low Moor Sough in this, that the plaintiffs, in 1838, used the water of the Bowling Sough where it passes through their land, by making
[*779] a communication to their reservoir, for *working the mill.

Have the plaintiffs a right to the water of this sough, as described in the third count of the declaration? It appears to us to be clear, that, as they have a right to the use of the Bowling Beck, as incident to their property on the banks and bed of it, they would have the right to all the water which actually formed part of that stream, as soon as it had become part, whether such water came by natural means, as from springs, or from the surface of the hills above, or from rains or melted snow, or was added by artificial means, as from the drainage of lands or of colliery works; and if the proprietors of the drained lands or of the colliery augmented the stream by pouring water into it, and so gave it to the stream, it would become part of the current; no distinction could then be made between the original natural stream and such accessions to it.

But the question arises with respect to an artificial stream not yet united to the natural one.

The proprietor of the land through which the Bowling Sough flows has no right to insist on the colliery owners causing all the waters from their works to flow through their land. These owners merely get rid of a nuisance to their works by discharging the water into the sough, and cannot be considered as giving it to one more than another of the proprietors of the land through which that sough is constructed; each may take and use what passes through his land, and the proprietor of land below has no

right to any part of that water until it has reached his own land, — he has no right to compel the owners above to permit the water to flow through their land for his benefit; and, consequently, he has no right of action if they refuse to do so.

If they polluted the water, so as to be injurious to the tenant below, the case would be different.

We think, therefore, that the plaintiffs have no right of action for the diversion of that water. The question as to *the Low Moor Sough is less favourable to the plaintiffs, [* 780] for this sough does not pass through their land at all.

We are of opinion, that, if the plaintiffs would not be entitled to the water of these soughs if above ground, their being below ground in this case would probably make no difference. It does not certainly make a difference in favour of the plaintiffs.

The issues on the seventh and ninth pleas ought, therefore, to be found for the defendants.

The next question is also one of considerable nicety. It is, whether the verdict should be entered for the plaintiffs on the pleas of not guilty, as to the third count, complaining of the abstraction of the water from the Bowling Sough, and the fourth, complaining of the abstraction and detention of the water from the Low Moor Sough. The defendants contend that the diminution of the water by 5 per cent., and the altering the flow of the water, are injuries too trifling to be the subject of an action.

In considering this question, it is to be assumed that the plaintiffs' right is established to the use of the water. It is said that the true rule on this subject is laid down by Chancellor KENT, 3 Com. 439, 440, that streams are meant for the use of men, and that it would be unreasonable, and contrary to the universal consent of mankind, to debar each riparian proprietor from the application of the water to domestic, agricultural, or manufacturing purposes, provided the use of it be made so as to work no material injury or annoyance to his neighbour, and though there will, no doubt, be, in the exercise of a proper use of water, some evaporation and decrease of it, — some variation in the weight and velocity of the current; but the maxim "de minimis non curat lex" applies, and a right of action by the proprietor below would not necessarily flow from such use, — it would depend on the nature and extent of the injury, and the manner of using the water.

[*781] *In America, a very liberal use of the water, for the purposes of irrigation, and for carrying on manufactures, has been allowed. In France, also, the right of the riparian proprietor to the use of the water is not strictly construed. He may use it "en bon père de famille, à son plus grand avantage," (Code Civil, art. 640, note by Paillet).[1] He may make trenches to conduct the water to irrigate his land if he return it with no other loss than that which irrigation caused. In England, it is not very clear that such a user would be permitted, as arising out of the right to the use of the water *jure naturæ;* but, no doubt, if the stream were only used by the riparian proprietor and his family, by drinking it, or for the supply for domestic purposes, no action would lie for this ordinary use of it; and it may be conceived, that if a field be covered with houses, the ordinary use by the inhabitants might sensibly diminish the stream, yet no action would, we apprehend, lie, any more than if the air was rendered less pure and healthy by the increase of inhabitants in the neighbourhood, and by the smoke issuing from the chimneys of an increased number of houses. But, on the other hand, as the establishment of a manufacture rendering the air sensibly impure, by emitting noxious gases, would be actionable, so would it be if it rendered the water less pure by the admixture of noxious substances; and if a mode of enjoyment, quite different from the ordinary one, is adopted, by which the water is diverted into a reservoir, and there delayed for the purposes of a manufacture, an action seems to us to be maintainable; and so, if by that mode of dealing with the water it is sensibly diminished in quantity.

We think, therefore, that the issue on not guilty, so far as it relates to both Bowling Sough and Low Moor Sough, should be found for the plaintiffs. *Judgment accordingly.*

ENGLISH NOTES.

See cases cited in notes to *Chasemore* v. *Richards*, No. 16 of "Action" 1 R. C. at p. 758.

It may be here added that pollution of a stream by others is no justification to a defendant charged with fouling the water. *Crossley & Sons* v. *Lightowler* (1867), L. R. 2 Ch. 478, 36 L. J. Ch. 584. Nor is it any excuse for the defendant to show that he is exercising a lawful trade which is beneficial to the community. *Stockport Waterworks Co.* v.

[1] See "Manuel de Droit Français." Paris, 1832.

Potter (1862), 7 H. & N. 160, 31 L. J. Ex. 9. So, the High Court will restrain the pollution of a stream by the drainage of a town, however beneficial that may be to the town, if material injury arises therefrom to a riparian owner. *Attorney General* v. *Gee* (1870), L. R. 10 Eq. 131, 23 L. T. 299; *Attorney General* v. *Leeds Corporation* (1870), L. R. 5 Ch. 583, 39 L. J. Ch. 711, 19 W. R. 19. See also per Romilly, M. R. in *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (1866), L. R. 1 Eq. 161 at p. 169, 35 L. J. Ch. 88 at p. 93, and per Wood, V. C. in *Lingwood* v. *Stowmarket Company* (1866), L. R. 1 Eq. 77.

The case of *Whalley* v. *Laing* (1857), 2 H. & N. 476, 26 L. J. Ex. 327 and (Ex. Ch. 1858) 3 H. & N. 675, 27 L. J. Ex. 422, is an authority for the proposition that a licensee taking water from an artificial watercourse has a right of action against a stranger who pollutes the supply. It is true that the judgment of the Court of Exchequer in favour of the plaintiff was reversed in the Exchequer Chamber; but that was on the ground that the cause of action, if there was a good one, was not properly pleaded; and there is the great authority of Willes, J., in support of the question of principle determined by the Court of Exchequer.

AMERICAN NOTES.

This case is extensively cited by Washburn on Easements and Gould on Waters, and there is no doubt of the general acceptance of the principle in the American cases. It is unnecessary to cite more than the following: *Dwight Printing Co.* v. *Boston*, 122 Massachusetts, 583; *Richmond Manuf. Co.* v. *Atlantic D. L. Co.*, 10 Rhode Island, 106; 14 Am. Rep. 658; *Lewis* v. *Stein*, 16 Alabama, 214; 50 Am. Dec. 177; *O'Riley* v. *McChesney*, 49 New York, 672; *Gladfelter* v. *Walker*, 40 Maryland, 1; *Holsman* v. *Boiling S. B. Co.*, 14 New Jersey Equity, 335; *Potter* v. *Froment*, 47 California, 165; *Sanderson* v. *Penn. Coal Co.*, 86 Penn. St. 401; 27 Am. Rep. 711; 94 Penn. St. 302; 39 Am. Rep. 785; 102 Penn. St. 370; *Mitchell* v. *Barry*, 26 Q. B. (Canada), 416; *Woodyear* v. *Schaefer*, 57 Maryland, 1; *Ottawa Gaslight Co.* v. *Graham*, 35 Illinois, 346; 81 Am. Dec. 263; *Woodward* v. *Aborn*, 35 Maine, 271; 58 Am. Dec. 699; *Maywood* v. *Logan*, 78 Michigan, 135; *Tate* v. *Parrish*, 7 Monroe (Kentucky), 325; *Pensacola Gas Co.* v. *Pebley*, 25 Florida, 381; *Jacobs* v. *Allard*, 42 Vermont, 303; 1 Am. Rep. 331; *Washburn* v. *Gilman*, 64 Maine, 163; 18 Am. Rep. 246; *Robinson* v. *Black D. C. Co.*, 57 California, 412; 40 Am. Rep. 118; *Red R. R. Mills* v. *Wright*, 30 Minnesota, 249; 44 Am. Rep. 194; *Ferguson* v. *Firmenich M. Co.*, 77 Iowa, 576; 14 Am. St. Rep. 319; *Barton* v. *Union Cattle Co.*, 28 Nebraska, 350; 26 Am. St. Rep. 340; *Hazeltine* v. *Case*, 46 Wisconsin, 391; 32 Am. Rep. 715; *Village of Dwight* v. *Hayes*, 150 Illinois, 273; 41 Am. St. Rep. 367; *Drake* v. *Lady E. C. &c. Co.*, 102 Alabama, 501, 24 Lawyers' Rep. Annotated, 64; *Kinnaird* v. *Standard Oil Co.*, 89 Kentucky, 468; 7 Lawyers' Rep. Annotated, 451.

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Some necessary limitations are placed on the extent of this doctrine. Thus a mine owner is not liable for the natural drainage of his mine into a stream. *Elder* v. *Lykens V. C. Co.*, 157 Penn. St. 490; 37 Am. St. Rep. 742. So of the proprietor of a hospital who uses the water of a well to bathe his patients and allows it to flow away into a natural stream. *Barnard* v. *Sherley*, 135 Indiana, 547; 41 Am. St. Rep. 454. The court said: "The natural right to have the water of a stream descend in its pure state must yield to the equal right of those above. Their use of the stream for mill purposes and the other manifold purposes for which they may lawfully use it will tend to render it more or less impure. The water may thus be rendered unfit for many uses for which it had before been suitable; but so far as that condition results from a reasonable use of the stream, in accordance with the common right, the lower riparian proprietor has no remedy. When the population becomes dense, and towns or villages gather along its banks, the stream naturally suffers still greater deterioration. Against such injury, incident as it is to the growth and industrial prosperity of the community, the law affords no redress. So in cities and towns, with their numerous inhabitants and diversified business, with their mills, shops, and manufactories, with their streets and sewers — all the products and means of a high civilization — it would be impossible that the pure streams that flow in from the farmsides should remain uncontaminated; and those that live upon the lower banks of such streams must, for the general good, abide the necessary results of such causes: *Merrifield* v. *City of Worcester*, 110 Mass. 216; 14 Am. Rep. 592."

In *Helfrich* v. *Catonsville Water Co.*, 74 Maryland, 269; 28 Am. St. Rep. 245; 13 Lawyers' Rep. Annotated, 117, it was held that one may pasture his cattle by a stream, although it produces some defilement of the water. The court said: "The right to the use of a stream of water in its natural purity cannot override other co-equal and co-existing rights; it must certainly yield to those of a more absolute and unqualified character. The tillage of the soil and the tending of flocks and herds were the earliest occupations of the human race. The husbandman soweth his seed, and gathereth the harvest to furnish us with food; and the flocks and herds bring forth their increase for our use. It would be most unnatural and unwise to put any unnecessary restrictions on those pursuits which furnish the world with the means of subsistence. We must confess that the right of a man to cultivate his own fields and to pasture his cattle on his own land is of an original and primary character, and that it would be oppressive to interfere with the free exercise of it, except under a necessity caused by grave public considerations. The washings from cultivated fields might, and probably would, carry soil and manure into streams of water, and make them muddy and impure. And so the habits of cattle, according to their natural instincts, would lead them to stand in the water and befoul the stream. But nevertheless the owner of the land must not lose the beneficial use of it. The inconveniences, which arise from the pollution of the water by these causes, must be borne by those who suffer from them.

The ordinary requirements of domestic life diminish the purity of the atmosphere; but as long as these causes are within the limits of reason and necessity, the law recognizes no ground of complaint against them. The reasonable and proper exercise of acknowledged right by one man may and often does work annoyance and loss to another; but rights cannot be forfeited for this reason."

Although a right to pollute a stream may be acquired by prescription, yet it is "limited by the character and extent of that exercised during the period of prescription, and for any increase, causing material injury, an action could be brought." *Mississippi Mills Co.* v. *Smith*, 69 Mississippi, 299; 30 Am. St. Rep. 546, citing *Crossly* v. *Lightowler*, L. R. 2 Ch. 478; *McCallum* v. *Germantown W. Co.*, 54 Penn. St. 40; *Holsman* v. *Boiling S. B. Co.*, 14 New Jersey Equity, 335.

Section IV. — *Profits à Prendre and Rights of Common.*

No. 14. — GATEWARD'S CASE.

(C. P. 1605.)

RULE.

A CLAIM by custom to enjoy a *profit à prendre* in the soil of another is invalid and insupportable.

Gateward's Case.

6 Co. Rep. 59 *b*–62 *a* (s. c. Cro. Jac. 152).

Profit à Prendre. — Custom.

There cannot be a custom for inhabitants, as such, to have *profit à prendre* in the soil of another. But there may be a custom for every inhabitant to have a discharge in his own land, or an easement in the land of another. Copyholders in fee, or for life, may have by custom of the manor common in the demesnes of the lord of the manor, and they ought to alledge the custom to be that every copyholder of every customary messuage, &c., and not that every inhabitant in any ancient customary messuage, &c.

In trespass by Robert Smith against Stephen Gateward, gent. "quare clausum fregit apud Horsington in com' Lincoln' vocat' Horsington Holmes, cum quibusd' averiis, viz. equis, vaccis & bidentibus depastus fuit 1 Aug. an. 43 El." with continuance. The defendant "quoad porcos," pleaded not guilty, and as the residue of the trespass he pleaded, "quod villa de Stixwold est antiqua villa, & contigue adjacet prædict' claus. vocat' Horsington

No. 14. — Gateward's Case, 6 Co. Rep. 59 b, 60 a.

Holmes, quodque infra eandem villam habetur, & a toto tempore cujus contrar' memoria hom' non existit talis habebatur consuetudo, viz. quod inhabitantes infra eandem villam de Stixwold prædict' infra aliquod antiquum messuagium ibidem ratione commorantiæ, & resident' suæ in eadem habuerunt & usi fuerunt & consueverunt habere com' pastur' in præd' loco in quo, &c. pro omnibus & omnimodis bobus & equis & aliis grossis animal' communical' super hujusmodi antiqua messuagia sua infra præd' villam [* 60 a] de Stixwold præd' modo & formâ sequente, * viz. quolibet anno ad omnia tempora anni, necnon pro bidentibus suis levant' & cubant', &c. quolibet ann. super primum diem Augusti, & abinde usque festum Annunciationis beatæ Mariæ Virginis tunc prox' sequen'." And pleaded that he "præd' tempore quo fuit & adhuc est commorans & inhabitans" in the said town of Stixwold, in an ancient house in *S. præd'*, and so justified; upon which the plaintiff did demur in law. And this plea began, Trin. 3 Jac. and was oftentimes argued at the bar, and now this term was openly argued at the bench by all the justices; and it was unanimously resolved by all the justices of the Common Pleas, that the custom was against law for several reasons. 1. There are but four manner of commons, *sc.* common appendant, appurtenant, in gross, and by reason of vicinage, and this common "ratione commorant' & resident'" is none of them, and "argumentum a divisione est fortissimum in jure." 2. What estate shall he have who is inhabitant in the common, when it appears he hath no estate or interest in the house (but a mere habitation and dwelling), in respect of which he ought to have his common? For none can have interest in common in respect of a house in which he hath no interest. 3. Such common will be transitory, and altogether uncertain, for it will follow the person, and for no certain time or estate, but during his inhabitancy, and such manner of interest the law will not suffer, for custom ought to extend to that which hath certainty and continuance. 4. It will be against the nature and quality of a common, for every common may be suspended or extinguished, but such a common will be so incident to the person, that no person certain can extinguish it, but as soon as he who releases, &c. removes, the new inhabitant shall have it. 5. If the law should allow such common, the law would give an action or remedy for it; but he who claims it as inhabitant, can have no

action for it. 6. In these words, inhabitants and residents, are included tenant in fee-simple, tenant for life, for years, tenant by *elegit*, &c. tenant at will, &c. and he who hath no interest, but only his habitation and dwelling; and by the rule of all our books without question, tenant in fee-simple ought to prescribe in his own name, tenant for life, years, by *elegit*, &c. and at will, &c. in the name of him who hath the fee: and as he who hath no interest can have no common; so there is none that hath any interest, though it be but at will, and who ought to have common, but by good pleading may enjoy it.[1] 7. No Improvement can be made in any wastes, if such common (custom) should be allowed, for the tenants for life, for *years, at [*60 b] will, tenant by *elegit*, statute-staple, and statute-merchant of houses of the lord himself, would have common in the wastes of the lord himself, if such prescription should be allowed, which would be inconvenient.

But two differences were taken and agreed by the whole court. 1. Between a charge in the soil of another and a discharge in his own soil. 2. Between an interest or profit to be taken or had in another's soil and an easement in another's soil; and therefore a custom, that every inhabitant of a town hath paid a *modus decimandi* to the parson in discharge of their tithes, is good; for they claim not a charge, or profit apprender in the soil of another, but a discharge in their own land: so of a custom that every inhabitant of such a town shall have a way over such land, either to the church or market, &c. that is good, for it is but an easement and no profit; and a way or passage may well follow the person, and no such inconvenience as in the case at bar. 8. It was resolved, that copyholders in fee, or for life, may by custom of the manor have common in the demesnes of the lord of the manor, but then they ought to alledge the custom of the manor to be, "quod quilibet tenens customarius cujuslibet, antiqui mesuagii customar', &c." and not "quod quilibet inhabitans infra aliquod antiquum messuagium customar, &c." For a copyholder hath a customary interest in the house, &c. and therefore he may have a customary common in the lord's wastes; and in such case he cannot prescribe in the name of the lord, for the lord cannot claim common in his own soil, and therefore of necessity such custom ought to be alledged. *Vide* 21 E. III. 34. See

[1] Corrected translation by Mr. Joshua Williams, "Commons," p. 17.

the Fourth Part of my Reports, *Foiston's* case, 31, 32. Another difference was taken, and agreed between a prescription which always is alledged in the person, and a custom, which always ought to be alledged in the land: for every prescription ought to have by common intendment a lawful beginning, but otherwise it is of a custom; for that ought to be reasonable, & *ex certâ causâ rationabili* (as Littleton saith) *usitata*, but need not be intended to have a lawful beginning, as custom to have land devisable, or of the nature of gavel-kind, or borough-English, &c. These and the like customs are reasonable, but by common intendment they cannot have a lawful beginning, by no grant, or act, or agreement, but only by parliament. See also for this matter *Foiston's* case. Also it was agreed, that the custom of a manor that *dom' pro tempore* shall grant lands customary, is good, and tenant at will may do it: and so 20 H. VI. 8 b. by the custom of the [* 61 a] court of Common Pleas, * the Chief Justice grants divers offices for life, and these customs are good: but in such cases, he who grants them hath an interest in the manor or office, and their grant is made good by the custom. And 19 R. 2 *Action sur le case* 52. A beadle of the hundred shall have three flaggons of beer of every brewer who sells within the hundred, *causâ quâ supra*. But a custom, that an inhabitant or resident, shall grant or take any profit, is merely void. 9. It was resolved, that if the custom had been alledged, that "quilibet pater-familias infra aliquod antiquum messuag', &c." it would be also insufficient for the causes and reasons aforesaid; and if he hath any interest he may be relieved as aforesaid. *Vide* 7 E. IV. 26, a. 15 E. IV. 29, b. & 32, 18 E. IV. 3 b, 20 E. IV. 10 b, 18 H. VIII. 1 b, 19 H. VIII. reported by Spilman, that such custom is not warranted by law, and so was it adjudged in this court, Trin. 33 Eliz. Rot. 422. See the Book of Entries, Trespass, Common 6. *Vide* 9 H. VI. 62 b, 7 E. VI., Dyer 70. *Isam's* case. Note, reader, the law in this general case well resolved, and no book in the law is adjudged against it; and hereby it appears how pleaders may safely plead in these and the like cases: and observe well, that the custom in the case at bar was insufficient and repugnant in itself; for it was alledged, that the custom of the town of S. was, that every inhabitant thereof had used, &c. to have common within a place in the town of H. which was another town. *Vide* 21 Eliz. Dyer 363, pl. 27.

No. 14. — Gateward's Case. — Notes.

ENGLISH NOTES.

One important effect of *Gateward's Case* has already been dealt with under No. 6 of "Custom," 8 R. C. 337, and notes. The case itself is a landmark in the history of the law, although the line which separates a claim by custom from one by grant, the existence of which is often a fiction based upon evidence of usage, is difficult to define.

Even as a rule of pleading, an exception has been allowed, apparently by the necessity of the case, in favour of copyholders claiming, as against the lord, rights of profit in the soil of the waste. For, if the strict rule of pleading (referred to p. 247, *supra*) that the claim must be made in the name of the owner of the fee, were applied, the claims of the copyholders, whose rights of pasture, &c. are frequently among the best established rights of this nature, would be excluded. They are therefore allowed to plead that they have these rights by the custom of the manor. Williams Rights of Common, p. 17.

Gateward's Case was much relied on, on behalf of the Lords of Manors in the Epping Forest Cases. In *Willingale* v. *Maitland* (1866), L. R., 3 Eq. 103, 36 L. J. Ch. 64, 12 Jur. (N. S.) 932, 15 W. R. 83, the bill was filed by a labourer on behalf of himself and all other the inhabitants of the parish of L. against the lord of the manor of L. claiming that the waste lands of the manor were subject to rights in the parishioners of cutting wood; and that Queen Elizabeth, when lady of the manor, had, by royal charter, granted to the inhabitants of the parish that the labouring poor of the parish might at certain times and in a certain way, lop and carry away wood from the wastes. On demurrer, this was held by Lord Romilly, M. R., to be a good claim.

In *The Commissioners of Sewers of City of London* v. *Glasse* (1872), L. R., 7 Ch. 456, 41 L. J. Ch. 409, 26 L. T. 647, 20 W. R. 515, the bill was filed by the plaintiffs on behalf of themselves and all other the owners and occupiers of lands and tenements lying within the Forest of Essex against the lords of divers manors within the forest and the Attorney General; and the plaintiffs claimed, in right of, and as appendant to their several lands and tenements within the forest, a right of common of pasture upon all the waste grounds within the forest for all manner of cattle commonable within the forest levant and couchant upon their respective lands and tenements within the forest. It was alleged that these rights were granted by various Crown charters in compensation for the burdens to which the owners of land within the forest were subject under the forest law. On demurrer — The Lords Justices, affirming the decision of the Master of the Rolls (Sir G. Jessel) held that the claim was good. On the hearing, the statements having been substantiated by ancient documentary evidence, the Master

OF THE ROLLS held the right to have been established, (1874), L. R., 19 Eq. 134, 44 L. J. Ch. 129, 31 L. T. 495, 23 W. R. 102.

On the other hand, in *Chilton* v. *Corporation of London* (1878), 7 Ch. D. 735, 47 L. J. Ch. 433, 38 L. T. 498, 26 W. R. 474, the statement of claim alleged that there was vested in the inhabitants of the parish of L. (of whom the plaintiff is one) the right at certain times to lop the trees upon the wastes of the manor of L. The defence admitted this statement with the qualification that trees of a certain description were not subject to the right of lopping and that the defendants "do not admit that the plaintiff, as the occupier of a house built upon land which forms part of the waste of the forest or otherwise, is an inhabitant of the parish entitled to exercise the said right." On this admission the plaintiff moved for an injunction against the defendants destroying the trees so as to interfere with the alleged right of lopping. The MASTER OF THE ROLLS (Sir G. JESSEL) dismissed the motion with costs. The statement of the right by the plaintiff (he considered) did not show the lawful existence of any such right; nor did the qualified admission entitle the plaintiffs to have the alleged right treated as having had a lawful origin.

The defendants to an action for taking underwood for fuel from the waste of the plaintiff's manor of T. in Dorsetshire justified as inhabitants of the parish of T., and proved immemorial user by some inhabitants as such, but they did not prove user by the inhabitants generally as such, and exclusive right was claimed by the tenants of the manor. It was held that the justification could not stand either upon custom, as the custom would be for the inhabitants to have a *profit à prendre* in the soil of another, or upon a lost grant from a private person, inhabitants being incapable of taking under a grant which does not incorporate them. *Rivers* v. *Adams*; *The Same* v. *Isaacs*; *The Same* v. *Ferrett* (1879), 3 Ex. D. 361, 48 L. J. Ex. 47, 39 L. T. 39, 27 W. R. 381.

An incorporated borough had enjoyed immemorially a several oyster fishery in a navigable tidal river, qualified by a usage also immemorial for free inhabitants of ancient tenements in the borough to dredge for oysters without stint from Candlemas to Easter eve in each year. The Corporation claimed a several fishery discharged from the usage in favour of the inhabitants. It was held that the claim of the free inhabitants was not necessarily to be regarded as a claim by custom to a *profit à prendre in alieno sole*, but was a claim to which the law could and would give effect by presuming a grant to the Corporation, subject to a condition of charitable trust in favour of the free inhabitants. *Goodman* v. *The Mayor of Saltash* (H. L. 1882), 7 App. Cas. 633, 52 L. J. Q. B. 193, 48 L. T. 239, 31 W. R. 293.

No. 14. — Gateward's Case. — Notes.

By the first section of the Prescription Act (2 & 3 Will. IV. c. 71) "no claim which may be lawfully made at the common law by custom, prescription, or grant, to any Right of common or other profit or benefit to be taken and enjoyed from or upon any land . . . shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years . . . and where such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

In *Rogers* v. *Taylor* (1857), 1 H. & N. 706, 26 L. J. Ex. 203, the plaintiff, as reversioner of land, alleged that the defendant dug and excavated stone and sand and converted the same to his own use, and also that the excavations had injured the land permanently. The defendant pleaded that one R. was seised in fee of the mines and stone within certain parts of the lordship of B., and that R. and all whose estate he had, and his and their tenants, from time immemorial had been used and accustomed of right, as often as it might be necessary for the purpose of effectually working the said quarries to enter upon the waste lands within the part of the lordship within which the quarries were situate, and to dig through the same to the quarries and to raise the stone and carry away the same. The plea then alleged a demise by R. to the defendant of a quarry of stone under these lands, and justifying the acts in the exercise of these rights. The plea was held to be good. As a custom the user pleaded would probably have been held unreasonable and bad; but the plea was held good on the ground that the quarry was the property of the defendant, and that the right to use the plaintiff's land for the purpose of working the quarry in the way alleged might have originated in grant and if so that the claim was good under the Prescription Act, 2 & 3 W. IV. c. 71.

In the case of *Earl de la Warr* v. *Miles* (The Ashdown Forest Case, C. A. 1881), 17 Ch. D. 535, 50 L. J. Ch. 754, 44 L. T. 487, 29 W. R. 809, it was held that in order to show the indefeasible right by sixty years' user under the statute it was not necessary to show that for the whole period of sixty years the acts were done under claim of some right capable of being legally supported, but only that they were done as a thing that the person doing them had some right to do. So that a claim which may be lawfully made by grant may be supported by the long usage, although perhaps commenced under an erroneous conception of right. So far the statute seems to modify the effect of the principal

case, but it would not assist the claim by an indefinite body of persons in whose favour there is no reason to presume a charter of incorporation.

AMERICAN NOTES.

This subject was fully annotated under Custom, *ante*, vol. 8, p. 347.

No. 15. — TYRRINGHAM'S CASE.

(1584.)

RULE.

COMMON appendant cannot be gained by prescription, but is implied as a necessary incident to an ancient feoffment in arable land. Common of turbary cannot be appendant to land, though it may be to a house. If the commoner purchases part of the land in which he has common appendant, yet the right is not extinct, but shall be apportioned.

Tyrringham's Case.

4 Co. Rep. 36 *b*–39 *a*.

Common Appendant.

[36 b] T. S. seised of a house, land, meadow, and pasture, to which he and all those whose estate he had, had used to have common of pasture for oxen, cows, and heifers levant and couchant upon the house, land, meadow, and pasture, as well in thirty acres in the same town, of which A. was seised in fee, as in forty acres of land, whereof B. was seised in fee, to the said house, land, meadow, and pasture, appertaining. Afterwards B. purchased the said house, land, meadow, and pasture, to which all, &c. to him and his heirs, and demised the same to plaintiff, who put his cattle into the said thirty acres to common, and they were driven out by defendant, farmer of A. with a little dog; held, 1st. That prescription does not make a thing appendant to another, unless it agree in nature and quality with it — as a thing corporeal cannot be appendant to another corporeal thing, nor *vice versa*; but a thing incorporeal may be appendant to a thing corporeal, or *e converso*; though a thing incorporeal cannot be appendant to a corporeal, which does not agree with it in nature, as a common of turbary cannot be appendant to land; but to a house, that common appendant is of common right, and need not be prescribed for; but it only belongs to ancient arable land, and for horses and oxen to plough, and cows and sheep to manure the land; it cannot be appendant to meadow or pasture, and therefore the prescription being for common appendant time out of mind, to a house, meadow, and pasture, as well as to the arable land, the common was appur-

No. 15. — Tyrringham's Case, 4 Co. Rep. 36 b.

tenant, and not appendant. 2nd. Common appendant, being of common right, is apportionable by the commoner's purchasing part of the land to which, &c. as rent is, on the lord's purchasing part of the tenancy; so by his alienation of part of the land to which the common is appendant. But common appurtenant, being against common right, by the said purchase all the common was extinguished. 3rd. Unity of possession of the whole land is an extinguishment of common appendant. 4th. Common by vicinage is not common appendant: but, inasmuch as it ought to be by prescription, time out of mind, it is, in this respect, resembled to common appendant. And one may enclose against the other, for one cannot put his cattle into the lands of the other but they must escape thither, in which case the trespass is excused by reason of the ancient usage. 5th. That when the plaintiff's cattle trespass on defendant's land, he might chase them out with a little dog, without being compelled to distrain them. Common appendant remains, though a house be afterwards built on the land, or the arable land be converted to pasture; but in pleading it ought to be prescribed for as appendant to land. So it may be appendant to a manor, carve of land, &c. though it comprehend a house, meadow, &c.

When common appendant is apportionable by purchase of part of the land, the commoner ought to prescribe for the whole, till such a day when he purchased; when by sale the alience may prescribe for common appendant to his parcel.

Common being apportioned by purchase of part if an assise be brought, the ter-tenant of the land charged with the residue of the common shall be only charged.

Common appurtenant, and in gross, may commence either by grant at this day, or by prescription.

In case of common by vicinage between adjoining manors, the lord of one manor may enclose against the others, and thereby take away such common.

In trespass between Phesant plaintiff, and Salmon defendant, the case was such: Thomas Tyrringham was seised of an house, 44 acres of land, 7 acres of meadow, and 2 acres of pasture, in Titchmersh in the county of Northampton; to which house, land, meadow, and pasture, he and all those whose estate he had, had used to have common of pasture for oxen, cows, and heifers, levant and couchant upon the house, land, meadow, and pasture, as well in 30 acres of land in the same town, (whereof one John Pickering was then seised in fee) as in 40 acres of land and pasture in Titchmersh aforesaid (whereof one Boniface Pickering was then seised in fee) as to the said house, land, meadow, and pasture appertaining. And afterwards the said Boniface Pickering being seised as aforesaid, of the said 40 acres, purchased to him and his heirs the said house, 44 acres of land, 7 acres of meadow, and two acres of pasture, to which, &c. and being so seised as well of the

said 40 acres in which, as of the said tenements to which, &c. demised the house, land, meadow, and pasture to which, &c. to Phesant, who put in two cows into the said 30 acres to use the said common, and the said Salmon who was farmer of the said John Pickering, with a little dog, *leviter et molliter* drove out the said cows, and the said Phesant brought his action of trespass for chasing his cattle. In this case divers points were resolved by Wray, J. C., Sir Thomas Gawdy, *et totam curiam*. First, that prescription doth not make a thing appendant, unless the thing which shall be appendant agrees in quality and nature to the thing to which it shall be appendant as a thing corporate cannot be appendant to a thing corporate, nor a thing incorporate [* 37 a] to a thing incorporate, as it is * held in *Hill* and *Grange's* case, Plow. Com. 168 a. b. But a thing incorporate, as an advowson, may be to a thing corporate as to a manor; or a thing corporate as land, to a thing incorporate, as an office; as it is there also held: but every thing incorporate cannot be appendant to a thing corporate; as common of turbary cannot be appendant to land, but to an house, as it is held in 5 Ass. 9; for the thing which is appendant ought to agree with the nature and quality of the thing to which it is appendant, and turfs are to be spent in an house: so 10 E. III. 5. a leet cannot be appendant to a church or chapel, for they are of several natures. The beginning of common appendant by the ancient law was in such manner; when a lord enfeoffed another of arable land to hold of him in socage, *i. e. per servicium socæ*, as every such tenure at the beginning (as Littleton saith) was that the feoffee *ad manutenendum servicium socæ*, should have common in the lord's wastes for his necessary cattle which plowed and manured his land, and that for two reasons. 1. Because it was, as it was then held, tacite implied in the feoffment, for the feoffee could not plough and manure his land without cattle, and they could not be kept without pasture, *et per consequens* the feoffee should have (as a thing necessary and incident) common in the lord's wastes and land, and that appears by the ancient books in temp. E. I. Common 24, & 17 E. II. Common 23, & 20 E. III. Admeasurement 8, & 18 E. III. and by the rehearsal of the statute of Merton cap. 4. The 2nd reason was for the maintenance and advancement of tillage, which is much respected and favoured in law; so that such common appendant is of common right, and commences by

operation of law, and in favour of tillage, and therefore it is not necessary to prescribe therein, as it is held in 4 H. VI. & 22 H. VI., as it would be if it was against common right; but it is only appendant to ancient land arable hide and gain, and only for cattle, sc. horses and oxen to plough his land, and cows and sheep to manure his land, and all for the bettering and advancement of tillage, and with this resolution agree 37 H. VI. 34 a. b. *per tot' cur' et* 26 H. VIII. 4 a. as to this latter point, and therefore it is against the nature of common appendant, to be appendant to meadow or pasture; and because in the case at bar the prescription was to have common appendant from time whereof, &c. to an house, meadow, and pasture, as well as to arable land, by which it appears to the court that there had been an house, meadow, and pasture, from time whereof, &c. it was therefore resolved, that this common was appurtenant and not appendant. But if a man has had common for cattle which serve for his plough appendant to his land, and perhaps of late time an house is built upon * part, and some part is employed to pasture, [* 37 b] and some for meadow, and that for maintenance of tillage which was the original cause of the common, in this case the common remains appendant and shall be intended, in respect to the continual usage of the common for cattle levant and couchant upon such land, at the beginning all was arable but in pleading he ought to have it appendant to land, and although *terra dicitur a terendo, quia vomere teritur*, yet terra includes all; and although it is now pasture or meadow, yet it is arable, id est, may be ploughed, although it is not now in tillage and ploughed; but if he prescribes to have it appendant to an house or meadow, or pasture, then it appears, of his own showing, (as hath been said) that it had been at all times an house, meadow and pasture, and then he cannot have common as appendant to it, but such is common appurtenant. A man may prescribe to have common appendant to his manor, for all the demesnes shall be intended arable, or at least shall be in construction of law *reddendo singula singulis* appendant to such demesnes as are ancient arable land, and not to any land newly ploughed and improved to be arable out of his wastes and moors parcel of the manor, and therewith agrees 5 Ass. 2. Also when a man claims common appendant to his manor, no incongruity, as in the case at bar, appears of his own showing. So common may be claimed to be appendant

to a carve of land, and yet a carve of land may contain pasture meadow, and wood, as it is held in 6 E. III. 42, but no incongruity appears there, and it shall be applied to that which agrees with the nature and quality of a common appendant. 2. It was resolved that common appendant may be apportioned for two reasons: 1. Because it is of common right, and therefore if the commoner purchases parcel of the land, in which, &c. yet the common shall be apportioned; as if the lord purchases parcel of the tenancy, the rent shall be apportioned; so if A. has common appendant to twenty acres of land, and enfeoffs B. of part of the said twenty acres to which, &c. this common shall be apportioned, and B. shall have common pro rata. And where it was objected: 1st. That the prescription fails in both the cases; for in the first case he never had common in part of the land only, but entirely in all; and it would now be a prejudice to the ter-tenant, if he should have common in the thirty acres only for all the cattle levant and couchant upon all the tenements to which, &c. And in the latter case, no common was ever appendant to part of the land, but entirely to the whole: also, 2. In assise of common all the ter-tenants ought to be named, and that cannot be when the commoner himself has purchased part of the land. As to these objections, it was answered and resolved, that as to the [* 38 a] first the prescription ought to be special, sc. * to prescribe to have common in the whole till such a day, and then to show the purchase of part, and from that time that he has put in his cattle into the residue *pro rata portione* as in the cases, when a corporation has liberties by prescription, and within time of memory the corporation is altered, there ought to be a special prescription; as to the second case, sc. when part of the land to which, &c. is aliened, there, every of them may prescribe to have common for cattle levant and couchant upon his land, and in none of these cases any prejudice accrues to the tenant of the land in which the common is to be had, for he shall not be charged with more upon the matter than he was before the severance; and God forbid the law should not be so, when part of the land to which, &c. is aliened; for otherwise many commons in England (which God forbid) would be annihilated and lost: and it was agreed, that such common which is admeasurable, shall remain after the severance of part of the land to which, &c. But in the case at bar, forasmuch as the court resolved that the common was

appurtenant and not appendant, and so against common right, it was adjudged, that by the said purchase all the common was extinct; for in such case common appurtenant cannot be extinct in part, and be *in esse* for part by the act of the parties. And as to the last objection, it was answered and resolved, that if upon the matter the common appendant should be apportioned, then the terre-tenant should be only charged out of the land with the residue of the common, as in case where a rent-charge is apportioned in case of descent, the tenant of the land out of which the residue of the rent which remains issues shall only be named. And it was said, in this case this word (pertinens,) is Latin as well for appurtenant as for appendant, and therefore subjecta materia; and the circumstance of the case ought to direct the court to judge the common to be appendant, or appurtenant. 3. It was resolved, that unity of possession of the whole land to which, &c. and of the whole land, in which, &c. makes extinguishment of common appendant against the opinions 11 E. III. Common 11, 14 Ass. 21, 15 Ass. 2, 20 E. III. Admeasurement 8. The reason of which opinions was, because the land to which the common was claimed was ancient land hide and gain, and for maintenance and advancement of tillage: but inasmuch as it was against a rule in law, sc. when a man has as high and perdurable estate as well in the land as in the rent, common, and other profit issuing out of the same land, there the rent, common and profit, is extinct; and therewith agrees 24 E. III. 25, 4. In this case WRAY, C. J. said, that common for cause of vicinage is not common appendant: but inasmuch as it ought to be by prescription from time whereof, &c. as common appendant ought, it is in this respect resembled to common appendant: but common appurtenant and in *gross, may commence either at this [*38 b] day by grant, or be by prescription. And WRAY, Chief Justice, further said, that in case of common for cause of vicinage, the one may enclose against the other; for he who has such common cannot put his cattle into the land of the other, but he ought to put them in the land where he has common; and if they estray into the other land, they are excused of trespass, by reason of the ancient usage which the law allows to avoid suits which would arise, if actions should be brought for every such trespass, when no separation or enclosure is between the commons, and therefore he said, that one may enclose against the other, for

cessante causâ cessat effectus. 5. It was resolved without any difficulty, that when the plaintiff's cattle came into the defendant's land, and did him trespass, the defendant with a little dog might chase them out, and should not be compelled to distrain them damage feasant. Nota reader, according to the said opinion of WRAY, C. J. it was now lately adjudged in the King's Bench, between Smith plaintiff and How and Redman defendants, where the case was; that two lords of two several manors had two wastes adjoining (parcels of their manors joining) without inclosure or separation, and yet the bounds of each manor was well known by certain bounds and marks, in which wastes the tenants of the one manor, and of the other, had reciprocally common for cause of vicinage; in that case one may enclose against, and thereby utterly toll the common for cause of vicinage: against which, two objections were made. 1. Because it had been used by prescription from time whereof, &c. the beginning of which cannot be known, it would be hard now to break that which has had such continuance; for as it is said, "obtemperandum est consuetudini rationabili tanquam legi." 2. Perhaps the waste of one was greater or of greater value than the other, and probably those who had the less at the beginning gave recompence to have his common in the greater, and therefore it would be now unreasonable to undo or defeat it. As to these it was answered and resolved, that the prescription imports the reciprocal cause in itself, sc. for cause of vicinage, and no other cause can be imagined; and forasmuch as it is potius an excuse of trespass when the cattle of the tenants of the one manor stray into the waste of the other manor, than any certain inheritance; for it was resolved clearly, that the tenants of the one manor could not put their beasts into the wastes of the other manor, but they should come there only by escape, and that the enclosure is only to prevent the escape of the cattle (which is a lawful act;) for these reasons it was adjudged, that the one might inclose against the other.

[*39 a] *Nota* reader, it is true that agriculture and tillage is *greatly respected and favoured as well by the common law, as by the common assent of the King, Lords spiritual and temporal, and all the Commons, in many parliaments. 1. The common law prefers arable land before all other, and therefore for its dignity it ought to be named in a præcipe before meadow, pasture, wood, or any other soil; and it appears by the

statute of 4 H. VII. cap, 19, that six inconveniences are introduced by subversion or conversion of arable land into pasture, tending to two deplorable consequences. The first inconvenience is the increase of idleness, the root and cause of all mischiefs. 2. Depopulation and decrease of populous towns, and maintenance only of two or three herdsmen, who keep beasts, in lieu of great numbers of strong and able men. 3. Churches for want of inhabitants run to ruin, and are destroyed. 4. The service of God neglected. 5. Injury and wrong done to patrons and curates. 6. The defence of the land for want of men strong and enured to labour against foreign enemies, weakened and impaired. The two consequences are: 1. These inconveniences tend to the great displeasure of God. 2. To the subversion of the policy and good government of the land, and all this by decay of agriculture, which is there said to be one of the greatest commodities of this realm, which one act of parliament as to this purpose may, as a figure in arithmetic, in the third place stand for an hundred; but I have observed that the most excellent policy, and assured means to increase and advance agriculture, is to provide that corn shall be of a reasonable and competent value: for make what statutes you please, if the plowman has not a competent profit for his excessive labour and great charge, he will not employ his labour and charge without a reasonable gain to support himself and his poor family.

ENGLISH NOTES.

Common appendant, — as Lord Coke shows in the above case, — is the proper description of that species of common, generally consisting of common of pasture, which is essentially part and parcel of an ancient tenement.

The historical accuracy of Lord Coke's explanation of the origin of common appendant has been questioned in the light of modern investigation. For it is now well understood that the common field system of tillage, of which common appendant is a characteristic feature, has a still more ancient origin, the traces of which survive in countries so widely separated as the Punjab, Russia, and the British Isles. The traces of the system in classical literature are scanty, as might be expected. For classical literature is not often in touch with the tillers of the soil. But there is the well known description by Tacitus of the cultivation amongst the ancient Germans: — "Arva per annos mutant et superest ager." And there is perhaps a trace in the Homeric tradition that the founder of the Pheacian colony — ἐδάσσετ' ἀρούρας —

"apportioned the tillage" — (the beasts of tillage must have still pastured in common).

The extreme antiquity of the species of property of which common appendant is parcel is, however, not inconsistent with the actual grant in historical times of a right of common along with arable land. Of such grants Mr. Joshua Williams cites instances which may perhaps mark the original creation of such a tenement, just as there are Indian villages of an ancient type, where the proprietors can show the actual *sunnud* or grant by which they have been permitted to settle upon land previously uncultivated. It is not however necessary, in order to understand common appendant, to pursue these speculations further. The important point is that the connexion of the right of common with the arable land to which it is appendant, is ancient, and goes as far back as the origin of the tenement itself, which includes both.

The case of *Mors* v. *Webbe* (1609), 2 Brownlow & Goldesborough, 297, is instructive upon the question of apportionment. The plaintiff (in replevin) pleaded title to common for 2 horses, 4 other beasts, and 120 sheep as appendant to 2 virgates of land of which he was seised. It appeared that the plaintiff had made a lease of 6 acres parcel of the 2 virgates of land in one of the fields with the common thereto belonging for the term of ten years, and that the beasts for which the replevin was brought were in another field. The question was raised whether this lease suspended or extinguished the right of common. It was held it did not; that the right of common remained in the lessor, but that, pending the lease, the lessee could exercise the right of his position. "It was agreed that common appendant and appurtenant were all one as to the severance, for if such a commoner grant parcel of that land to which the common is appurtenant or appendant, the grantee shall have common *pro ratâ*, but if a commoner purchase parcel of the land in which he hath common appurtenant, that this extincts all his common." Coke, C. J., observed that this was a case of common appendant, for it was pleaded as belonging to 2 virgates of land, and for commonable beasts. And he seems to have further thought that if it was pleaded as common appurtenant by prescription, the levancy and couchancy of the beasts, *i. e.* that they were accustomed to plough, manure, and feed on the land, might be taken as intended.

Tyrringham's Case was followed and applied in *Bennett* v. *Reeve* (1740). Willes, 227, where it was held that common appendant could only be claimed for so many cattle as are necessary to plough and manure the tenant's arable land. The principle that common could only be claimed for such of the beasts as were levant and couchant upon the claimant's land, had, it was admitted, been already established in regard to a claim of common appurtenant. And this criterion was, in effect, held to be applicable to common appendant as well.

No. 15. — Tyrringham's Case. — Notes.

In the case of *Baring* v. *Abingdon* (Ch. D. 5th August, 1891), 1892, 2 Ch. 374, 67 L. T. 6, 7 Times Law R. 743, the principal case is cited and applied by Mr. Justice STIRLING to show that, when it had been proved that a certain tenement was ancient freehold of the manor of Banstead, the owner of the tenement was *primâ facie* entitled to the rights of common to which the judgment of the Court of Appeal in *Robertson* v. *Hartopp* (43 Ch. D. 484, 59 L. J. Ch. 553), had declared the freehold tenants of the manor to be entitled. It made no difference that by a deed of 1859 the rights of the lord of the manor had been released to the freeholder — for the rights of common held in respect of a freehold tenement, being presumably held by grant, were not within the reason of the rule which has been applied to copyholds, on the enfranchisement of which the rights of common assumed to have been annexed by usage to the estate, have been held to be extinguished by the act of the tenant in converting that estate by purchase, into freehold; *Marsham* v. *Hunter* (1609), Cro. Jac. 253, Yelverton, 189.

Mr. Joshua Williams mentions two cases in which the right was claimed by copyholders or customary tenants to the entire pasture of a certain place to the exclusion of the lord who was owner of the soil. These are *Potter* v. *North* (1669), 1 Wms. Saunders, 347, and *Hoskins* v. *Robins* (1671), 2 Wms. Saunders, 320, 2 Keble, 758, 842, 1 Vent. 123. In the former the plaintiffs failed to prove the right as alleged. In the latter they succeeded. The right was not stated as limited by levancy and couchancy or otherwise; and this was apparently right, since if the tenants were to have the whole pasture, to the exclusion of the lord, it was immaterial to him by how many beasts each should depasture on the common.

A right of turbary or of estovers must be claimed in respect of a house, and (as the house may be comparatively modern) it seems to be more in the nature of common appurtenant than appendant. But the distinction in respect of this kind of common is not of much practical importance. See *Metcalf* v. *Rorke* (1845), 8 Ir. Rep. 137.

AMERICAN NOTES.

The doctrine of commons has very small applicability in this country, and has mostly disappeared before statutory regulations.

Early in New York it was held that a common of "cutting and hewing timber for building" was apportionable on severance. *Livingston* v. *Ten Broeck*, 16 Johnson (N. Y.), 14; 8 Am. Dec. 287. The Court say: "*Tyrringham's Case*, 4 Co. Rep. 36, is a very leading case, and it only requires to be understood to command respect." "I cannot find that the doctrine of *Tyrringham's Case* has ever been overruled; on the contrary, the principle on which it is grounded has been recognized." But in *Van Rensselaer* v. *Radcliff*, 10 Wendell (New York), 639; 25 Am. Dec. 582, it was held that this was not

applicable to common of estovers, citing *Leyman* v. *Abeel*, 16 Johnson (New York), 30; and the cases cited in the *Livingston Case* were all said to be of common of pasture. The court said: "The common (estovers) belongs to the whole farm as an entirety, not to parts of it. This would enlarge the right to the prejudice of the land out of which common was to be taken."

Common of sea-weed, gravel, etc., is apportionable on severance. *Hall* v. *Lawrence*, 2 Rhode Island, 218; 57 Am. Dec. 715, citing the principal case.

No 16. — WYAT WILD'S CASE.

(Trin. 7 Jac. 1.)

No. 17. — COWLAM *v.* SLACK.

(1812.)

RULE.

Common appurtenant to land is apportionable on alienation in fee by the commoner of part of the land to which the right appertains. And, as it may be claimed under a grant within legal memory, it may be regranted after it has been extinguished by unity of possession.

Wyat Wild's Case.

8 Co. Rep. 78 *b*–79 *b* (S. C. Brownl. 180).

Common Appendant or Appurtenant. — When Apportionable.

[78 b] If a commoner purchases parcel of the land in which he has common appendant, the common shall be apportioned: but if he purchase parcel of the land in which he has common appurtenant, such common is extinct.

But in either case, the common shall be apportioned by the alienation in fee of parcel of the land to which, &c.

And the alienee may plead that he is seised, &c., and that he and all those whose estate he has, &c. have used to have common of pasture, &c.

In a replevin between William Wood, plaintiff, and William Norton, Esq., defendant, upon taking of his sheep at Croydon in the county of Surry, in a place called Norwood: the defendant said, that the place where, &c. doth contain 200 acres, part of the manor of Croydon, and entitled himself to have common there, and avowed for damage feasant. The plaintiff, in bar of the

No. 16. — Wyat Wild's Case, 8 Co. Rep. 78 b, 79 a.

avowry, said, that before and at the time of the taking, he himself was, and yet is seised of five acres of land in Croydon, aforesaid in fee, and that he and all those whose estate he has in the said five acres *a tempore cujus, &c.* have used to have common of pasture in the said 200 acres for all his commonable cattle levant and couchant upon the said five acres of land, at all times of the year, as to the said five acres of land appertaining; for which cause he put in his sheep, &c. To which the defendant said, that before the said William Wood had any thing in the said five acres of land, one Wyat Wild was seised of a messuage and 40 acres of land, in Croydon aforesaid, whereof the said five acres were parcel, in fee, and that the said Wyat, and all those whose estate he had in the said messuage, and 40 acres of land, whereof, &c. *a tempore cujus,* &c. had common of pasture in the said 200 acres for all his commonable cattle, levant and couchant upon the said messuage and 40 acres of land, whereof &c. as to the said messuage and 40 acres of land appertaining, and the said Wyat being so seised of the said five acres, enfeoffed one John Wood in fee, whose estate the said William Wood before the time of the taking, &c. had, "idemque Williel' Wood, colore inde clam' commun' pastur'" in the said 200 acres, &c. "pro omnibus aver' suis communib' sup' præd' quinq' acr' ter'" levant and couchant, &c. * put in his [* 79 a] cattle, and he took them as damage-feasant, &c.; upon which the plaintiff demurred in law. And the last term and this term this case was argued by the Serjeants at the bar; and now at this term it was argued at the Bench by all the Justices, *sc.* COKE Chief Justice, WALMESLEY, WARBURTON, DANIEL, and FOSTER: and in this case two points were resolved, — 1. That (be the said common appendant or appurtenant) the common in the case at bar is apportionable. 2. That the pleading thereof was sufficient. As to the first it was well agreed that common appendant was of common right, and severable; and although the commoner in such case purchases parcel of the land in which, &c. yet the common shall be apportioned, but in such case common appurtenant, and not appendant, by purchase of parcel of the land in which, &c. is extinct for the causes and reasons given in *Tyrringham's Case,* all which was affirmed for good law by the whole court. And it was strongly urged, that common appurtenant shall not be severable in the case at the bar for divers reasons. 1. Because this common appurtenant wholly belonged to a house and 40 acres of land by

prescription; and he by his own act cannot make this entire thing several. 2. The feoffee of parcel shall not have common, because the prescription fails, for no common was ever appurtenant to that parcel, but to the messuage and all the land. 3. Common appurtenant is a thing against common right, and therefore by the act of the party shall be no more severed or divided, than a condition or *nomine pœnæ*, or any other thing against common right. As to that it was answered and resolved, that it appears by the prescription, that the said common is severable, for the prescription is to have common in the land, in which, &c. to be taken by the mouths of his beasts which are levant and couchant on the land, to which, &c. and that extends to the whole, and to every parcel, and it can be no more damage or charge to the tenant of the land in which, &c. after the severance, than it was before, for no other beasts can pasture there, but those which are levant and couchant on the land, to which, &c. But if he who has common appurtenant purchases parcel of the land in which, &c. all the common is extinct: or, if he takes a lease of parcel of the land, all is suspended, because it is the folly of the commoner to intermeddle with part of the land in which, &c. which belongs not to him; but when the commoner intermeddles but only with his own land, by alienation thereof, that shall not in such case turn to his prejudice, for that is not against any rule of the law, as the other case, when he purchases part of the land, in which, &c. because his [* 79 b] common appurtenant was against * common right; and he cannot common in his own land which he has purchased. And it will be a great inconvenience, if by the alienation of parcel the alienee shall lose the common which belongs to him, for then the alienor shall lose his common also; for by the reason which has been made, Wyat Wild cannot prescribe to have common to the house and 35 acres, because the common was entirely appurtenant to the messuage and 40 acres, and if the law should be such, all common appurtenant in England would be destroyed (which would be against the commonwealth) for no land continues in so entire a manner, every acre together with another, as it has been *ab initio*, but for preferment of younger sons, advancement of daughters, payment of debts, or other necessary considerations, part has been severed; and therefore this case is not like a condition, or *nomine pœnæ*, which are entire, and not severable by the act of the parties, but is like a rent reserved on a lease for years:

and therefore if a man makes a lease of three acres, each of equal yearly value, rendering 3*s.* rent, and the lessor grants the reversion of one acre, and the tenant attorns the grantee shall have 12*d.* rent; for although it was one lease, one reversion, and one rent, yet that was incident to the reversion, which was severable, and the rent shall wait upon the reversion, and upon every part of it. So in the case at bar, although at the beginning there was but one common attendant upon one tenancy; yet forasmuch as it is attendant upon the tenancy which is severable, and upon every part of it, the alienee of part of the tenancy shall have common. So if he who has such common appurtenant to land, leases part of the land to another, the lease shall have common for the beasts levant and couchant; and if an advowson be appendant to a manor which descends to divers co-parceners, and the co-parceners make partition of the manor to which, &c. without speaking of the advowson, the advowson, notwithstanding the division and severance of the manor to which, &c. remains appendant, 13 Ed. III. *Quare imp.* 58, 19 Ed. III. *ibid.* 59, 17 E. 38, 43 Ed. III. 35 13 E. II. *Quare imp.* 170, 2 H. VII. 5. *Vide* 4 Eliz. Dy. 213.

Cowlam v. Slack.

15 East 108–117 (13 R. R. 401).

Common Appurtenant. — Prescription. — Presumed Grant within Legal Memory.

[108] Common appurtenant may be claimed, as well by grant within time of memory, as by prescription: and after a unity of possession in the lord of the land, in respect of which the right of common was claimed with the soil and freehold of the waste, evidence that the lord's tenant of the land had for 50 years past enjoyed the right of common on the waste is evidence for the jury to presume a new grant of common as appurtenant so as to support a count in an action by the tenant for surcharging the common, declaring upon his possession of the messuage and land, with the appurtenances, and that by reason thereof he was entitled of right to the common of pasture as belonging and appertaining to his messuage and land: and also to support another count, in substance the same, alleging his possession of the messuage and land, and that by reason thereof he was entitled to common of pasture, &c.

The plaintiff declared that before, and at the time of committing the grievances after mentioned, he was, and from thence hitherto had been and still is, lawfully possessed of a certain messuage, and 250 acres of land, with the appurtenances, in the parish of Crowle,

in the county of Lincoln; and by reason thereof during all the time aforesaid hath had, and of right ought to have had, and still of right ought to have, common of pasture for all his commonable cattle levant and couchant in and upon his said messuage and land with the appurtenances, in, upon, and over certain large wastes or commons in the parish aforesaid, to wit, &c. Ealand Carr or Bolton, (and so mentioning several other commons, some of them stinted,) as belonging and appertaining to his said messuage and land with the appurtenances, &c.: and then alleged a grievance to him by the defendant's surcharging the said common and waste grounds. A second count, to the same effect, laid [* 109] the plaintiff's messuage, * land, and appurtenances, as being within the manor of Crowle. A third count, more general, stated the plaintiff's lawful possession, at the time of the grievance, of the messuage and land, with the appurtenances; and that by reason thereof he was entitled of right to common of pasture in, upon, and throughout all the commonable waste grounds in the said parish of Crowle, for all his commonable cattle levant and couchant in and upon his said last-mentioned messuage and land, with the appurtenances; (without claiming such right of common as belonging and appertaining to his messuage and land:) and then it proceeded, as before, to state the disturbance of the plaintiff's right by the defendant's surcharging the common.

The cause was tried before Grose, J. at the last assizes at Lincoln, when it appeared that the plaintiff, his father, and grandfather had occupied the manor house and farm for above 50 years past, during all which time they had constantly stocked and enjoyed the common. But it appearing also, upon cross-examination, that the messuage and farm were so held by the plaintiff and his ancestors, as tenants to the lord of the manor, the objection was taken that neither the lord nor his tenants could have a right of common upon the lord's own soil, but that the unity of possession extinguished the common; and the learned Judge, being of that opinion, nonsuited the plaintiff.

Clarke, in moving to set aside the nonsuit, contended that it was competent to the lord to grant a right of common at [* 110] this day to his own tenants over his own * wastes, according to the case of *Bradshaw* v. *Eyre*, Cro. Eliz. 570; and that the manner in which the commons had been enjoyed by the tenants of the farm in question was evidence to the jury that

the lord had made such a grant. This, he said, had never been questioned in the case of re-grants of estates which had fallen in by escheat to the lord. The Court gave a rule nisi, against which

Reader and Copley now showed cause. It cannot be disputed but that unity of possession of the waste with the land in respect of which a right of common is claimed on such waste will extinguish the right of common: which is admitted in the very case cited of *Bradshaw* v. *Eyre*. And though the user of the common in the manner proved for the last fifty years, might upon the principle of that case, have been evidence of a new and express grant of common to the tenants; yet no such question was made at the trial: and in *Kindred* v. *Bagg*, 1 Taunt. 10, the Court refused to set aside a nonsuit, on the ground that the case ought to have been submitted to the jury; because the point was not made by the plaintiff at the trial. But supposing that difficulty were out of the way, the plaintiff is not entitled to recover upon any of the counts in the declaration; for in the two first it is laid to be common appurtenant: but that was put an end to by the unity of possession, and could not be set up again without a new grant from the lord, which was not attempted to be proved. Nor is the allegation in the latter count substantially different; for
though the common is not there said to be appurtenant, yet* [*111]
it is laid that by reason thereof (i. e. of his possession,) the
plaintiff was entitled to common: but that could only be by prescription; for if it were by grant or licence of the lord, such right would be by force of the grant or licence, and not merely by reason of the possession. As in *Fentiman* v. *Smith*, 4 East, 107 (7 R. R. 533), where in case for obstructing a water-course to a mill, the plaintiff declared on his possession of the mill, with the appurtenances, and that by reason of such his possession he had a right to the use of the water running to the mill, &c.: this was held not to be proved by showing that he had a licence from the defendant to lead the stream over his land, which licence was revocable and revoked. In the case of *Bradshaw* v. *Eyre*, the defendant in his plea expressly stated the new grant (subsequent to the unity of possession) of the messuage and land, with all commons, &c. thereto appertaining, or occupied or used therewith; which would have let in the evidence of user if it could have been shown; but it was not. Besides, the evidence given at the trial was as applicable to the case of a mere licence, as of a grant from

the lord: but a licence gives no interest in the land; and one who claims by reason of his possession of a messuage or land must show a permanent interest in the soil in respect of which he claims, which a licence does not confer.

The Attorney-General, Clarke, Rough, Serjt., and Denman, in support of the rule. As to the latter point, the fact of the tenants of the farm having always turned out their cattle on the common was evidence that they had an interest in the common in respect of their possession of the farm, and not merely that they [* 112] did it by * licence. This interest might arise, since the unity of possession, by a new grant from the lord; and, therefore, the user of the common was proper evidence of such a grant: but the nonsuit proceeded on the ground that the claim of common could only arise by prescription, which was extinguished by the unity of possession. Here, however, a possessory right only is stated by the plaintiff, and that did not want the support of a prescriptive title. But it may be presumed, if necessary, that when common was originally granted out by the first lord, he reserved the use of it for his own tenants at all times to come. [Lord Ellenborough, C. J. Every thing that the lord does not grant out remains in him, without any special reservation. No right of common, as such, subsists in the lord, but the full right of dominion so far as he has not granted it away.] The case of *Bradshaw* v. *Eyre*, Cro. Eliz. 570, is decisive that a right of common may be revived by a new grant after the extinction of the prescriptive right by a unity of possession. Upon the union, the owner of the soil takes it discharged of the old right of common: but he may charge it again by a new grant to another. All the authorities show that common appurtenant may exist either by prescription or by grant, and Co. Lit. 121. says that it may be created at this day. As soon therefore as it was, or may be presumed to have been granted, the right of common became and was appurtenant to the land demised: and if so, all the counts are sustainable; though it is sufficient for the present purpose if the last count be sustained. The proof was that the several tenants of the farm in succession for above fifty years under different [* 113] lords had all enjoyed * the common by their cattle levant and couchant on the farm: and the constant enjoyment of a thing is evidence of a right to enjoy it. It would be evidence against the lord himself, and still more against a stranger. [Lord

Ellenborough, C. J. asked if there were any precedents of a claim of common, by reason merely of the plaintiff's possession of land without stating it to be by prescription or by grant?] There is no necessity for a plaintiff in a possessory action against a wrong doer to state his title; but it is sufficient for him to state that he was possessed of his land, and that by reason thereof he was entitled to common:[1] [Le Blanc, J. May not common be claimed as appurtenant generally; and then as prescription supposes an original grant, may not the right be proved either by prescription, or by grant within time of memory? And though it may not have been usual to claim it in this way, I do not see why it may not be so claimed.] In *Musgrave* v. *Cave*, Willes, 319, it was said not to be necessary in pleading common to allege expressly whether it was appendant, appurtenant, or in gross; though it was there held to appear sufficiently, from the nature of the common claimed, that it was appurtenant; and there seems to be no more reason why it should be alleged to be by prescription or grant.

The case stood over for consideration for a few days, and now

Lord Ellenborough, C. J., delivered the judgment of the Court. This was a motion for a new trial in a *cause [*114] tried before my brother Grose at Lincoln, and the only question was whether the nonsuit was maintainable, upon the ground that the evidence did not support the declaration. The plaintiff had alleged a disturbance of his right of common for all commonable cattle, levant and couchant on his land; and which right he claimed in all the counts of his declaration, but the last, as belonging and appertaining to the said closes of land; and in the last count, after stating that he was possessed of such closes, he alleged "that by reason thereof" he was entitled to the same right of common in the place in question. It appeared in evidence that the plaintiff was tenant to the lord of the manor of the closes in respect of which the common was claimed, and of course, that as any right of common, which might have been antecedently appurtenant to these lands, became extinct by an union of them which had taken place in the hands of the lord with the soil out of which such common was claimed, the tenant could not claim the common

[1] The distinction is taken in a note by Mr. Serjt. Williams to the cause of *Mellor* v. *Spateman*, 1 Saund. 346 [No. 18, p. 273, *post*], which was referred to and where the cases on the subject are collected.

in question in right of his land, as appurtenant, after such union had taken place. But inasmuch as the tenant, and his father before him, had for a long series of years actually enjoyed this common, it was contended before us (for no such point was made below), on the part of the plaintiff, that such enjoyment laid a foundation for presuming a new grant from the lord, and which presumption ought to have been left to the jury: supposing that any new grant could in point of law have sustained the allegation of common belonging and appertaining to the plaintiff's lands, which occurs in all the counts but the last; and of his being entitled to common by reason thereof, which occurs in the last count.

[*115] Upon consideration there does not appear to be any material *difference in point of legal effect between the claims of common as made in these several counts: in all, the claim is in substance a claim of common appurtenant to the closes in respect of which the common is claimed. And the only question upon the argument, of which the Court wished further to consider, was whether common appurtenant, for which as is said in the text of Co. Lit. 122, one must prescribe, is, as suggested in the notes of the learned commentators, also claimable by grant as well as by prescription. It certainly occurs in favour of such claim by grant, that as prescription is only evidence of an immemorial grant, by which in time beyond memory the right then began to exist, it may equally begin to exist through the same medium, *i. e.* of grant, now shewn, or fairly to be presumed from usage, at the present day. The case of *Bradshaw* v. *Eyre*, Cro. Eliz. 570, which was a case similar to the present, as far as the extinction of common by unity of possession is concerned, did not afford an express authority for the creation of common strictly appurtenant by a new grant at the present day; because the lease contained not only the words all commons, profits, and commodities thereto appertaining; upon which the argument for common appurtenant might be built; but the further words, "or occupied or used with the aforesaid messuage;" which latter words might import a substantive new grant in gross of common to the tenant, by words of reference to antecedent usage and enjoyment as the measure of its future enjoyment, and not strictly an annexation of such right *de novo* as an appurtenant to the lands, &c. in question. However, the case of *Sacheverell* v. *Porter* in Cro. Car. 482, referred to in the fourth note upon Co. Lit. 122, but much better reported in Sir William

*Jones, 396, is decisive upon the question. According to [*116] Sir William Jones, Sacheverell brought trespass against Porter for breaking his close and consuming his grass with his beasts in Crippleston in the county of Stafford. And the case was such upon the pleading and special verdict, that Foulke Pembridge was seised of Whitenall waste in Crippleston, and the prior of Stone was seised, in right of his church, of three messuages, one hundred acres of land, &c. in Stullington in the county aforesaid; and being so seised the said Foulke by his deed 2 H. IV. granted to the said prior and his successors common of pasture for himself and his successors, and his tenants, in Stullington, in the said waste. The priory was dissolved and came to King Hen. VIII., and by descent to Queen Elizabeth, who by letters patent granted it to Rowland Hill in fee, and from him by mesne conveyance it came to one Warlowe, who enfeoffed the defendant of thirty-three acres, parcel of the lands in Stullington, with the appurtenances in fee; and he put his beasts into the waste land to take his common; and the plaintiff being owner of the waste brought trespass. And it was adjudged, upon argument at the bar by Rolle and Serjt. Milward, by all the Court, BRAMPSTON, JONES, CROOKE, and BARKLEY, that the action does not lie. And by all the Court these points were adjudged; first, when the said Foulke granted to the prior, for him and his tenants of Stullington, common of pasture; this was common appurtenant, and this may be as well by grant as by prescription. The other points are not material to be here stated. It appearing from this pointed authority, in confirmation of the reason of the thing upon principle, that common appurtenant, (such as was claimed by the plaintiff's declaration), may be created by modern grant, it was *proper that the jury should [*117] have had the usage in this case left to them, as a foundation whereupon they might or might not, according as the evidence of enjoyment would have warranted them, have presumed such a grant to have been made by the lord to the plaintiff or his father as would have sustained the right claimed of common appurtenant in respect of their lands. And as this was not done, we think the nonsuit should be set aside, and a new trial granted.

ENGLISH NOTES.

The former part of the rule is, in effect, also laid down in *Tyrringham's Case*, No. 15, p. 252, *ante*, and *Mors* v. *Webbe* cited in the notes

to that case (p. 260, *ante*). The same principle is again laid down in *Sacheverell* v. *Porter* (1637), Sir W. Jones, 396, where (citing *Wyat Wild's Case*) it is said: — "On a parcel of the land being granted away, the common (appurtenant) is not extinct."

A right of common of pasture appurtenant is necessarily limited to the beasts *levant* and *couchant* on the land in respect of which the common is claimed. *Morley* v. *Clifford* (1882), 20 Ch. D. 753, 51 L. J. Ch. 687, 46 L. T. 561, 30 W. R. 606. This phrase, whatever it may mean originally, is simply a measure of the rights of each having regard to the rights of all the commoners, and the numbers must be ascertained by the Court Rolls or by inquiry. It appears however that levancy and couchancy has little practical significance as defining the rights of the commoners against the lord, inasmuch as the total number of the beasts to which all the commoners are entitled is as many as the land will bear. *Leech* v. *Midgeley* (1668), 2 Keble, 590, cited in *Robertson* v. *Hartopp* (C. A. 1889), 43 Ch. D. 484, 516, 59 L. J. Ch. 553, 566. See also *Cheesman* v. *Hardham* (1818), 1 B. & Ald. 706, 19 R. R. 432; *Carr* v. *Lambert* (1866), L. R. 1 Ex. 168, 35 L. J. Ex. 121. Certainly no lord of the manor has recently succeeded in a fairly contested case, in establishing the right to enclose land subject to common of pasture, on the plea that he left enough — there is, in fact, never enough — for the use of the commoners. And, as before observed (8 R. C. 334), illegal enclosures are made still more difficult by the Law of Commons Amendment Act 1893 (56 & 57 Vict. c. 57).

It may perhaps be doubted whether the right established in *Hoskins* v. *Robins* (p. 261, *ante*) is essentially different from an ordinary right of common; but the companion case of *Potter* v. *North* (p. 261, *supra*) shows the danger, even in a claim between all the commoners and the lord, of pleading the exclusive right to the pasture. It is much safer to plead the right for beasts *levant* and *couchant*, which has a presumption in its favour, and will probably cover any claim capable of being established by evidence. This form of pleading has been invariably adopted in recent cases.

As an instance of common appurtenant by modern grant may be cited, *Fox* v. *Amherst* (1875), L. R., 20 Eq. 403, 44 L. J. Ch. 666, where by an arrangement confirmed by a private Act of Parliament in the time of James I., the copyholders in a manor were enfranchised, subject to a provision that the copyholders after enfranchisement should enjoy the like common of pasture as before, and that the copyholders should make by-laws for the regulation of the common. By-laws were made accordingly, stinting the rights of common according to the annual value of the land held by the copyholders. The rights so stinted were followed by the Court in the apportionment of compensation money for a portion

of the common taken by a Railway Company under their compulsory powers. Assuming that in the absence of the special provision in the arrangement above mentioned, the copyholder's rights of common would have been extinguished by the enfranchisement, the rights so reserved were in effect rights of common appurtenant under the grant contained in the statutory arrangement.

AMERICAN NOTES.

In *Bell* v. *Ohio & P. R. Co.*, 25 Penn. St. 161; 64 Am. Dec. 687, it was held that right of common of pasturage, annexed to and reserved out of town lots under a State survey and laying out, is appurtenant and not appendant, and ceases on severance. The Court said: "What then is the effect of this purchase by the commoner of a part of the land in which he claims common of pasture? There is a distinction between common appendant and common appurtenant in this important particular, that if he who has common appurtenant purchases parcel of the land subject to the easement, all his right of common is extinct; or if he takes a lease of part of the land, all the common is suspended, because it is the folly of the commoner to intermeddle with the land; his common appurtenant was against common right, and he cannot common in his own land which he has purchased. This principle was expressly decided in *Kimpton and Bellamye's Case*, 4 Leon. 43; in *Tyrringham's Case*, 2 Co. 379; in *Wyat Wild's Case*, 8 Id. 79; and in numerous other cases. It was said in *Tyrringham's Case*, *supra*, that common appurtenant cannot be extinct in part and be *in esse* for part, by the act of the parties.

"These principles were fully recognized by this Court in the case of *Carr* v. *Wallace*, 7 Watts. 397. It is only necessary to add that the origin and nature of the right claimed in this case show that is a right of common appurtenant, The result is that the plaintiff's right of common pasture is extinguished."

No. 18. — MELLOR *v.* SPATEMAN.

(1669.)

RULE.

A CORPORATION may prescribe for common *in gross* for cattle levant and couchant within the town, but not for common *in gross* without number.

Mellor v. Spateman.

1 Wms. Saunders, 343–346 (s. c. 2 Keble, 570).

Corporation. — Common in Gross. — Prescription.

[343] A corporation may prescribe for common *in gross* for cattle levant and couchant within the town, but not for common *in gross* without number.

No. 18. — Mellor v. Spateman, 1 Wms. Saund. 343, 344.

Trespass by Mellor against Spateman: the plaintiff declares that the defendant, on the 20th of October in the 20th year of the now king, with force and arms broke his close at Derby, and the grass there growing with feet in walking, and with horses, bulls, cows, swine, and sheep eat up, trod down, and consumed, and other wrongs, &c. The defendant, as to all the trespass with cattle, except with two geldings and two mares, pleads not guilty; and as to the said trespass with the geldings and mares, he pleads in bar, that the place where, &c. was 20 acres of land in Derby aforesaid, and from time whereof, &c. was a parcel of a common field called Littlefield in Derby aforesaid; and that the borough of Derby was an ancient borough; and the defendant at the time when, &c. and long before, was a burgess of the same borough. And the defendant further said, that the burgesses of that borough from time whereof, &c. until the 11th day of July in the 14th year of King Charles the First, were a body politic and corporate, by the name of bailiffs and burgesses of the borough of Derby; and that on the said 11th day of July in the 14th year aforesaid the king by his letters patent under the great seal, changed the name of the corporation to the name of mayor and burgesses, &c.; and then the defendant lays a prescription for common in the corporation, namely, that the bailiffs and burgesses from time whereof, &c. until the said 11th day of July, and the mayor and burgesses always afterwards, had for themselves and for every burgess of the same borough, common for all their com-
[344] monable cattle in the said field called Littlefield, whereof the place where, &c. is parcel, in the manner following, *viz.* for two years together, when the corn is cut and carried away, until the said field be resown with grain, and in the third year when the said field shall lie fresh, for the whole year. And the defendant further avers, that at the time when, &c. all the corn growing upon the said field was cut and carried away, and no part of that field was sown again, wherefore the defendant put in his cattle to use his common there; which is the same trespass &c.: and this, &c.: wherefore, &c.: on which plea the plaintiff demurred in law. And the case was opened in Trinity term last past; and the court then doubted whether a prescription for common in gross was good or not.

And now in this term it was argued by Saunders for the defendant that the prescription was good; and first, he said it was

clear that a corporation, by the change or alteration of the name of the corporation, does not lose its franchises. *Luttrel's Case*, 4 Co. Rep. 87, *quod fuit concessum*. Then he said that a corporation may prescribe for the benefit of its particular members, as well as a natural person can prescribe for common or other profit, or easement for himself and his tenants. For although a corporation aggregate, as this is, be a thing in imagination only, having neither body nor spirit, nor conscience, as the law defines it; yet the law takes notice that the natural persons members of the corporation, of whom the corporation consists, are not strangers to the corporation, but are the parties interested in all the revenues and privileges of the corporation, of which they are members. And therefore, if a corporation bring an action for any thing which they claim in their corporate capacity, it is a principal challenge to a juror that he is of affinity to any member of the corporation, though the corporation itself cannot have any kindred. Co. Litt. 157 a. And that a corporation may take a grant for the benefit of their particular members appears by the book of 48 Edw. III. fol. 17.[1] The mayor and commonalty of L. brought an action of covenant against the mayor, bailiffs, and commonalty of Derby, and declared, that the predecessors of the defendants by their deed, brought into court, had granted to the predecessors of the plaintiffs, that all the commonalty of L. should be quit of murage, pontage, customs, and toll within the town of Derby for all their merchandises, &c. and that the officers of Derby had taken toll and custom from some burgesses of L. of wrong, and against the covenant, to their damages, &c.; and the action was adjudged good. And this was a grant to a corporation for the benefit of their particular members;[2] then if a corporation [345] can take a grant for the benefit of their individual members, they may prescribe to have the same thing to the same intent; for whatever may commence by grant may be claimed by prescription. And if such common, as the defendant has here claimed, had been granted to the corporation at this day, it would be good without question; and so, he said, is the prescription in the manner it is here laid; which the court did not much deny.

But the point on which the court insisted was, that there could not be any common in gross without number; but the prescrip-

[1] Fitz. Covenant, 22. Bro. Covenant, 15. Corporation, 74.

[2] 2 Lev. 246 *Stables* v. *Mellon*.

tion in the case at bar ought to be for cattle levant and couchant in the town; for otherwise, (the Chief Justice said,) the corporation may surcharge the common, if the number of the cattle be not restrained to be levant and couchant in the same town.

Upon which it was said for the defendant, that in Co. Litt. 122 a. in the enumeration of the several and particular kinds of common, common in gross without number is expressly said to be one; and 22 Ass. pl. 36,[1] an assize was brought by the prioress of Napleton for common in gross without number, and she recovered; and the difference is shown between common in gross, and common appendant or appurtenant. So in 11 H. VI. 22 b & 27, *Stroude's Case*,[2] common in gross without number is claimed by prescription, and admitted good: And 15 Edw. IV. 29 b the *City of Coventry's Case*, that a corporation may prescribe for common in gross without number. And as to the objection of surcharge, it was answered, that although a natural person, or body politic, have common in gross without number, yet they cannot by law surcharge the common, as appears 12 H. VIII. 2,[3] where it is said, that if a man hath common without number, yet he ought not so to surcharge the soil but that the lord or owner of the soil may have common there also. And though F. N. B. 125 (D) says, that if one has common in gross without number it shall not be admeasured; yet if he surcharge, the lord of the soil may distrain him, as may be well collected out of the same book. And the common, in the case at bar, is common in gross, and not appendant or appurtenant; and therefore it is not proper to prescribe for common for cattle levant and couchant in the town. For then the prescription will run in this manner, *viz.* that the corporation is seised of the town, and that they and all those whose estate they have in the town have had common, &c. for their cattle levant and couchant in the town; but they do not so prescribe here, but they prescribe for common in gross without an-
[346] nexing it to any land. And the prescription for common appurtenant, and common in gross without number, in a natural person, is very different; because, for common appurtenant, a man shows his seisin in fee of the land to which he claims his common, and then says, that he and all those whose

[1] Fitz. Common, 19. Bro. Commoner, 23.
[2] Fitz. Common, 3. Bro. Common, 47.
[3] Bro. Common, 48, per Brook, Justice.

estate he has in the land from time whereof, &c. have had common of pasture in the place where, &c. for his cattle levant and couchant on the land to which, &c. But the prescription for common in gross is where one does not lay seisin of any land, but says, that he and all his ancestors whose heir he is from time whereof, &c., have had common in the place where, &c. for all their cattle, without relation to any land, and without saying levant and couchant, because there is no land on which they can be levant and couchant, or to which the common can be appurtenant. And as a natural person prescribes in himself and his ancestors, so if a corporation hath been a corporation aggregate from time whereof, &c. they may prescribe in the manner they have done here, and therefore the prescription by the corporation for common in gross is as it ought to be: but if they had claimed common appurtenant it would have been otherwise; for then they ought to have shown a seisin of land in fee, and prescribed to have common for their cattle levant and couchant upon such land: wherefore he concluded that the prescription for common in gross without number was good.

Bigland, *è contra*; and he insisted that the defendant ought to have said in the prescription that the common was for cattle levant and couchant in the town.

And so was the opinion of the whole court; and they relied much on the book of 15 E. IV. 32 b. And the court did not dislike any part of the plea, but only it was not said in the plea "levant and couchant within the town." And Kelynge, Chief Justice, said positively, that there cannot be any common in gross without number; and they all held that the plea was bad for want of those words, and judgment was given for the plaintiff. And Kelynge said, that they did not destroy the common, but the judgment was for the fault in the plea only: and he informed the defendant and his counsel, that if they would put in the words levant and couchant in the town, the prescription would be good enough in the manner above mentioned.

And the defendant's counsel was of opinion to bring a writ of error; but the action was commenced by original writ out of Chancery, and therefore a writ of error did not lie in the Exchequer-Chamber by the statute 27 Eliz. c. 8, but only in Parliament; wherefore nothing further was done.

ENGLISH NOTES.

The distinction in the above rule is one of pleading rather than of substance, as the following case will show.

In *Johnson* v. *Barnes* (C. P. 1872 and Ex. Ch. 1873), L. R., 7 C. P. 592, 8 C. P. 527, 41 L. J. C. P. 25, a question arose upon rights of pasturage claimed by the Corporation of Colchester. The Corporation had from time immemorial exercised by actual enjoyment by the free burgesses, or by way of receipt of rent or acknowledgment a right of pasturage for all cattle, sheep, and other commonable animals, levant and couchant within the borough, over lands in the neighbourhood of the borough, during a certain season of the year, and there was no evidence that during such season the owners or occupiers of the lands in question or any other person had exercised the right of pasture over such lands. The Corporation had, since the time of Henry VIII. from time to time exercised the right of releasing for valuable consideration their rights of pasturage over portions of the land subject thereto, still continuing to exercise their rights over the rest as before. The releases and other deeds of conveyance made by the corporation described the right in words appropriate to a right of common. And the right was pleaded as a right of common. It was forcibly argued that such a right could only have been gained as common appurtenant, and that by the release of the rights over portions of the pasturage, the right of common was extinguished. The Court of Common Pleas, in a judgment delivered by Willes, J., held that a legal origin of the right might be ascribed to a grant to the Corporation of the common in gross with power to grant or release any part, as in the case of a several pasture. In the Exchequer Chamber the Court (Kelly, C. B., Martin, B., Blackburn, J., Cleasby, J., Quain, J., and Archibald, J.) gave judgment in favour of the Corporation on a different ground, namely that a legal origin might be presumed for the right which had been long exercised *de facto*, by presuming a grant to the Corporation of the sole right to the pasturage; and that such a grant should be presumed accordingly. This judgment was not quite consistent with the pleadings; but any objection on that ground would only have been a question of amendment, which probably the Court would have allowed unconditionally; and no such objection was made.

Section V. — *Extinction of Easements.*

No. 19. — JAMES *v.* PLANT.

(EX. CH. 1836.)

(ERROR FROM PLANT *v.* JAMES.)

(K. B. 1833.)

RULE.

UNITY of seisin of the land to which a right of way (or other easement) is appurtenant, extinguishes the right.

But if there is a subsequent severance, the same right of way may still exist by the intention of the grant as construed by reference to the circumstances.

James v. Plant.

(Ex. Ch. in error from Plant v. James in K. B.)

4 Adol. & Ell. 749–766 (s. c. 6 N. & M. 282).

Easement. — Unity of Possession. — Appurtenances.

[749] Estates A. and B., formerly distinct, became vested in co-parceners. Before that time, a right of way had been enjoyed from A. over B., and, after the unity of seisin, the way always continued to be used. The parceners, for the purpose of making partition, conveyed to a releasee to uses the messuages, tenements, lands, &c. (of which the estates consisted), and all houses, outhouses, ways, easements, &c., to the said several messuages or tenements, lands, &c., belonging or appertaining, or therewith usually held, used, occupied, or enjoyed: to have and to hold the messuages, &c., called A., with the buildings, lands, &c. thereunto belonging, and their appurtenances, to the releasee to the use of S. in fee; *habendum*, as to estate B., in similar terms with respect to the parcels, to the releasee to his own use in fee, in order that he might become tenant to the præcipe in a recovery.

Held, that the deed sufficiently showed an intention that a right of way (which way was admitted to have been used up to the time of the deed), from the high road over B. to A. and back, for the convenient use of A., by the occupiers of A., should pass to the uses limited as to A.

That by the word "appurtenances," in the *habendum* as to A., interpreting that clause with reference to the other parts of the deed, the way in question did pass.

And that the releasee to uses, having no estate in A., had not such a seisin of the soil as would extinguish the right of way by unity of seisin.

No. 19. — James v. Plant, 4 Adol. & Ell. 749, 750.

Trespass for breaking and entering certain closes.

Plea, that the closes in which &c. were parcel of a certain farm, lands, and premises called Woodseaves House Farm, mentioned in the after stated indenture, and that, before the making of that indenture, Thomas Smallwood and Maria his wife (in right of Maria), and Elizabeth Hector, were seised respectively in fee each of an undivided moiety of and in Woodseaves House Farm, and also of and in the messuages, tenements, and premises after mentioned to have been bargained, sold, and released to Thomas James, and called respectively Park Hall and Park House: and, being so seised, afterwards, viz. November 10th, 1812, by indenture of release between Smallwood and his wife of the first part, Elizabeth Hector of the second, Thomas Huxley of the third, and Richard Spearman of the fourth, of the date last mentioned, for the making a partition of the messuages, * lands, &c. after described, and for barring all estates tail, reversions, &c., of and in the messuage or tenement after described, called Woodseaves Farm, and the lands and hereditaments thereunto belonging, and the allotment, &c., also after described, and for conveying and assuring all the said messuages, lands, &c., to the uses and on the trusts after declared, and in consideration of 10*s.* the said T. S. and Maria his wife, and Elizabeth Hector, did, according to their respective estates, grant, bargain, sell, alien, and release to Huxley (in his possession then being by a bargain and sale, &c.) all that messuage or tenement called by the name of Park Hall, with the outbuildings and several parcels of land thereunto belonging and then occupied therewith, situate, &c. containing, &c.; and also all that other messuage or tenement called by the name of Park House, with the buildings and several parcels of land thereunto belonging and then occupied therewith, situate, &c. containing, &c.; which two last-mentioned messuages or tenements, lands, &c., were purchased by Brooke Hector of and from Richard Whitworth, Esq. and, on the decease of the said B. H. intestate, descended to the said Maria and Elizabeth his two daughters and co-heiresses; and also all that other messuage or tenement called by the name of Woodseaves House Farm, with the outbuildings and the several parcels of land thereunto belonging, and then occupied therewith, situate, &c. containing, &c.; which last-mentioned messuage and premises were purchased from certain persons (in the plea mentioned) by Thomas Adams, and

[* 750]

were, by settlement made on the marriage of the said Brooke Hector with Elizabeth his late wife, daughter of the said Thomas Adams, limited, after her decease, and in default of her * male issue by B. H., to the use of all her daughters by [*751] B. H. in tail general; and also all that allotment, &c. (an allotment of waste under an inclosure act): "And all houses, outhouses, edifices, buildings, barns, stables, cowhouses, yards, gardens, orchards, ways, paths, passages, waters, watercourses, hedges, ditches, mounds, fences, trees, woods, underwoods, and the ground and soil thereof, easements, profits, privileges, advantages, emoluments, hereditaments, rights, members, and appurtenances whatsoever, to the said several messuages or tenements, lands and hereditaments hereinbefore described belonging or in anywise appertaining, or therewith usually held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof;" and the reversion and reversions, remainder and remainders, &c., and all the estate, right, title, &c. of Thomas Smallwood and Maria his wife, and Elizabeth Hector, and each of them, of, in, to, or out of the said premises, &c.: "to have and to hold the said messuages or tenements called Park Hall and Park House, with the buildings, lands, and hereditaments thereunto belonging, thereby before granted and released, and expressed and intended so to be, and every part and parcel thereof, with their and every of their appurtenances," to Huxley and his heirs to the uses and on the trusts after declared: "and to have and to hold the said messuage or tenement called Woodseaves House Farm, with the buildings, lands, and hereditaments thereunto belonging, and the said allotment," &c. before respectively granted, "and every part and parcel thereof, with their and every of their appurtenances," to Huxley, his heirs, and assigns, to the use of Huxley, his heirs, and assigns, to the intent that he * might become tenant to the præcipe in a recovery to be [*752] suffered as was after mentioned.

The plea then stated a covenant in the said indenture by Smallwood, on behalf of himself and his wife, to levy a fine of their moiety in Park Hall and Park House, with the premises thereto belonging, and before mentioned to have been purchased by Brooke Hector, to Spearman and his heirs: and that it was agreed between the parties to the indenture, that a recovery should be suffered of Woodseaves House Farm, with the buildings, &c., and

appurtenances thereto belonging; and also of the said allotment with the appurtenances in which recovery Spearman should recover against Hartley and Thomas and Maria Smallwood and Elizabeth Hester should be vouchees; and that the uses of the fine of the said messuages, &c., and premises, before granted, and the uses of the said recovery were declared respectively to be, as to "the whole of the said messuages or tenements called Park Hall and Park House with the buildings lands hereditaments and appurtenances thereunto respectively belonging," and also the said allotment with its appurtenances to such use, &c., and for such estate and interest as Smallwood should by deed appoint, &c., and in default of such appointment, &c., to the use of Smallwood and his assigns during his life, and from and after the determination of that estate to Smallwood's decease, to the use of Spearman, his heirs and assigns, during Smallwood's life, in trust for Smallwood and his assigns; and from and after the determination of that estate to the use of Smallwood, his heirs and assigns; and, as to "the said messuage or tenement called Woodcocks House Farm, with the buildings lands hereditaments
[*784] and appurtenances thereto belonging," to "the use of Elizabeth Hester, her heirs and assigns for ever."

The plea then stated a recovery suffered of Wordsworth and the allotment, and a declaration of a moiety of Park Hall and Park House, according to the above indentures.

The plea went on to state "that long before and at the time of the making of the said indentures of release, and of the levying of the said fine and suffering the said recovery the occupiers for the time being of the said messuage and premises called Park Hall had always been used to have and enjoy a certain way from a certain public King's highway in the parish of &c. "into, through, over, and along the said closes in which &c. towards and unto Park Hall aforesaid, and so back again into, through, over, and along the said closes in which &c. into and unto the said public King's highway, for themselves and their servants, on foot, and with carts and carts and other carriages to go, return, pass and repass in and along the said way, every day and at all times," &c. "for the convenient use and occupation of Park Hall aforesaid; and the said way had before and at the time of the making of the said indentures of release, and of the levying of the said fine and suffering the said recovery, been always held, used, occupied, and enjoyed accordingly."

No. 19. — James v. Plant. 4 Adol. & Ell. 753–755.

The plea then stated that, after the fine and recovery, by indenture, to which Smallwood, Spearman, and others were parties, Spearman and others bargained, sold, and released to Thomas James, in fee, the said tenements and premises, with the appurtenances, called Park Hall, and all houses, outhouses, easements, &c. thereto belonging or therewith held, used, occupied, or enjoyed. And that * Thomas James died seised in fee: [* 754] whereupon his estate in the tenements and premises descended to William James, his heir at law, from whom the present defendant George James deduced title. And the defendant James pleaded that he, as the owner and occupier of Park Hall aforesaid, before and at the said several times when &c. was and still is entitled to such way as last aforesaid: and he, in virtue of such his alleged title, and the other defendant as his servant, justified the trespasses complained of.

The plaintiff demurred to this plea, assigning for cause, "that it does not appear that the said supposed way in the said plea mentioned was in any manner granted or reserved to the said defendant George James or any person under, by, or from whom he claims, or that he hath any claim or title to the same." The defendants joined in demurrer; and on argument, in Michaelmas term 1833, the Court of King's Bench gave judgment for the plaintiff. *Plant* v. *James*, 5 B. & Ad. 791.

Error was brought on the judgment; and the case was argued after Trinity term 1835.[1]

Sir W. W. Follett for the plaintiff in error. It appears by the pleadings that the occupiers of Park Hall had an ancient right of way over the Woodseaves estate to the high road: that that right was lost by unity of seisin, but that the actual user of the way continued down to the time when the indenture of November 1812 was executed. The object of the agreement of partition was, that one daughter of Brooke Hector should take * the Park Hall estate, the other the Woodseaves, each [* 755] estate as it was then used. The question is whether, as to Park Hall and the way from it over Woodseaves, an execution of that intent can be collected from the deed. The whole property, including both Park Hall and Woodseaves, is conveyed to Huxley, with all "easements, profits, privileges, advantages, emol-

[1] June 18th. Before Tindal, C. J., Lord Abinger, C. B., Park, Bosanquet, and Vaughan, JJ., and Alderson, B.

uments, hereditaments, rights, members, and appurtenances whatsoever, to the said several messuages or tenements, lands, and hereditaments" before described, "belonging or in anywise appertaining, or therewith usually held, used, occupied, or enjoyed." If Park Hall by itself had been so conveyed, there is no doubt that the way now claimed would have passed. Where a right of way has existed, from one man's estate over the estate of another, and the two properties have centered in the same person, and he again conveys away that estate to which the easement has belonged, the general rule is that, if he merely grants such estate "with the appurtenances," the right of way is not revived; but, if he grants it with all easements, &c. "therewith used and enjoyed," that operates as a revival. But other words, if clearly intended to have such an effect, may operate in the same manner. In Bro. Abr. Extinguishment et Suspencion, pl. 15, it is said that, if a way be extinct by unity of possession of the land from which &c. and the mill to which &c. and the whole descend to coparceners, and, upon partition, one of them has the land, and the other the mill and the way reserved to it, the way is revived *tamen videtur*, that it is a new way (see 11 Vin. Abr. Extinguishment, (C) pl. 9). In *Whalley* v. *Tompson*, 1 Bos. & P. 371 [*756] (4 R. R. 826), a way had been enjoyed from *close A. over close B., the same person being seised of both. He devised his estate in close A. "with the appurtenances;" and it was held that the right of way did not thereby pass, for that the word "appurtenances" in the will had nothing to operate upon. The words of the will there did not testify the intention to pass the right of way. But, "if a man seised of Blackacre and Whiteacre, uses a way through Whiteacre to Blackacre, afterwards grants Blackacre, with all ways, &c. this way thro' Whiteacre shall pass to the grantee," Com. Dig. Chimin (D. 3). In *Clements* v. *Lambert*, 1 Taunt. 205 (9 R. R. 749), where common appurtenant to a messuage had been extinguished by unity of possession, the party seised conveyed the messuage with all commons and appurtenances thereto belonging or in anywise appertaining; and this was held not to convey a new right of common; but it seems admitted there that, if the deed had contained such words as "used with the said messuage," the common, if shown to have been in fact so used, would have passed. *Morris* v. *Edgington*, 3 Taunt. 24 (12 R. R. 579), unless denied to be law, is decisive

in favour of the plaintiff in error. There a man demised part of his premises, with certain rights of ingress, &c. and "all other ways and easements to the said demised premises belonging and appertaining;" and these latter words were held to pass a right of way on the grantor's own premises, which the grantor had himself used for access to the premises demised, MANSFIELD, C. J. relying upon the intent of the grantor as shown by the circumstances of the case. The principle, that in such a case the intent must be consulted, was recognised in *Barlow* v. *Rhodes*, 1 Cro. & M. 439, 3 Tyrwh. 280. * Now, in the present [*757] case, after the grant of all ways and easements to the several messuages, &c. appertaining or therewith usually held, the *habendum* follows, to have, &c. "the said messuages or tenements called Park Hall and Park House, with the buildings, lands, and hereditaments thereunto belonging, thereby before granted and released," &c. "and every part and parcel thereof, with their and every of their appurtenances." It is clearly intended here, by the word "appurtenances," to convey the right of way in question to the uses pointed out as to Park Hall and Park House. It would otherwise be unmeaning to convey to Huxley by the previous clause the "ways" to the several messuages, &c. appertaining. He could not take them. Whatever vested in him by that clause was to pass immediately to the *cestui que use*, not to be held by him for a moment. The intention was, that Park Hall, and all that belonged to it, should pass to one family, and Woodseaves to the other; and that intention must prevail, though the words employed in the *habendum* itself are not strictly proper for the grant of a revived right of way.

R. V. Richards, *contrà*. No intendment can be made against a grantor, or in favour of a grantee, in this case, because both the parties interested are in the situation of grantors. The object of the deed was to make the two estates entirely separate; and there is no ground for supposing an intention to revive an incumbrance or easement for the benefit of Park Hall, at the expense of Woodseaves. The words of conveyance to Huxley, "and all ways, easements," &c. are only general and usual words of conveyance; they could not carry to * the releasee a right of [*758] way, properly so called, over his own land: and, in the subsequent clauses, by which the estate is divided, no such words are used, nor is any intention shown but that of passing whatever

strictly belonged to each farm. If the previous clause did not carry a right of way to Huxley, there is nothing in the subsequent clauses to which a different operation can be ascribed. An entire partition was contemplated. [TINDAL, C. J. The partition would be complete, though the proprietor of one estate retained an easement over the other. Lord ABINGER, C. B. There had been an immemorial way from Park Hall over Woodseaves: the intention may have been only to make the two estates separate, as they were before.] The way does not appear to have been a way of necessity, or material to the use and enjoyment of the Park Hall estate: and, after the unity of possession, it was as if it had never existed. In *Morris* v. *Edgington*, 3 Taunt. 24 (12 R. R. 579), it was clear that some way was intended to pass; and the question was, what passed. The observations of BAYLEY, B. in *Barlow* v. *Rhodes*, 1 Cro. & M. 449, 3 Tyrwh. 287, referred to by the Court of King's Bench when giving judgment in *Plant* v. *James*, 5 B. & Ad. 794, apply to this part of the subject. [ALDERSON, B. If the general words of conveyance to the releasee to uses had been repeated in the clause limiting the uses as to Park Hall and Park House, would not the way in question have passed?] In that case it would. [ALDERSON, B. Is not the same thing done, more compendiously, by the present mode of conveyance? Lord ABINGER, C. B. Suppose no recovery had been necessary, and the [*759] coparceners had simply conveyed * Park Hall and Woodseaves, with the ways, &c. thereto belonging, to a trustee who was to re-convey to two parties; and he had re-conveyed the respective estates with the appurtenances, to those parties, not specifying the ways. Must not the former deed have been looked at, to see what he meant to convey? The whole would have been considered as one conveyance. ALDERSON, B. Why should any way have been conveyed to the releasee to uses, unless it was intended to go to some one through him?] All the estate goes to him, and the ways are included: but there is no reason that the way insisted upon should pass to either *cestui que use*. The party claiming is bound to show that the deed is clear in his favour. The words relative to a right of way are used in that part of the deed where they cannot have the operation now contended for, and omitted in the clause which points out what the *cestui que use* of Park Hall and Park House is to have.

Sir W. W. Follett, in reply. The word "appurtenances," in

the clause limiting the uses as to Park Hall, refers back, and embodies the several matters (ways, easements, &c.) enumerated in the previous clause. There could have been no doubt as to the effect of the word, if Park Hall alone had been conveyed in the form here used; and it can make no difference in the construction, that Park Hall and Woodseaves are both conveyed by the same deed. And it is a material circumstance that, in the earlier clause, the conveyance is of the ways, easements, &c. "to the said several messuages," &c. belonging. This is not noticed in the judgment of the Court of King's Bench. It is said in that judgment (5 B. & Ad. p. 796) that the right of * way could not pass, [* 760] because, "the soil itself of both estates passed;" and the words "all ways used, occupied, and enjoyed with the lands," could not "create a right of way *de novo* in the very lands the freehold of which was granted by the same sentence in the deed." That would be true, if the freehold of the two estates had vested in the releasee; but that was not so: at the moment when the deed was executed, the two estates passed each to the person to whose use it was conveyed; the *cestui que use* of Park Hall had the same estate, and at the same time, as if there had been no release to an intermediate party. Rights of way are conveyed by this deed, for some purpose; they cannot remain in the releasee; and, unless upon the construction suggested for the plaintiff in error, it does not appear what becomes of them.

Cur. adv. vult.

Tindal, C. J. now delivered the judgment of the Court.

This case comes before us upon a writ of error, brought on a judgment of the Court of King's Bench, given for the plaintiff below, upon a demurrer to the defendants' plea, that Court having in effect determined, by their judgment, that the right of way, under which the defendants below have justified the trespasses complained of, did not pass under the indenture of release, the fine, and the recovery, set out in the defendants' plea.

There will be no necessity for us to enter into the discussion of the principles of law, upon which the judgment of the Court below has proceeded; with respect to which principles there is no difference in opinion * between this Court and [* 761] the Court of King's Bench. We all agree that, where there is a unity of seisin of the land, and of the way over the land,

in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way; and that, after such extinguishment, or during such suspension of the right; the way cannot pass as an appurtenant under the ordinary legal sense of that word. We agree also in the principle laid down by the Court of King's Bench, that, in the case of an unity of seisin, in order to pass a way existing in point of user, but extinguished or suspended in point of law, the grantor must either employ words of express grant, or must describe the way in question as one "used and enjoyed with the land" which forms the subject matter of the conveyance.

But, agreeing thus far with the Court below, we feel ourselves compelled to differ from it in the application of these principles to the present case. For we think the intention of the grantors to pass the way in question to the owner of the Park Hall estate appears from the deed itself, and that there are words contained in that deed sufficient to carry such intention of the parties into effect.

It appears from the recitals in the deed that, at the time of its execution, that is, on the 10th of November, 1812, the Park Hall estate, in respect of which the right of way is claimed, was vested in the two sisters, Maria, the wife of Thomas Smallwood, and Elizabeth Hector, as coparceners in fee, claiming by descent from their father Brooke Hector; and that at the same time the Woodseaves House estate, which comprises the land over which [* 762] the way extends and which came from their * mother, was vested in them, as tenants in common in tail general under a settlement made upon their mother's marriage with their father Brooke Hector.

There can be no doubt therefore, as before observed, but that any right of way, which before the unity of seisin of these two properties might have belonged to the Park Hall estate, over the lands of the Woodseaves House Farm, became suspended in law from the moment when such unity of seisin commenced; and that such suspension of the right would continue until the unity of seisin should cease by the determination of the estate tail.

It appears, however, from the averment in the plea, which is admitted by the demurrer to be true, that, long before and at the time of the making of the said indenture, &c., the occupiers for the

time being of the Park Hall estate had "always been used to have and enjoy a certain way," therein described, over the closes in which, &c., and back again, "for the convenient use and occupation of Park Hall aforesaid;" and that such way had, before and at the time of the making of the said indenture, &c., "been always held, used, occupied, and enjoyed therewith." And that this was the very same way in dispute between the parties, is evident, as well from the fact that the defendants justify under it, as also because the plaintiff has not new assigned the trespasses as having been committed out of and beyond this way so described in the plea.

It appears therefore judicially to the Court that the way in question is a way that has always existed for the convenient use and enjoyment of Park Hall, and has always been held and occupied and enjoyed therewith; that is, not only before the unity of seisin of the land and way over it, but since and during such unity of * seisin, and notwithstanding the legal effect [* 763] of it, and indeed up to the very time of the execution of the deed.

This being so, the reasonable inference must be that, in a deed making a partition between the two sisters, it was the intention of the contracting parties that each sister should take the whole of the estate allotted to her as her share, in the same plight and condition, as to all its conveniences and means of enjoyment, as it was held and occupied at the time such partition was made; and that no reason can be suggested, *à priori*, for supposing that a way which had been always found useful and convenient for the enjoyment of the Park Hall estate, and which, for that purpose, had been always held and enjoyed by the tenants of Park Hall, and which continued so to be up to the very time of the partition made, should after the partition cease to be held and enjoyed for the same purpose by that sister to whom Park Hall was allotted. Indeed, so strong is that inference, that authorities are not wanting to show that, where a way has been extinguished by the unity of seisin of two estates, by the partition of the two the way is revived. Thus it is laid down as law, in 1 Jenkins's Centuries, Ca. 37, that "a way is extinguished by unity of possession, and is revivable afterwards upon a descent to two daughters, where the land through which, &c. is allotted to one; and the other land to which the way belonged, is allotted to the other sister; and this allotment, with-

out specialty, to have the way anciently used, is sufficient to revive it;" and to the same point is the authority of Bro. Abr., title Extinguishment, 15, with this difference only, that he adds, "*tamen videtur quæ est novel chimin.*"

But, independently of this general inference of intention, [*764] resulting from the object of the parties being *that of effecting a partition, we think the intention of the parties, that the way should pass, is to be inferred more particularly from the frame and texture of the deed itself.

For the grantors convey to Huxley, the grantee, the lands comprised in Park Hall, and the lands comprised in Woodseaves House Farm, and all ways, paths, "passages," &c., "to the said several messuages," lands, and hereditaments "belonging or in any wise appertaining, or therewith usually held, used, occupied, or enjoyed, or accepted," &c., "as part, parcel, or member thereof." Huxley therefore takes, under the latter words, the way in question, which, according to the allegation in the pleadings, was held and enjoyed with Park Hall: and we can assign no object for which this way could have been granted to him, except it was intended to pass it through him with the land itself, upon the several uses which are subsequently declared as to Park Hall.

Upon the first head, therefore, we think the intention of the grantors to pass this way sufficiently appears; and that the only question is, whether there are words in the release sufficient, upon their legal construction, to pass such right of way. Now the deed of release, after describing the premises intended to be conveyed in the terms before adverted to, proceeds in the *habendum* thus: — "To hold the said messuages or tenements called Park Hall and Park House, with the buildings, lands, and hereditaments thereunto belonging, thereby before granted and released, and expressed and intended so to be, and every part and parcel thereof, with their and every of their appurtenances," unto the said Thomas Huxley and his heirs, to such uses as are therein declared. The [*765] deed then contains a covenant, on the part *of Smallwood, that he and his wife would levy a fine of the Park Hall and Park House estate, and that the said fine so to be levied "of the said several messuages or tenements, lands, hereditaments, and premises thereby before granted and released, or expressed or intended so to be," should enure, and that the said Thomas Huxley and his heirs should stand seised of all the same messuages or

tenements, lands, hereditaments, and premises, and every of them, and of every part thereof, with the appurtenances, to the several uses, &c. thereinafter declared of and concerning the same respectively (that is to say), as to, for, and concerning the whole of the said messuages and tenements called Park Hall and Park House, with the buildings, lands, hereditaments, and appurtenances thereunto respectively belonging, to the use of such person, &c. And we think that the word "appurtenances," where it occurs in that part of the *habendum* which relates to the Park Hall estate, and, again, where it occurs in the declaration of the uses of the fine, is not confined to that which is in legal strictness an appurtenant, such as an easement, the enjoyment whereof has never been interrupted by unity of possession or extinguished by unity of seisin, but that it will let in and comprehend the right of way which has been "usually held, used, occupied, or enjoyed" with the Park Hall and Park House estate, as above expressed in the operative part of the deed itself, that is, the very way which is now in dispute. The deed itself forms a glossary for the word, by which glossary it is to be interpreted. (See the cases to this point well collected in the argument of counsel in the case of *The Marquis of Cholmondeley* v. *Lord Clinton*, 2 B. & Ald. 637; 21 R. R. 428.)

* It has been urged in argument that, even if the word [*766] "appurtenances" is capable of receiving a more enlarged meaning from the context, yet the way in and over the lands of the Woodseaves estate did not and could not pass by those general words, for the soil itself of both the estates passed to the same trustee. But to this it appears to us to be a sufficient answer, that, whilst the Woodseaves lands are conveyed to Huxley to the use of him and his heirs, to the intent that he may suffer a common recovery, no estate whatever is conveyed to him in the Park Hall estate, but he is a mere releasee to uses only. And, with respect to such releasee, it is a known doctrine that, since the statute, he takes no interest whatever in the land; that on his account it can neither escheat nor be forfeited; nor is it subject either to dower or curtesy on account of his momentary seisin. And we know of no authority, and without it there is no reason for holding, that such momentary seisin of the land shall operate to extinguish a right of way by unity of seisin.

We therefore think we only construe the deed so as to carry into effect the manifest intention of the parties, when we hold the

words of it to be sufficient, when explained by the context, to carry the right of way in dispute to the grantee of the Park Hall and Park House estate; and we think ourselves justified in such construction according to the well known principle, "benignè faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat."

On these grounds we give judgment of reversal.

Judgment reversed.

ENGLISH NOTES.

Sury v. *Pigot* (1625), Popham's Rep. 166, was an action for stopping a natural watercourse. The question at issue was whether the right to the flow of the water had been extinguished by unity of ownership. Whitlock, C. J., answered the question in the negative and remarked (p. 170), "A way or common shall be extinguished because they are part of the profits of the land, and the same law is of fishings also; but in our case, the watercourse doth not begin by the consent of parties nor by prescription, but *ex jure naturæ*, and therefore shall not be extinguished by unity." This, and several authorities to the same effect, are cited as conclusive upon the law of the subject, by the judgment of the Court of Exchequer in *Wood* v. *Waud* (1849), 3 Ex. 748, at p. 775, 18 L. J. Ex. 305, at p. 312 (No. 13, p. 226, at p. 237, *ante*).

In *Bright* v. *Walker* (1834), 1 C. M. & R. 211, at p. 219, the Court said that an easement could not be acquired by prescription if unity of possession existed during any portion of the prescriptive period, for then the claimant would not have enjoyed, as of right, the easement, but the soil itself. For a similar reason a tenant cannot by user, under any circumstances, acquire against his landlord an easement in favour of his own premises over the land of which he is tenant. For he cannot enjoy such easement as of right, otherwise than in his right as tenant. *Outram* v. *Maude* (1881), 17 Ch. D. 391, 50 L. J. Ch. 783, 29 W. R. 818.

To extinguish an easement there must be unity of seisin. Unity of possession of, or title to the dominant and servient tenements for different estates, does not destroy, only suspends, the easement. This appears by the judgment of the Exchequer Chamber in the principal case; and also by the judgments of the Barons of Exchequer in *Thomas* v. *Thomas* (1835), 2 C. M. & R. 34. In that case the dominant tenement was held in fee simple, and the servient tenement on a leasehold tenure for a term of 500 years, and it appeared that the legal estate in and the actual possession of both the properties had at one time subsequent to the acquisition of the right

become vested in the same person. It was held that this union did not extinguish, but merely suspended the easement. ALDERSON said: "If I am seised of freehold premises, and possessed of leasehold premises adjoining, and there has formerly been an easement enjoyed by the occupiers of the one against the occupiers of the other, while the premises are in my hands, the easement is necessarily suspended, but it is not extinguished, because there is no unity of seisin; and if I part with the premises, the right, not being extinguished, will revive."

A. and B. who were joint-tenants, or tenants in common, of an estate demised certain land belonging to the estate to X. for a term of 1000 years with a proviso that A. and B. should have the right to use or grant rights of way for carriage of goods over the land. Subsequently the estate was partitioned between A. and B., — the reversion in the land which was subject to the term of 1000 years falling to A.'s share. A. subsequently conveyed this reversion to X. It was held by the House of Lords, affirming the judgment of the Court of Appeal, that the effect of this was to merge and extinguish the rights under the proviso, those rights being in effect covenants made with A. and B. as owners of the reversion, and being covenants running with the reversion. *Lord Dynevor* v. *Tennant* (H. L. 1888), 13 App. Cas. 279. 57 L. J. Ch. 1078, 59 L. T. 5, 37 W. R. 193.

There are no provisions in the Railway Acts having the effect of extinguishing a public right of way. *Cole* v. *Miles* (1888), 57 L. J. M. C. 132, 60 L. T. 145, 36 W. R. 784. The obvious course for a railway company is to make a convenient way by bridge or otherwise, wherever there is a public right of way.

AMERICAN NOTES.

The principles of the Rule are acknowledged in the American Courts, "As no one can be said to use one part of his own estate adversely to another part, the proposition is universally true that if the owner of one of the estates, whether dominant or servient, becomes the owner of the other, the servitude which one owes to the other is merged in such ownership, and thereby extinguished." Washburn on Easements, p. 684. No man can have an easement in his own land. To work this result however the estate in both tenements must be co-extensive and permanent. *Hancock* v. *Wentworth*, 5 Metcalf (Mass.), 446; *Gayetty* v. *Bethune*, 14 Massachusetts, 49; 7 Am. Dec. 188; *Kieffer* v. *Imhoff*, 26 Penn. St. 438; *Plimpton* v. *Converse*, 42 Vermont, 712; *Warren* v. *Blake*, 54 Maine, 276; 89 Am. Dec. 748; *Ritger* v. *Parker*, 8 Cushing (Mass.), 145; 54 Am. Dec. 744; *Atlanta Mills* v. *Mason*, 120 Massachusetts, 244; *Manning* v. *Smith*, 6 Connecticut, 288; *Pearce* v. *McClenaghan*, 5 Richardson Law (So. Car.), 178; 55 Am. Dec. 710. In *Ritger* v. *Parker*, *supra*, it was said: "From this view of the subject, it seems manifest that the merger of the easement, arising from unity of title and possession, which

will extinguish and put an end to such easement, arises from that unlimited power of disposal, which will enable the owner to grant any part of the soil with the former incidents, or to grant it without the former incidents, or create and annex to it or subject it to new incidents in favor of another estate, at his own will and pleasure. Such a power of disposal can only exist when the same proprietor has a permanent estate in both tenements, not liable to be defeated by the performance of a condition or happening of any event beyond his control, and where the estates can not again be disjoined by operation of law."

On subsequent severance the easement re-attaches if it is apparent, natural, or necessary, and the owner has done nothing to destroy it. Washburn on Easements, pp. 690, 691; *Dunklee* v. *Wilton R. Co.*, 4 Foster (New Hampshire), 489; *Grant* v. *Chase*, 17 Massachusetts, 443; 9 Am. Dec. 161; *Hathorn* v. *Stinson*, 10 Maine, 224; 25 Am. Dec. 228, 236. "It is true that unity of title will in general have that effect," *i. e.*, extinguishment; "but where the easement is essential to the enjoyment of the land, and the estate cannot be enjoyed without it, the easement of necessity is appurtenant to the estate, and will pass with it to the purchaser: *Nicholas* v. *Chamberlain*, Cro. Jac. 121; *Ferguson* v. *Witsell*, 5 Richardson Law (So. Car.), 280. A person cannot have a right of way, as an easement, in the legal sense of the word, over his own land: *Wright* v. *Rattray*, 1 East, 381. . . . It did not pass under the word 'appurtenances,' for the operation of this word in conveyances is uniformly confined to an existing right, and is not understood as creating a new one: *Wialley* v. *Thompson*, 1 Bos. & Pul. 371. So far as respects the right claimed by the plaintiff in this case, there was nothing for the word appurtenances to work upon. The general rule to be gathered from the books is this, that ordinary rights of way do not pass upon a severance of the possession unless the grantor uses language in the conveyance showing that he intended to create the easement *de novo*. He holds the remaining part of the premises discharged from all easements except such as arise from the necessity of the case." (Citing *Grant* v. *Chase*, 17 Massachusetts, 443; 9 Am. Dec. 161.) *Stuyvesant* v. *Woodruff*, 1 Zabriskie (New Jersey), 133; 47 Am. Dec. 156. This precise doctrine was held on severance after unity of title, in *Manning* v. *Smith*, 6 Connecticut, 288, in the case of a conduit, the distinction being taken between natural or necessary easements and others.

No 20. — LUTTREL'S CASE.

(1738.)

RULE.

WHERE the dominant tenement is so altered as to change the nature of the easement, the easement is extinguished.

But the easement is not extinguished, if the use is the same in substance though not in quality.

No. 20. — Luttrel's Case, 4 Co. Rep. 86 a.

Luttrel's Case.

4 Co. Rep. 86 *a*–89 *a*.

Easement. — Alteration of Dominant Tenement. — User.

A person having two ancient fulling mills, to which was annexed by [86 a] prescription a right to a watercourse, pulled them down, and erected two mills to grind corn: held the prescription remained.

If the plaintiff, in an action on the case for disturbing his water-course, prescribe to have the watercourse to his mills generally, it is sufficient.

If a man has estovers by prescription to his house, although he alters the rooms and chambers of it, so as to make a parlour where there was a hall, or a hall where the parlour was, and the like alteration of the qualities, not of the house itself, by which no prejudice accrues to the owner of the wood; it is not any destruction of the prescription. Although he builds new chimneys, or makes an addition to the old house, he shall not lose his prescription; but he cannot employ any of his estovers in the new chimneys, nor in the part newly added.

If a corporation has franchises or privileges by grant or prescription, and afterwards they are incorporated by another name, the new body shall enjoy all the privileges, &c., which the old corporation had either by grant or by prescription

Cottel brought an action on the case against Luttrel, and declared, that 4 Martii, anno 40 Eliz. he was seised in fee of two old and ruinous fulling mills, and that from time immemorial, *magna pars aquæ cujusdam rivuli* ran from a place called Head Wear to the said mills, and that for all the said time there had been a bank to keep the water within the current, and that afterwards the plaintiff, 8 Octob. 41 Eliz. pulled down the said fulling mills, and in June 42, in the place of the said fulling mills erected two mills to grind corn; and that the said water ran to the said mills till the 10th of September next following, and that the same day the defendants *foderunt et fregerunt* the bank, and diverted the water from his mills, &c. The defendants pleaded not guilty, and it was found against them, upon which the plaintiff had judgment. Upon which Luttrel the defendant brought a writ of error upon the new statute in the Exchequer Chamber, and there, two errors were assigned. 1. That by the breaking and abating of the old fulling mills, and by the building of new mills of another nature, the plaintiff had destroyed the prescription, and could not prescribe to have any watercourse to grist mills: as if a man grants me a watercourse to my fulling mills, I cannot (as it was said) convert them to corn mills, *nec e contra*. So if I

grant to one estovers to burn in his hall, he cannot convert his hall into a kitchen or malt-house: the same law of a prescription; for prescription in such case shall be intended to commence by grant, and in proof thereof they cited Fitzherbert N. B. 180 H. And 7 E. IV. 27 a., if a man has estovers by grant, or appendant to an ancient house, he shall not have them to an house which he new builds; and 10 H. VII. 13 a. b. & 16 H. VII. 9 a. b. [* 86 b] where the abbot * of Newark granted by fine to find three chaplains in such a chapel of the conusee, and afterwards the said chapel fell, and there *tenetur* (during the time that there is no chapel, the divine service shall cease, for it ought to be done in a decent and reverend manner, and not at large *sub dio:* but there *tenetur* if the chapel is rebuilt in the same place where the old stood, then he ought to do the divine service there: but (it was collected) if it is built in another place, there the grantee is not bound to do Divine service there: if there be lord and tenant, and the tenant holds to cover and repair the lord's hall, as in 10 E. III. 23, in this case if the hall falls, yet if the lord builds the hall in the same place where it was before, and of such bigness as it was before, the tenant is bound to cover it; but if it is of greater length or breadth so as prejudice may come to the tenant, or if it is built in another place, or if that which was the hall is converted to a cow-house, stable, kitchen, or the like, he is not bound to cover it, for the lord by his act cannot alter the nature of the tenure, nor of the service which the tenant ought to do: and in this case here, it might be more beneficial to him who made the original grant, and to others who had his estate to have them fulling mills, than corn mills: for perhaps they have corn mills so near, that the building of corn mills would be prejudicial to them, and it would be against reason to extend a grant or prescription to have a watercourse to fulling mills, to corn mills, which is not within the purport or intention of the grant or prescription, and the grant or prescription ought to be pursued: if a man holds of another as of his manor by homage, fealty, and castle-guard, the lord aliens the manor except the castle, there the alienee shall not have castle-guard, as appears by 31 E. I. Ass. 441. And it was said that there the alienee cannot build a new castle, for the tenure was to keep the old castle. Another objection was made, forasmuch as the plaintiff himself has broke and abated the fulling mills, although he builds new mills in the

same place, and of the same nature as the old were, yet he has destroyed his prescription; for although in case when mills or houses which have watercourse, or estovers, or other things appendant or appurtenant to them, be overthrown by the wind, or burned by wildfire, or fall by any other act of God, that if the owner rebuilds them in the same place, and in the same manner as they stood before, that they shall have the same ancient things appendants and appurtenants to this new mill or house, because the act of God shall not prejudice any; yet if they be erased by the party himself, or fall through his default, the ancient appendants thereby are lost; for by his own act he cannot extend the prescription or grant which was in a manner appropriated to the *old house, to a new house: so it was [*87 a] objected, that if one of his own wrong, burns, or pulls down the house or mill which has such appurtenances, he shall recover all the damages; and although in such case he rebuilds the house or mill, yet he shall not have the appendances, *vide* Perkins, 128 b. But it was resolved, that the prescription did extend to these new grist mills; for it appears by the Register, and also by F. N. B. that if a man is to demand a grist mill, fulling mill, or any other mill, the writ shall be general, *de uno molendino*, without any addition of grist or fulling, 21 Ass. 23, agrees of a plaint in assise. So that the mill is the substance, and thing to be demanded, and the addition of grist, or fulling, are but to show the quality or nature of the mill, and therefore if the plaintiff had prescribed to have the said watercourse to his mill generally (as he well might) then the case would be without question, that he might alter the mill into what nature of a mill he pleased, provided always that no prejudice should thereby arise, either by diverting or stopping of the water, as it was before, and it should be intended that the grant to have the watercourse was before the building of the mills, for nobody will build a mill before he is sure to have water, and then the grant of a watercourse being generally to his mill, he may alter the quality of the mill at his pleasure, as is aforesaid: so if a man has estovers either by grant or prescription to his house, although he alter the rooms and chambers of this house, so as to make a parlour where it was the hall, or the hall where the parlour was, and the like alteration of the qualities, and not of the house itself, and without making new chimneys by which no prejudice accrues to

the owner of the wood, it is not any destruction of the prescription, for then many prescriptions will be destroyed, and although he builds new chimneys, or makes a new addition to his old house, by that he shall not lose his prescription, but he cannot employ or spend any of his estovers in the new chimneys, or in the part newly added; the same law of conduits and waterpipes, and the like: so if a man has an old window to his hall, and afterwards he converts the hall into a parlour or any other use, yet it is not lawful for his neighbour to stop it, for he shall prescribe to have the light in such part of his house: and although in this case the plaintiff has made a question, forasmuch as he has not prescribed generally to have the said water-course to his mills generally, but particularly to his fulling mills, yet forasmuch as in general the mill was the substance, and the addition demonstrates only the quality, and the alteration was not of the substance, but only of the quality, or the name of the mill, and that without [*87 b] any prejudice in the *water-course to the owner thereof; for these reasons it was resolved, that the prescription remained. If a corporation have franchises or privileges by grant or prescription, and afterwards they are incorporated by another name, as where they were bailiffs and burgesses before, now they are mayor and commonalty; or prior and convent before, and afterwards they are translated into a Dean and Chapter, although in these cases the quality and name of their corporation are altered and changed, and chiefly in the case of prior and convent, for from regular who are dead persons in law they are made secular, yet the new body will enjoy all the franchises, privileges, and hereditaments which the old corporation or body politic had either by grant or prescription, for no person will be prejudiced thereby; *vide* 14 H. VI. 12; 37 Ass. 6, 38 Ass. 22; 39 H. VI. 15. Another reason was added that when a man has anything appendant or appurtenant to an house or mill, the most perdurable part of it is the land in which the foundation is, and upon which the whole fabric of it consists and in respect thereof, by grant of all his lands, all his houses, mills, and woods will pass. And so it was resolved, as POPHAM, C. J. said, by WRAY and DYER, Chief Justices, upon conference had with divers other Justices upon a case referred to the said Chief Justices: for in *præcipe*, where an house, mill, or wood is demanded, the warrant of Attorney is *in placito terræ*: and in case of voucher, when judgment

is given for the tenant to have in value against the vouchee, the judgment is *quod habeat de terris* of the vouchee *ad valentiam*, yet thereby he shall have houses, mills, woods, &c., and in special cases by recovery of lands, a man shall recover houses, as it is held by some, 4 E. III. 161; 6 E. III. 283; 2 E. III. 37; Plow. Com. 168; 8 E. III. 377; Dyer 28 H. VIII. 47, and therewith agrees the civil law; for "appellatione fundi, omne ædificium et omnis ager continetur." Then the prescription or grant shall respect the most durable part, and which in judgment of law includes the whole. And therefore it was resolved that although the house or mill falls by the act or default of the owner, or by the wrong of another, yet forasmuch as the perdurable part, and which includes the whole, remains, he may rebuild it without any loss of any appendant or appurtenant to it, but it ought to be upon the same place which was the old foundation of the old house: for as that supported and in judgment of law included the old house when it stood, so it shall support and include the new house, and so in a manner is a continuance of the old house; and so the *quære* which Perkins makes fol. 128 well resolved. And so it was said in all the cases of estovers and tenures aforesaid when the alteration of the quality
* or name of part of the house doth not cause any preju- [* 88 a]
dice to the terre-tenant, the estovers and services remain:
et nota, reader, a case reported, by Serjeant Bendloes, Mich. 3 H. VIII. Rot. 649, *in communi banco in repl'* brought by *Sir William Capel* against *Robert Apprice* and others, of four horses taken in a place called Old Hadham Park, in Little Hadham in the county of Hertford; the defendants made conusans as bailiffs to Richard Bishop of London because Sir Thomas Brand, knight, was seised of the manor of Little Hadham in fee, whereof the place where, &c., was parcel, and held it of the Bishop of London, "ut de castro suo de Stortford in com' præd' per homagium, fidelitatem, et ad scutagium domini Regis xl. s. cum acciderit, et ad plus plus, et ad minus minus, et per redditum, v. s. pro ward' castri præd' ad festum Sancti Michaelis Archangeli annuatim solvend', ac per redditum xiii. s. iv. d. pro auxilio vicecom' " "at four feasts of the year, &c." And for 15*s.* for castle-guard behind for three years, &c. they avowed the taking of one of the said four horses, and for 40*s.* for aid of the Sheriff behind also for three years, they avowed the taking of the other three horses. The plaintiff in bar

of the avowry as to the taking of one horse for castle-guard said, that before the beginning of the said three years, "castrum præd' funditus corruit et penitus in decasum extitit, et adhuc existit, et hoc paratus est verificare, unde petit judicium si præd' Rich. Apprice, &c. pro aliquo redditu pro wardo castri præd' sic obruti et penitus in decasum existen', capt' præd' unius equi justam cognoscere debet, &c." Upon which it was demurred in law, and as to the aid of the Sheriff it was also demurred in law: and in that case it was resolved, that although the castle is ruined and decayed, yet the rent remained; for when the tenant holds of the lord to ward or repair the lord's castle, and afterwards such service (as Lit. says in the case of Soccage) was in ancient time changed by mutual consent of the lord and tenant into an annual rent, yet it is said, that such rent is paid *pro wardo castri, id est,* in satisfaction *wardi castri:* for in this case, and such like, (*pro*) signifies full and perpetual recompence and satisfaction, and not conditional, or satisfaction temporary, *sc.* for a time, so that the lord may have the castle-ward when he will, for the seisin of the rent is not seisin of the castle-guard in such case: but if the tenant holds to guard the lord's castle, if the castle falls, the service is suspended until it is rebuilt, but then the tenure shall not be in such case alleged to be by the rent, but by the castle-guard, neither shall the avowry be made as in the case at bar it is for the rent, but for the castle-guard: *vide* Lit. 26 b. that if a man holds his land by certain rent for castle-guard, Lit. says, that such tenure is tenure in soccage, which cannot be if the [* 88 b] castle-guard remains, for then * the tenure shall be by knight's service, for Littleton saith, that where the tenant ought by himself or by another to do castle-guard, that such tenure is tenure by knight's service, so the difference between rent for castle-guard, and service to guard the castle. The same law if the tenant holds of his lord by certain rent for work-days, or any other service. And Sir William Capel the plaintiff, perceiving the opinion of the Court against him for both points, was non-suited, and both the rents, as the said serjeant reports, are paid to this day: and when a man holds of another in soccage, or otherwise as of his castle, and afterwards the castle falls, and is utterly ruined, yet the tenure remains; for it must be known that when any tenure is of any person as of a castle, in such case the castle includes in itself a manor, for *castrum* as a manor *est nomen*

generale et collectivum, and may include in itself divers things, *sc.* demesnes and services, &c., 5 H. VII. 9 a. Land may be parcel of a castle, *vide* 29 H. VI. Traverse 4. That an hundred may be as well parcel of a castle as it may be of a manor, as it is held in 8 H. VII. 1. And therefore when a tenure is of any as of his castle (which always in such case includes in itself a manor) although the castle is ruined, yet the tenure remains without question: *vide* 19 E. II. Ass. 399. Divers tenants held of another as of his manor by fealty and suit to the lord's mill, the lord aliened the mill, with the suit of the tenants, and afterward the vendor died, and his son entered, and conceiving that the tenants who held of his manor could not do suit to him who had not the manor, of himself made a new mill elsewhere upon other parcel of his demesnes, and had the suit to his own mill which the vendee ought to have had; for no man can have suit to his mill by reason of tenure, if it were not of corn growing in certain land, and that within his seignory: *vide* 17 E. III. (67) 97; 29 E. III. 12; 16 E. III.; Avowry, 92. And by the said case it appears, that although the ancient mill is aliened, or if it falls, the lord may erect a new mill in another place within his manor, for the tenure in such case is to do suit to the lord's mill generally, and not to any particular mill: *nota bene* all these differences. Another error was assigned because the prescription was, that *magna pars aquæ cujusdam rivuli, &c.* that it was incertain how much water should be comprehended within these words, *magna pars aquæ;* and declarations, and especially in actions on the case, ought to be certain, and the whole case ought to be showed in certain and if the truth is that one and the same river before it comes to the mills divides itself into two branches, whereof one * only runs to the mills, the better form was [* 89 a] to prescribe to have *aquæ cursum* to the said mills, for each of the branches *est aquæ cursus; quod fuit concessum* as to this point: but it was resolved, that although the declaration might have had a better form, yet in substance it was good, for it was not possible to show how much water runs to mills, and the quantity of the water is not material, forasmuch as the defendant, by the breaking of the bank, diverted the water which ran to the said mills: *vide* 8 El. Dyer, 248 b, where in an action on the case the plaintiff declared that the defendant *divertit multum cursus aquæ;* and another precedent is there cited between *Wikes* and

Searle, that an assise of nuisance was brought *pro diversione majoris partis cursus aquæ*, by which the judgment given by Sir John Popham, Chief Justice, and his companions, Justices of the King's Bench, was affirmed. *Nota* well this case was adjudged by both the Courts, (*i. e. B. R. et Cam. Scac.*)

ENGLISH NOTES.

An alteration in the dominant tenement to cause an extinction of any easement must be material, and not of a trifling character only.

In *Allan* v. *Gomme* (1840), 11 Ad. & El. 758, 9 L. J. Q. B. 258, an easement had been granted in the following words, "A right of way and passage over the said close to the stable and loft over the same, and the space or opening under the said loft now used as a woodhouse." The loft and the woodhouse were replaced by a cottage. It was held that the words "now used as a woodhouse" merely fixed the locality of the dominant tenement, and did not mean that the way could only be used while the place was used as a woodhouse. But as the space in question was at the time of the grant an open space of ground, it was held that the way could only be used for the purposes to which such space could be used as an open space of ground, and that the owner of the space having converted it into a cottage could not use the way as a way to the cottage. In the judgment of the Court delivered by Lord Denman, Ch. J., it was said (11 Ad. & El. 772): "The defendant is confined to the use of the way to a place which should be in the same predicament as it was at the time of the making of the deed." In *Henning* v. *Burnet* (1852), 8 Exch. 187, 192, 22 L. J. Ex. 79, 81, Parke, B., observed that the law so laid down was too strict: "If" (he says) "a general right of way is given to a cottage, the right is not altered by reason of the cottage being altered." He further observed: "I do not altogether assent to the law as laid down in *Allan* v. *Gomme*, although that case may be supported by the context as far as relates to the woodhouses mentioned therein." The question in *Henning* v. *Burnet* was whether a person, to whom a certain house and stables had been conveyed together with free ingress, &c., with carts, carriages, &c., by a carriage road leading to the houses, was entitled to open out a gate from the carriage road into a field of his own, and from this point to get access to his house through his own property. It was held that he was not, although there was, at a point further on, an old gateway by which he had access to the field.

The two cases last mentioned were both referred to by Willes, J., in the case of *Williams* v. *James* (1867), L. R., 2 C. P. 577, at p. 282, 36 L. J. C. P. 256, 259, 16 L. T. 664, 15 W. R. 928, — a case of excess

of user which was cited in *Wimbledon and Putney Commons Conservators* v. *Dixon* (*The Caesar's Camp Case*), No. 9, p. 164, *ante*. WILLES, J., said: — "There is a distinction between the case of a right of way by virtue of a grant and that of one established by prescription by virtue of user; in a grant the language of the deed is to be construed, and in construing it we are not to forget the maxim that we are to presume most strongly against the grantor. Such cases were *Henning* v. *Burnet*. . . . I agree with the argument that where you have a right of way by user, you cannot extend the purposes beyond those for which it was used, and for which it might reasonably be inferred it would have been used if wanted at the time of the grant; thus, if the field were a field in the country, the way could only be used for rustic purposes . . . it could not be used for the tenement as a manufactory. Where a right of way is proved by evidence there must be reasonable use for the purposes of the land in the condition in which it was while the user existed. This wide distinction reconciles the *dictum* of Mr. Baron PARKE with some of the cases which have been cited."

An owner of paper mills who was assumed to have a prescriptive right to pollute a stream by pouring refuse matter into the water was held not to be restricted in the use of his right to the making of paper from the materials he had been accustomed to use, provided he did not, by changing the materials, increase the injury ordinarily inflicted on other riparian proprietors. *Baxendale* v. *McMurray* (1867), L. R., 2 Ch. 790, 15 W. R. 32. It is to be observed that in this case a prescriptive right to pollute the water to some extent was not disputed; but except the authority of some *dicta* of V. C. KINDERSLEY in *Wood* v. *Sutcliffe* (1852), 21 L. J. Ch. 253, 255, it is difficult to see the ground upon which any such right (if it were denied) could be established. It is too notorious that manufacturers are apt to disregard the rights of their neighbours unless and until restrained by legal proceedings, and, on the chance that even if restrained, they will find, at an expense less than that of removing their works, the means of abating the nuisance. Nor is it easy to comprehend how a paper maker, who from time to time discharges his refuse into a natural stream, can be presumed to do so "as of right" or "claiming right thereto" as against all inferior proprietors.

By The Land Drainage Act, 1861 (24 & 25 Vict. c. 133, s. 58), "no person shall, without the consent of the Commissioners, cause any filthy or unwholesome water or washings of manufactories or mines . . . to flow into any watercourse within the jurisdiction of the Commissioners of Sewers, . . . but this section shall not apply to any person having a legal right to cause such water, &c., . . . to flow into any existing watercourse." The only reported case I can find in which a legal right

was claimed under this proviso is *Clarke* v. *Somersetshire Drainage Commissioners* (1888), 57 L. J. M. C. 96, 59 L. T. 670, 36 W. R. 890, where the claim failed. For the reason above stated, and observing that the point was conceded, and not thrashed out in *Baxendale* v. *McMurray*, it does not clearly appear that such a claim, if contested, can ever succeed.

AMERICAN NOTES.

"The question in such cases is whether the alteration is of the substance, or of the mere quality of the thing." Washburn on Easements, p. 408, citing the principal case. "A mere change in the mode of use of an easement, acquired either by grant or prescription, will not affect the right, provided the change does not materially affect the rights of others." *Ibid.* See *Ibid.* p. 704. "The act must be such as indicates an intention to extinguish the easement, or it must be something which enhances the burden upon the servient estate, to the injury of the same, against the consent of the owner thereof," *Ibid.* p. 703. See *Buddington* v. *Bradley*, 10 Connecticut, 213; 26 Am. Dec. 386. One may not turn an irrigating ditch into a mill race. *Darlington* v. *Painter*, 7 Penn. St. 473: this "would necessarily widen or deepen it and tear away the soil;" the flow must "remain the same as to quantity and rapidity." Followed in *Chestnut, &c. Co.* v. *Piper*, 77 Penn. St. 432.

A mere change of the place of application does not necessarily impair the right to apply water to a wheel. *Whittier* v. *Cocheco M. Co.*, 9 New Hampshire, 454; 32 Am. Dec. 382; *Kidd* v. *Laird*, 15 California, 161; *Cowell* v. *Thayer*, 5 Metcalf, 253. So of a new wheel, *King* v. *Tiffany*, 9 Connecticut, 162. A dam carried away by a freshet may be restored, *Riverdale Park Co.* v. *Westcott*, 74 Maryland, 311; 28 Am. St. Rep. 249. So of a mere change in the form of the cover of a reservoir. *Olcott* v. *Thompson*, 59 New Hampshire, 154; 47 Am. Rep. 184: "The substance of the easement is shown by the usage; but the form of the cover is a question of reasonable necessity. And in determining that question, the rights of the defendant, as the owner of the land, are to be considered, as well as the rights of the owners of the easement. He cannot compel them to adopt a form unreasonably inconvenient; and they cannot compel him to submit to the disfigurement of his grounds by a structure unreasonably unsightly and repulsive. The form may be a matter of great consequence to him, and of no interest to them."

The rule as to water-easements is thus stated in *Carlisle* v. *Cooper*, 21 New Jersey Equity, 595: "The owner of the easement is not bound to use the water in the same manner, or apply it to the same mill. He may make alterations or improvements at his pleasure, provided no prejudice thereby arises to the owner of the servient tenement, in the increase of the burden upon his land, *Luttrel's Case*, 4 Co. Rep. 87; *Saunders* v. *Newman*, 1 B. & Ald. 258, 19 R. R. 312. So it is not necessary that the dam should have been maintained for the whole period upon the same spot, if the extent of flowage is at all times the same, *Davis* v. *Brigham*, 29 Maine, 391; *Stackpole*

v. *Curtis*, 32 Maine, 383. A change in the mode of use or the purpose for which it is used, or an increase in capacity of the machinery which is propelled by the water, will not affect the right, if the quantity used is not increased, and the change is not to the prejudice of others. Angell on Watercourses, §§ 228, 229, 230; *Hale* v. *Oldroyd*, 14 M. & W. 789; *Baxendale* v. *McMurray*, L. R., 2 Ch. App. 790; *Casler* v. *Shipman*, 35 N. Y. 533; *Whittier* v. *Cocheco Manufacturing Co.*, 9 New Hamp. R. 454; Washb. on Easem. 279, § 38; *Hulme* v. *Shreve*, 3 Green's Ch. (N. J.), 116."

A party having appropriated water for a sawmill may subsequently substitute a gristmill, *McDonald* v. *Bear River, &c. Co.*, 13 California, 220, 236. "It by no means follows that because in an agricultural district a party takes up a mill-seat, gets a good title — as we esteem possession of public land to be — to the land, and makes valuable improvements, all dependent on the use of the water as a motive power — that he means only to use the water appropriated for the first purpose to which he applies it. . . . The mere fact that he chooses to apply the water which he had a right to use, in whole or in part, if he so chose, in sawing timber, to grinding wheat, is no abandonment of his title to it." (*Obiter*).

Where a wooden building had for twenty years encroached six inches on a private alley, the court refused to restrain the casing it with brick, increasing the encroachment three inches, it not appearing that it would injure the way. *Hall* v. *Rood*, 40 Michigan, 46; 29 Am. Rep. 528. So where a bay window was built, encroaching from thirteen to eighteen inches on a passage way five feet wide, but not interfering with foot passage, the court refused to interfere. *Burnham* v. *Nevins*, 144 Massachusetts, 88; 59 Am. Rep. 61. The owner of the servient tenements may build over the way if he does not obstruct passage. *Sutton* v. *Groll*, 42 New Jersey Equity, 213.

Although a way may not be constantly changed, yet it may be straightened for convenience, *Lawton* v. *Rivers*, 2 McCord (So. Car.), 445; 13 Am. Dec. 741: "In a country like this, where a great portion of the land is still uncultivated and uninclosed, such changes are not only necessary, but tend to the improvement of the country. Something of the same sort, I should presume, might be allowed in a private way, without destroying a prescriptive right. Changing a road between any two given points, merely for the purpose of straightening a fence, or for the convenience of the parties, so that the way is still kept open from one place to the other, I should not consider as destroying its identity. But the entire obstruction of a way by one party, without laying off any other, and without the acquiescence of the other party, could hardly be considered as coming within the principle." But a public right of way must be "in a definite, certain, and precise line," *Gentleman* v. *Soule*, 32 Illinois, 271, 278. The owner of a right of way may not grade the way by elevating it in some places three or four feet and cutting it down in others eight feet, the *Redemptorists* v. *Wenig*, 79 Maryland, 348. "The question was not whether the grading was properly done with a view of making it a better way for the appellant, but whether such grading was to the injury and detriment of appellee's land." But

an irrigation ditch may be levelled by removing slight inequalities, *Burris v. People's Ditch Co.*, 104 California, 248.

After a water pipe has been laid, it may not be increased in size nor the place changed. *Onthank v. Lake Shore, &c. R. Co.*, 71 New York, 194; 27 Am. Rep. 35, citing *Jennison* v. *Walker*, 11 Gray (Mass.), 423. So of a dam: *Evangelical, &c. House v. Buffalo H. Association*, 64 New York, 561. So of an aqueduct: *Jaqui* v. *Johnson*, 27 New Jersey Equity, 526. So one may not increase the height of a dam and the depth of the pond: *Cary* v. *Daniels*, 8 Metcalf (Mass.), 466; 41 Am. Dec. 532; *Roberts* v. *Roberts'* 55 New York, 275. Nor the size of a flume: *Dewey* v. *Bellows*, 9 New Hampshire, 282. But a mere change in the mode of use of the water works is no detriment to the right, *Whittier* v. *Cocheco Manuf. Co.*, 9 New Hampshire, 454; 32 Am. Dec. 382; *Blanchard* v. *Baker*, 8 Maine, 253; 23 Am. Dec. 504.

One does not lose his easement by merely abusing it; as by using a right of way for purposes not permitted, *Mendell* v. *Delano*, 7 Metcalf (Mass.), 176.

One who has an easement to maintain a ditch through the land of another, in which to carry water from a creek, cannot maintain a ditch through the servient tenement to connect with a new channel of the creek suddenly formed by a freshet, where the owner thereof will be damaged in a large amount by its construction at the proposed point, and offers to allow him to make a connection at another point. *Joseph* v. *Ager*, 108 California, 517.

Some cases however are stricter. Thus it has been adjudged that the grantee of an easement for an open water-way may not be compelled to accept a pipe or covered aqueduct, *Johnston* v. *Hyde*, 32 New Jersey Equity, 446; and one easement to carry water in an open ditch over another's land gives no right to carry the same quantity in covered pipes in a closed ditch, although this would be more beneficial to the servient tenement. *Allen* v. *San José W. Co.*, 92 California, 138; 15 Lawyers' Rep. Annotated, 93, and notes citing the principal case.

A reservation in a deed of such a right of way over the stairs and in the hall of a building as may be necessary to the proper use and occupancy of the upper story thereof does not create an interest or easement in the soil; but a mere license or right which is extinguished by the destruction of the building without the fault of its owner. *Shirley* v. *Crabb*, 138 Indiana, 200; 46 Am. St. Rep. 376. Citing *Hahn* v. *Baker Lodge*, 21 Oregon, 30; 28 Am. St. Rep. 723; *Thorn* v. *Wilson*, 110 Indiana, 325; 59 Am. Rep. 209.

Section VI. — *Remedies for Disturbance of Easements.*

No. 21. — KREHL v. BURRELL.

(1877.)

RULE.

The Court will grant a mandatory injunction if necessary for the protection of an easement, if the defendant has persisted, after notice, in building to the injury of the right.

Krehl v. Burrell.

7 Ch. D. 551–555 (s. c. 47 L. J. Ch. 353, 38 L. T. 407.)

Right of Way. — Obstruction. — Mandatory Injunction. — Lord Cairns' Act (21 & 22 Vict. c. 27), s. 2.

In an action for an injunction to restrain the erection of a building on a [551] passage, over which the plaintiff claimed a right of way, where he had, on being informed of the defendant's intention, forthwith given him notice of his rights and commenced the action, and the defendant had, notwithstanding, continued and completed the erection of the building complained of, — the plaintiff's right having been established at the trial: —

Held, that it was a case for a mandatory injunction and not for damages under Lord Cairns' Act.

This was an action brought by the plaintiff, as owner and occupier of a messuage or a public-house, No. 27 Coleman Street, in the City of London, known as the "Three Tuns," with a restaurant and dining-room, to obtain an injunction to restrain the defendant from erecting a building on the site of an adjoining court, called Windmill Court, over which the plaintiff and his predecessors in title claimed an uninterrupted right of way to or from the said messuage for forty years.

The defendant had, shortly before the commencement of the action, purchased the houses around Windmill Court, and served upon the plaintiff a notice of his intention to build, and had begun obstructing the access to the plaintiff's premises, whereupon the plaintiff informed the defendant of his alleged rights, and on the 27th of April, 1876, issued his writ. The defendant, however,

continued his building, which was a large and expensive structure, thus blocking up the access to the back of the plaintiff's house, which was, as the plaintiff alleged, essential for the purposes of his business, though there was a front entrance in Coleman Street.

In December, 1877, the trial of the action came on, and witnesses were examined. The Court was of opinion that the plaintiff had established his right and gave a verdict accordingly, but directed the case to stand over to see what terms the defendant would propose.

[*552] *1878. Jan. 28. The case now came on for judgment.

It appeared that the defendant offered a substituted right of way which the plaintiff was willing to accept, provided that the defendant paid him £700 for damages for the difference between the two rights of way, and £100 for being deprived of access to his house by Windmill Court during the defendant's building, and the costs of the action.

The defendant refused to accede to these terms.

Davey, Q. C., and Everitt, for the plaintiff, asked for a mandatory injunction.

Chitty, Q. C., Hemings, and Clare, for the defendant, contended that, as he offered the plaintiff another access to his premises which would be equally convenient, this was not a case in which, having regard to Lord Cairns' Act, a mandatory injunction should be granted, citing *Isenbery* v. *East India House Estate Company*, 3 D. J. & S. 263, 33 L. J. Ch. 392; *Aynsley* v. *Glover*, L. R., 18 Eq. 544, 10 Ch. 283, and *Smith* v. *Smith*, L. R., 20 Eq. 500, 44 L. J. Ch. 630.

Jessel, M. R., then gave judgment on the verdict, and ordered that the defendant should be restrained from erecting upon or across the site of Windmill Court, or any part thereof, any building or erection so as to interfere with or obstruct the plaintiff's right of way or passage over or along the said court as the same existed before the commencement of the action. His Lordship added a mandatory order that the defendant, within three months from the date of the judgment, take down and remove any building or erection which he had, since the commencement of the action, erected or built on or across the site of Windmill Court, or any part thereof, so as to obstruct or interfere with the said right of way. His Lordship then continued as follows: —

No. 21. — Krehl v. Burrell, 7 Ch. D. 552, 553.

Before parting with the case I should like to say a few words about my view of the proper mode of exercising the discretion of the Court in reference to the jurisdiction conferred on the Court by the Act 21 & 22 Vict. c. 27, commonly called Lord Cairns' Act. The words of the 2nd section are general: "In all cases in which the Court of Chancery has jurisdiction to entertain an * application for an injunction against a breach of any [* 553] covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct."

The plaintiff in this action was the owner of an inn or public-house, No. 37, Coleman Street, in the City of London, with which he and his predecessors in title had, and enjoyed for many years without interruption, a user of a way or passage, and he claimed to be entitled as of right to such user. The user was undoubted, and the right was never disputed until the purchase by the defendant recently of the adjoining houses. The defendant threatened to obstruct the way, and the user of the passage or court, by erecting a large building. The plaintiff gave notice to the defendant that he was entitled to such way as of right, and on the defendant persisting in his threats the plaintiff brought an action, and issued a writ for an injunction on the 27th of April, 1876. Notwithstanding that the writ was issued, and in spite of the assertion by the plaintiff of his rights, the defendant, with full notice, and without any reasonable ground that I could discover at the trial of the action, and indeed without any ground at all, for none has been brought before me, insisted upon obstructing the way, and built over it a solid, and I am told a large and expensive structure, which completely blocked it up.

The action having been commenced in April, 1876, was brought to trial in December, 1877, and upon the trial by oral evidence I thought the right of the plaintiff clearly established, and gave a verdict accordingly. But, considering the position of the parties, I thought it desirable to give the defendant an opportunity of coming to terms before I delivered judgment. I thought it more likely he would make good terms before judgment than he would

afterwards; and in mercy to the defendant, so as not to put him entirely in the power of the plaintiff, I allowed the case to stand over. It seems that some terms have been proposed offering a substituted right of way, which the plaintiff is willing [* 554] to accept, * provided the sum of £800 is paid to him as damages. Whether or not that is a reasonable sum I have no means of ascertaining without a further trial, which of course I do not intend to have, these being terms of compromise and nothing else. At all events the sum in question does not appear to me to come at all within the description of extortion, especially considering the enormous benefit which would accrue to the defendant by allowing this expensive building to remain. So far I think my object has been accomplished. But, however, the defendant declines to pay the damages, and prefers, if necessary, to submit to an injunction, which of course he is entitled to do, for he is entitled to decide that for himself.

The question I have to decide is, whether the appeal to me by the defendant to deprive the plaintiff of his right of way, and give him money damages instead, can be entertained. I think it cannot. It is true he has another way to his house by Coleman Street; but it was obvious, when the facts were mentioned to me, that as regards the custom of the house it would be very seriously interfered with by depriving it of the back entrance, which was very much used, for special and intelligible reasons, by the customers. That being so, the question I have to consider is, whether the Court ought to exercise the discretion given by the statute, by enabling the rich man to buy the poor man's property without his consent, for that is really what it comes to. If with notice of the right belonging to the plaintiff, and in defiance of that notice, without any reasonable ground, and after action brought, the rich defendant is to be entitled to build up a house of enormous proportions, at an enormous expense, and then to say in effect to the Court, "You will injure me a great deal more by pulling it down than you will benefit the poor man by restoring his right," — of course that simply means that the Court in every case, at the instance of the rich man, is to compel the poor man to sell him his property at a valuation. That would be the real result of such a decision. It appears to me that it never could have been intended by the Legislature to bring such a result about. It never could have been meant to invest the Court of

Chancery with a new statutory power somewhat similar to that with which railway companies have been invested for the public benefit under the * Lands Clauses Act, to compel [*555] people to sell their property without their consent at a valuation. I am quite satisfied nothing of the kind was ever intended, and that, if I acceded to this view, instead of exercising the discretion which was intended to be reposed in me I should be exercising a new legislative authority which was never intended to be conferred by the words of the statute, and I should add one more to the number of instances which we have from the days in which the Bible was written until the present moment, in which the man of large possessions has endeavoured to deprive his neighbour, the man with small possessions, of his property, with or without adequate compensation.

ENGLISH NOTES.

No definite rules have been laid down as to when the Court will restrain the infringement of an easement by injunction, and when it will award damages, by way of complete relief for such an infringement. But it may be said generally that the tendency of modern decisions is to enlarge the boundary in favour of granting an injunction wherever a *bonâ fide* objection is made to the continuance of what is illegal.

In the *Currier's Co.* v. *Corbett* (1865), 2 Dr. & Sm. 355, (affirmed on appeal 4 De G. J. & S. 764, 11 Jur. N. S. 719, 13 L. T. 154, 13 W. R. 538) the buildings were finished before the filing of the bill, and the plaintiffs were not occupiers but reversioners. Damages were awarded and not an injunction. In *Isenberg* v. *East India House Estate Co.* (1864), 33 L. J. Ch. 392, the Court ordered an inquiry as to damages instead of granting a mandatory injunction to pull down so much of the defendant's incomplete buildings as obstructed the ancient lights of the plaintiffs, who were leather merchants in Leadenhall Street. These two cases were followed by Vice Chancellor Page Wood in *Senior* v. *Pawson* (1866), L. R., 3 Eq. 330.

In *Durrell* v. *Pritchard* (1865), L. R., 1 Ch. 244, 35 L. J. Ch. 223, Lord Romilly, M. R., refused an injunction where the buildings obstructing the plaintiff's light had been completed before the commencement of the suit. This judgment was affirmed by the Lords Justices Turner and Knight Bruce. But in *The City of London Brewery Co.* v. *Tennant* (1874), L. R., 9 Ch. 212, 43 L. J. Ch. 457, 29 L. T. 755, 22 W. R. 172, this judgment, so far as laying down any general rule, was dissented from. Lord Selborne (L. C.) said: — "I am not prepared to assent to the opinion, if such an opinion exists, that in every case in

which a building has been completed, even entirely completed, before the filing of a bill, the Court is powerless. The Court has power, if it thinks fit, to grant a mandatory injunction — that is, an order directing the removal of the building. . . . That this Court might interfere, after a succession of actions (for the continuing trespass) had been brought, and then grant a specific remedy by way of injunction was decided by Lord Cottenham in a case which I well remember, though it is not reported of *Holmes* v. *Upton*. The circumstance, therefore, that a work which is a continuing trespass, has been completed, cannot of itself take away the jurisdiction of this Court to interfere, in a case otherwise proper, even by injunction." On the other hand in *National Provincial Plate Glass Insurance Co.* v. *Prudential Assurance Co.* (1877), 6 Ch. D. 757, 761, The Master of the Rolls (Sir George Jessel) citing an observation of V. C. Kindersley in *Currier's Co.* v. *Corbett*, *supra*, observed that the fact of a building being completed before an injunction was asked for, might give rise to a question whether an injunction ought to be granted. He also observed that if the injury to the defendant of granting an injunction, would be out of all comparison to the injury to the plaintiff of refusing it, that might also be a reason for the Court to exercise its discretion of awarding damages instead.

In *Cleaves* v. *The Staffordshire Potteries Waterworks Co.* (1873), L. R., 8 Ch. 125, 42 L. J. Ch. 107, 27 L. T. 521, 21 W. R. 32, the defendant company fouled the water of a stream. The plaintiffs were held almost as a matter of course entitled to an injunction in restraint of the nuisance.

In *Greenwood* v. *Hornsey* (1886), 33 Ch. D. 471, 55 L. J. Ch. 917, the writ was issued when the defendant began his obstructing building. The plaintiff prayed for an interlocutory injunction, but on the defendants giving an undertaking to pull his building down if ordered, no interlocutory injunction was granted, and the defendant continued building. An injunction was granted at the trial, though buildings of the value of £6000 had been erected and the plaintiff's injury was only valued at £600. The observations of the Master of the Rolls in the principal case were cited and acted on. A similar judgment was given by Chitty, J., in *Lawrence* v. *Horton* (1890), 59 L. J. Ch. 441.

Another case for injunction is threatened infringement of an easement. The plaintiff must show that a violation of his rights will be the inevitable result of the proposed action of the defendant. *Haynes* v. *Taylor* (1847), 2 Ph. 209; *The Emperor of Austria* v. *Day* (1861), 3 De F. & J. 217; *Tipping* v. *Eckersley* (1855), 2 K. & J. 264; *Pattison* v. *Gilford* (1874), L. R., 18 Eq. 259, 43 L. J. Ch. 526; *Goodhart* v. *Hyett* (1883), 25 Ch. D. 182, 53 L. J. Ch. 219, 50 L. T. 95; *Fletcher* v. *Bealey* (1885), 28 Ch. D. 688, 54 L. J. Ch. 424, 52 L. T. 541, 33 W. R. 745.

No. 21. — Krehl v. Burrell. — Notes.

To maintain an action for damages or injunction for the infringement of a natural right, the plaintiff must prove that he has suffered some actual damage. *Kensit* v. *Great Eastern Railway Co.* (1883), 23 Ch. D. 566; 52 L. J. Ch. 608, 48 L. T. 784, 31 W. R. 603. There the plaintiff and the defendants were riparian owners on the bank of a stream. The defendants had placed a tank on their land which was filled with water from the stream, and permitted F. to take the water from the tank for use in his factory F. returned the water to the stream undiminished in quantity and undeteriorated in quality. The plaintiff's suit for an injunction against the defendants and F. was refused, for though F. had no right to take the water, the plaintiff had not suffered any actual damage. Actual damage need not be proved where the acts complained of are of such a nature that their continuance for the requisite period of prescription would create an easement against the plaintiff. For instance where the water of a stream is pent back, or polluted. *Sampson* v. *Hoddinott* (1857), 1 C. B. (N. S.) 590, 611; 26 L. J. C. P. 148, 150; *Bickett* v. *Morris* (1866), L. R., 1 H. L. Sc. 47, 14 L. T. 835. And see *Harrop* v. *Hirst* (1868), No. 3 of "Action" 1 R. C. 547, and notes. (L. R., 4 Ex. 43, 38 L. J. Ex. 1).

The damage or obstruction to give rise to an action must be substantial and not trifling. But if several persons do damage or obstruct slightly, and the sum total of such damage or obstruction is substantial, the plaintiff can sue any one or more of such persons. *Thorpe* v. *Brumfitte* (1873), L. R., 8 Ch. 650; *Lambton* v. *Mellish* (20th July, 1894), 1894, 3 Ch. 163, 63 L. J. Ch. 929, 71 L. T. 385, 43 W. R. 5.

AMERICAN NOTES.

The principal case is cited by Beach and High in their respective treatises on Injunctions.

"Besides his remedy by action at common law, the owner of an easement may, as a general proposition, not only seek redress for an infringement of his right to the same through a court of equity, but may prevent the same, when threatened by an application to the Court for an injunction to that effect." Washburn on Easements, p. 747; *Parker* v. *Winnipiseogee, &c. Co.*, 2 Black (U. S. Sup. Ct.), 545; *Trustees* v. *Cowen*, 4 Paige (New York Chancery), 510; 27 Am. Dec. 80; *Whitney* v. *Union Ry. Co.*, 11 Gray (Mass.), 365; *City of Jacksonville* v. *J. R. W. Co.*, 67 Illinois, 544; *St. Andrew's Church's Appeal*, 67 Penn. St. 512; *Holsman* v. *Boiling S. Co.*, 1 M. Carter (New Jersey Equity), 342; *Hicks* v. *Silliman*, 93 Illinois, 255; *Davis* v. *Londgreen*, 8 Nebraska, 43; *Burwell* v. *Hobson*, 12 Grattan (Virginia), 322; *Sheaffer's Appeal*, 100 Penn. St. 379; *Lord's Exec'rs* v. *Carbon I. M. Co.*, 38 New Jersey Equity, 452; *McMaugh* v. *Burke*, 12 Rhode Island, 199; *Ulbricht* v. *Eufala W. Co.*, 86 Alabama, 587; 4 Lawyers' Rep. Annotated, 572; *Fernald* v. *Knox Woolen Co.*, 82 Maine, 48; 7 Lawyers' Rep. Annotated,

459; *Proprietors* v. *Braintree W. S. Co.*, 149 Massachusetts, 478; 4 Lawyers' Rep. Annotated, 272; *Farris* v. *Dudley*, 78 Alabama, 124; 56 Am. Rep. 24.

The remedy is generally limited in this country to cases of "irreparable injury," but that phrase is very elastic. It must generally appear that damages will not make good the injury; and that the plaintiff has established his right at law or that his legal right is clear. A temporary injunction is generally granted to prevent any imminent and serious injury. Goddard on Easements, Bennett's ed., p. 366; Beach on Injunctions, sect. 1019.

In *Trowbridge* v. *True*, 52 Connecticut, 190; 52 Am. Rep. 579, the right to lateral support was supported by injunction, although the pecuniary injury threatened was slight, and could easily be compensated in damages.

Injunction is granted to obviate a multiplicity of suits. *Haines* v. *Hall*, 17 Oregon, 165; 3 Lawyers' Rep. Annotated, 609.

The doctrine of mandatory injunction was explicitly recognized, citing the principal case, in *Tucker* v. *Howard*, 128 Massachusetts, 361, the court observing: "The defendant, having by the service of process, full notice of the plaintiff's claim, went on to build at his own risk, and the injury caused to the plaintiff's estate by the defendant's wrongful act being substantial, a court of equity will not allow the wrong-doer to compel innocent persons to sell their right at a valuation, but will compel him to restore the premises as nearly as may be to their original condition." The writ however will be issued with caution and only when absolutely necessary to effectuate the plaintiff's right. *Delaware, &c. R. Co.*, v. *Central S. T. Co.*, 43 New Jersey Equity, 71; *Gardner* v. *Stroever*, 81 California, 148; 6 Lawyers' Rep. Annotated, 90. But the writ has been granted, in clear cases, even before the legal right was established.

The writ has been issued to compel the removal of a fence or a building from a way; *Avery* v. *New York C. R. Co.*, 106 New York, 142; *Schwoerer* v. *Boylston Market Association*, 99 Massachusetts, 285; to compel the removal of a bridge obstructing egress and light and air: *Salisbury* v. *Andrews*, 128 Massachusetts, 336; to compel permission to let water flow; *Brauns* v. *Glesige*, 130 Indiana, 167; to remove a breakwater; *Nicholson* v. *Getchell*, 96 California, 394; or a dam; *Troe* v. *Larson*, 84 Iowa, 649; 35 Am. St. Rep. 336, to compel the closing of a ditch; *Foot* v. *Bronson*, 4 Lansing (New York Sup. Ct.), 47; to restore water to its natural channel: *Carpenter* v. *Gold*, 88 Virginia, 551 (citing *Durrell* v. *Pritchard*, L. R., 1 Ch. App. 244); *Rigney* v. *Tacoma, &c. Co.*, 9 Washington, 576, 26 Lawyers' Rep. Annotated, 425; to compel a railway company to restore a street to safe condition after removal of its track; *Oskosh* v. *Milwaukee, &c. R. Co.*, 74 Wisconsin, 534; 17 Am. St. Rep. 175. At the suit of a city a mandatory injunction may issue to compel the removal of a building obstructing a public street; *City of Eau Claire* v. *Matzke*, 86 Wisconsin, 291; 39 Am. St. Rep. 900.

ELECTION (Equitable Doctrine of).

See also "Approbate and Reprobate," 3 R. C. 310–328; also Nos. 4 & 5 of "Conversion and Reconversion," 7 R. C. pp. 38–58.

No. 1. — ANON.

(7 ANNE, COWPER, CHANCELLOR.)

No. 2. — WHISTLER v. WEBSTER.

(1794.)

RULE.

A TESTATOR devises an estate X., of which he is seised in fee, to A.; and by the same will disposes of another estate Y., in which A. has an interest, in favour of B. A. can only take X. upon condition of permitting B. quietly to enjoy Y., or making compensation to him out of X. The condition is presumed whether the testator knew or did not know that he had not the power to dispose of Y. as he did.

Anon.

Gilbert, Eq. Rep. p. 15.

Election. — Devise of Entailed Estate.

The case was this. A. was seised of two acres, one in fee, the other in tail; and having two sons, he by his will devises the fee-simple acre to his eldest son, who was issue in tail; and he devised the tail acre to the youngest son and died. The eldest son entered upon the tail acre; whereupon the youngest son brought his bill in this Court against his brother, that he might enjoy the tail acre devised to him, or else have an equivalent out of the fee acre; because his father plainly designed him something.

LORD CHANCELLOR (COWPER). This devise being designed as a provision for the younger son, the devise of the fee acre to the

eldest son must be understood to be with a tacit condition that he shall suffer the younger son to enjoy quietly, or else, that the younger son shall have an equivalent out of the fee acre, and decreed the same accordingly.

Whistler v. Webster.

2 Vesey Jr. 367–372 (2 R. R. 260).

Election. — Appointment Ultra Vires. — Will.

[367] Testator appoints to grandchildren under a power to appoint to children a fund, to go in default of appointment equally: the appointment being bad, the children, having legacies, must elect.

By indentures 13th August, 1784, John Whistler out of the love and affection, which he bore Elizabeth his wife, and to make a suitable provision for her, in case she should survive, and for other considerations, assigned and transferred to Lady Martha Webster, her executors, &c., certain leasehold premises and monies upon trust to raise £3000 and to invest that sum in government or real securities, and from time to time to pay the produce to John Whistler for life; after his decease to his wife for life; and after her decease to pay the principal, or transfer the securities, to and among all and every or such of the children of the said John Whistler in such shares and proportions, and at such times, and subject to such conditions, as he should by his last will and testament appoint; for default of such appointment, to and among all and every the children of John Whistler by Elizabeth, equally to be divided between them share and share alike, as tenants in common and not as joint-tenants.

The fund having been laid out as directed, John Whistler by his will gave to his son John £1000; to his son Hugh £4000; and reciting that he was bound for his son Webster Whistler in £300 he gave him £100 more, if there should be sufficient effects after paying the other legacies before and after mentioned. He gave his daughter Mary Reeves £500; and his daughter Jane Whistler £1000; but directed, that she should be excluded from it, if she should attempt to marry without leave of her mother or guardians. The will then proceeded thus: "I also give to my grand-daughter Elizabeth Reeves, the sum of £1000 of lawful money of England, to be paid her after my wife's decease, out of a deed of trust. In case my said grand-daughter die

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before * my wife, I give and bequeath the said sum of [* 368] £1000 after my wife's decease to my youngest daughter Jane Whistler. I also give and bequeath to the children of my eldest son John Whistler £900 of lawful money of England, to be equally divided among them after my wife's decease, out of the deed of trust aforesaid. I also give and bequeath to my grandson Emanuel Reeves £500 of lawful money of England, to be paid after my wife's decease, out of the deed aforesaid. I also give and bequeath to the rest of the children of my daughter Mary Reeves except Elizabeth, to whom I have already bequeathed £1000, £600 of lawful money of England, to be equally divided among them after my wife's decease, out of the aforesaid deed of trust. Also if my grandson Emanuel should happen to die before my wife, my will is that the £500 left him shall after my wife's decease be equally shared among all the children of my daughter Mary Reeves aforesaid except Elizabeth, for whom I have already provided: those children to be brought up in the Church of England to be excluded all benefit of these legacies."

The testator then gave his wife all his goods and chattels; and all the overplus of his property and effects he gave equally to be divided between his son Hugh and his daughter Jane; and made Lady Webster and his wife executors and guardians.

The testator died in 1786, leaving all the children mentioned in his will surviving. They were the only children living at the execution of the indentures of 1784. John Whistler, jun., died before his mother, who died in 1793.

Jane Whistler married John Baxter; and they, with Hugh and Webster Whistler, brought the bill charging, that the appointment was bad, and that the £3000 became upon the death of Elizabeth Whistler divisible between the surviving children and the representatives of John.

The appointment to the grandchildren being clearly bad, the only question was, whether the children must elect to take under the settlement or the will.

Mr. Graham and Mr. Cox, for the plaintiffs. [369]

This is a new question. In none of the cases upon executions of powers was the question of election started until *Smith* v. *Lord Camelford.*[1] This is different from the common cases of elec-

[1] That cause stood for argument before the Lord Chancellor upon the question of election. See 2 Ves. jun. 698 (3 R. R. 36).

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tion; for the effect of the deed of 1784 is to give the children a vested and indefeasible interest in certain shares of this fund; and the father retained only the power of saying, what the shares should be. The grandchildren cannot be said to take under this will; for the power did not extend to them. I feel the weight of the argument, that that is the case of every person claiming an estate tail by devise: but in all those cases the devisee could take, provided the devisor had power of disposing by the will. In *Lord Darlington* v. *Pulteney*, not reported as to this point, if the heir in tail had waived her title, the will might have operated: here if the children waived their title, the grandchildren not being objects could not take. If the will operates at all, it is as an appointment, not as a will. The moment it is executed, the original instrument gives the title; therefore they do not defeat the will; which is a mere nomination of the parties, that took a vested interest of an undefined part subject to be defined by the will, which never could operate upon this in favour of grandchildren. It is clear, Hugh and Webster will elect different ways. The latter will elect to take under the articles: and the arrangement will be very difficult. *Cull* v. *Showell*, Amb. 727; 3 Wooddes, Append. 1, is very strong against the election.

Mr. Lloyd and Mr. Campbell, for the defendants.

It does not appear, upon what ground *Cull* v. *Showell* was determined. There must be some inaccuracy in it; for it refers to *Heard* v. *Greenbank*, 3 Atk. 695, 1 Ves. Sen. 298, where the reason, the heir was not put to election, was, that the will having only two witnesses was no will as to land. The foundation of all the cases of election is what is said by Lord TALBOT in *Streatfield* v. *Streatfield*, For. 176, that when a man takes upon himself to devise what he had no power over upon the supposition, that his will will be acquiesced in, this Court compels a devisee to take entirely, not partially under it, as in *Noys* v. *Mordaunt*, 2 Vern. 581; there being a tacit condition annexed to all devises of this nature, that the devisee does not disturb the disposition of the devisor. Then how is it material, what the instrument [*370] is? If it * is an appointment as to the £3000, yet it is a will as to his own property. *Walpole* v. *Lord Conway*, 3 Barnard. 153; *Harvey* v. *Desbouverie*, For. 130; *Kirkham* v. *Smith*, 1 Ves. 258; *Boughton* v. *Boughton*, 2 Ves. 12; *Unett* v. *Wilkes*, Amb. 430; *Cowper* v. *Scott*, 5 P. Will. 119.

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Reply.

The cases of election are, where the testator assumes an arbitrary power, which he has not, and the Court sees, that the whole arrangement of the will must be disappointed by the claim: whence the Court draws the inference, that such could not be the intention. It does not follow, that if this testator had known he could not give to his grandchildren, he would have said, his children should not take; and have recalled the benefit he had given them a short time before. From the loose expressions he uses, it is clear, he had not the deed before him.

MASTER OF THE ROLLS: (ARDEN).

When this cause was opened, I had no doubt: but *Cull* v. *Showell* was mentioned. If I had any doubt, I should be glad to have the great authority of the LORD CHANCELLOR to determine the doubtful opinion I might entertain:[1] but in a case in which I have no doubt whatsoever, it is my duty to pronounce my opinion.

The question is very short; whether the doctrine laid down in *Noys* v. *Mordaunt* and *Streatfield* v. *Streatfield* has established this broad principle; that no man shall claim any benefit under a will without conforming, as far as he is able, and giving effect, to everything contained in it, whereby any disposition is made showing an intention, that such a thing shall take place; without reference to the circumstance, whether the testator had any knowledge of the extent of his power, or not. Nothing can be more dangerous than to speculate upon what he would have done, if he had known one thing or another. It is enough for me to say, he had such intention; and I will not speculate upon what he would have intended in different cases put. There is an error in *Cull* v. *Showell*, if it was determined upon the point, * which seems according to both the books, from which it [* 371] is cited, to have been argued, and acquiesced in by the Court. It is endeavoured to say, the parties do not take under the will: they did not in any one case. In *Streatfield* v. *Streatfield* there was a legal estate: the devisor thought, he had given himself the complete interest to dispose of: but it turned out, that he was a mere trustee; that he had given himself no estate he could devise. It might be said there, as here, if he had known

[1] It had been suggested at the bar, that the cause should stand over until the determination of *Smith* v. *Lord Camelford*.

that, he would not have made that disposition. I am obliged to say, *Cull* v. *Showell* is erroneous, if founded upon the argument first argued: but there is another point in that case very material, viz. the length of time. It was impossible then to tell, of what the personal estate consisted; and no person can be put to elect without a clear knowledge of both funds. *Wake* v. *Wake*, 1 Ves. Jr. 335. I rather imagine, the LORD CHANCELLOR went with the Counsel in both arguments: but I am willing to believe, the latter was the ground: and that is sufficient to bear him out. The argument of Mr. WOODDESON is very ingenious, as far as he endeavours to distinguish that case from *Streatfield* v. *Streatfield* and the other cases of election. The circumstance of the legal estate and the other cases he puts, of tenant in tail neglecting to suffer a recovery, and of copyhold devised without surrender, make no difference. The devisor had the power, if he had used the proper means. *Non constat*, that General Poulteney would have made that disposition, if he had known his situation. The distinction between *Heard* v. *Greenbank* and these cases is, that where a testator affects to give real estate by will, it cannot be read, nor his will collected from it either in Courts of law or equity, unless there are three witnesses; otherwise it does not speak as to his land: but if there is an express condition, that would do; as in *Boughton* v. *Boughton*. In *Heard* v. *Greenbank* capacity both in the instrument and in the person giving was wanting. I have no difficulty in saying, I cannot distinguish this from *Streatfield* v. *Streatfield* and *Lord Darlington* v. *Pulteney*. If the instrument is such as to indicate what the intention was, the only question I will ask is, did he intend the property to go in such a manner? I will not ask, whether he had power to do so; and whether he would have done it, if he had known, he could not without a condition imposed upon another person. Whether he thought, he had the right, or knowing the extent of his authority intended by an arbitrary exertion of power to exceed it, no person [*372] taking under the will * shall disappoint it. If a testator disposes of the estate of A. to whom he gives some interest by his will, A. shall not take that, unless he gives up his estate to that amount.

There is no difficulty of arrangement. No one claiming a legacy under the will shall have any part of this fund to the disappointment of those, to whom it is given by the will. If they will

have this fund, I will take away their legacies; which shall go in compensation, as far as they will.

Therefore let the children elect; and reserve farther directions.

ENGLISH NOTES.

There is a class of cases which at first sight appear to raise a question of election, but are distinguishable. In *Carver* v. *Bowles* (1831), 2 Russ. & My. 301, a testator having a power to appoint a fund amongst his children appointed it to his two sons and three daughters in equal shares, and then declared that the shares appointed to the daughters should be held upon trusts in the nature of strict settlement. Since the appointment was bad in so far as it attempted to create trusts in favour of the children of the daughters, the question arose whether the shares were well appointed to the daughters absolutely. Sir John Leach, M. R., held that the words of appointment were sufficient to vest the shares absolutely in the daughters, and that this was not cut down by the ineffectual attempt to restrict the interest by limitations over to the issue, although the settlement was so far good as to limit the interest appointed to the daughters to their separate use with restraint on alienation. It being then contended on behalf of the issue of the daughters that, as the testator had manifested an intention that they should take interests in the settled fund, the daughters who took interests in the testator's own property under his will, were bound to elect. But Sir John Leach held that, the testator having made an absolute appointment in the first instance, no case of election was raised. This decision was followed by Vice-Chancellor Sir W. Page Wood in *Woolridge* v. *Woolridge* (1859), Johnson 63; and the principle of the decision was deduced by him as follows: — "Where there is an absolute appointment by will in favour of a proper object of the power, and that appointment is followed by attempts to modify the interest so appointed in a manner which the law will not allow, the Court reads the will as if all the passages in which such attempts are made were swept out of it, for all intents and purposes; *i. e.*, not only so far as they attempt to regulate the quantum of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been relied on as raising a case of election.

In *Wollaston* v. *King* (1868), L. R., 8 Eq. 165, a testatrix having, under her marriage settlement, power to appoint a fund in favour of the children of the marriage, made a will appointing a portion of the fund to her son C. for life, with remainder to such persons as he should appoint. She appointed the ultimate residue of the settled fund to her daughters, to whom she also gave benefits out of her own property. It

having been held that the appointment in favour of C.'s appointees was void for remoteness, and that the property so purported to be appointed fell into her ultimate residue for the benefit of the daughters, the appointees claimed that the daughters should be put to their election, so that the intended appointment should be made good out of the benefits received by the daughters under the will. But Vice-Chancellor JAMES held, that the principle of election did not apply. He observed (L. R., 8 Eq. 174) that in *Carver* v. *Bowles* (*supra*) certain persons were intended to take benefits under the will, and other persons were allowed to take other benefits without conforming to, and giving effect to, the first dispositions, and, in fact, after defeating them. He continued: "But why? The only intelligible principle which I can find is that it was held that the first dispositions, so far as they failed, did, under the will itself, enure for the benefit of the legatees; that the legatees were allowed to retain both benefits because they took both benefits under the will itself without calling in aid any other instrument or adverse title. It results in this, that the rule as to election is to be applied as between a gift under a will and a claim *dehors* the will, and adverse to it, and is not to be applied as between one clause in a will and another clause in the same will." The Vice-Chancellor further observed: — "It is also material that the reason why the gift fails is that there was an attempt to create a power in violation of the rules of law. I apprehend that it is not for this Court to aid such an attempt, either by the application of the doctrine of election or otherwise."

A decision in which *Wollaston* v. *King* is, in effect, followed, is *Wallinger* v. *Wallinger* (V. C. STUART, 1869), L. R., 9 Eq. 301; and there is a somewhat similar decision in *Cooper* v. *Cooper* (1870), 39 L. J. Ch. 525, where there was an invalid appointment by will of property which the testator had already validly appointed by deed.

The above-mentioned *dictum* of Vice-Chancellor JAMES in *Wollaston* v. *King* was in effect followed by PEARSON, J., in *Re Warren's Trusts* (1884), 26 Ch. D. 208, 53 L. J. Ch. 787, 50 L. T. 454, 32 W. R. 641, where the appointment in respect of which the claim was made was void for remoteness. PEARSON, J., said (26 Ch. D. at p. 219): — "How can there be any question of election? I must read the will as if the invalid appointment were not in it at all. The ordinary case of election is where a testator attempts to give by his will property which belongs to some one else. Such a gift is not *ex facie* void. In the present case it is the law which disappoints the appointee." The *dictum* in *Wollaston* v. *King* and the decision in *Re Warren's Trusts* were followed by the Appellate Court in Ireland in *Re Handcock's Trusts* (1889), 23 L. R., Ireland, 44.

In *White* v. *White* (1882), 22 Ch. D. 555, Mr. Justice FRY followed

the judgment in the principal case of *Whistler* v. *Webster*, distinguishing the case from those of the class represented by *Carver* v. *Bowles*, *Wollaston* v. *King*, and *Woolridge* v. *Woolridge*. A testator, having power under a settlement to appoint to children of a first marriage only, appointed the property (describing it as his own) in favour of a son of the first marriage subject to a charge in favour of his other children including the children of the second marriage, and he devised property of his own in the same way. FRY, J., held that a case of election arose in favour of the children of the second marriage. This decision was followed by Vice-Chancellor CHATTERTON in Ireland in *King* v. *King* (1884), 13 L. R., Ir. 531, where testator having a power to appoint lands to male issue, devised certain of these lands to a son "chargeable with £2000," and he gave benefits out of his own property to all the issue who were objects of the power. It was held that the issue were bound to elect between the benefits given them under the will, and any claim they might have to the settlement fund as unappointed. The Vice-Chancellor held, in effect, that this was not a case of an absolute appointment of the property to the son modified or cut down by subsequent language in favour of persons not the objects of the power, but a gift of so much less than the entirety, as if property representing £2000 had been carved out of it.

Another case in which the rule in *Whistler* v. *Webster* was simply followed was *In re Brooksbank*, *Beauclerk* v. *James* (KAY, J., 1886), 34 Ch. D. 160; 56 L. J. Ch. 82; 55 L. T. 593; 35 W. R. 101.

In the case of *Re Wheatley*, *Smith* v. *Spence* (1884), 27 Ch. D. 606; 54 L. J. Ch. 201; 51 L. T. 681; 33 W. R. 275, M. W., having a power under her brother's will to appoint to nephews and nieces, purported to exercise the power of appointment as to two-fifths, in favour of strangers. Certain persons, who were entitled in default of appointment under the will of the brother (the original testator), also took benefits under the will of M. W. out of her own property. CHITTY, J., applying the principal case of *Whistler* v. *Webster*, held that such persons were bound to elect for the benefit of the strangers interested under the appointment which was *ultra vires*. There was also a married woman entitled to an interest in default of appointment under the original will, and to her a benefit had been given by M. W. out of her own property for her separate use without power of alienation. As to this person, CHITTY, J., held she was not bound to elect; since by the terms of the instrument upon which the argument as to election was founded the interest to be relinquished was expressly made inalienable. The implied intention upon which the doctrine of election was founded yielded to this expressed intention. The latter part of this decision was dissented from by KAY, J., in *Re Vardon's Trusts* (1884), 28 Ch.

D. 121; 54 L. J. Ch. 244. But the Court of Appeal (1885), 31 Ch. D. 275; 55 L. J. Ch. 259; 53 L. T. 895; 34 W. R. 185 (No. 7, *post*), reversed the latter decision, and the judgment of CHITTY, J., therefore stands with the sanction of the Court of Appeal. (See No. 7, p. 370, *post*.)

The effect of election to take against the will appears sufficiently by the former of the principal cases. On this subject there is an elaborate note by Mr. Swanston appended to his report of *Gretton* v. *Haward* (1818), 1 Swanst. 409, 433. He sums up the result of numerous authorities (p. 441) as follows: — "This deduction of authorities appears (in the instance at least of election under wills and deeds of donation) to establish two propositions: 1. That in the event of election to take against the instrument, Courts of Equity assume jurisdiction to sequester the benefit intended for the refactory donee, in order to secure compensation to those whom his election disappoints; 2. That the surplus, after compensation, does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the Court controlled his legal right." See also 18 R. R. 95 at p. 106.

AMERICAN NOTES.

Mr. Pomeroy deals with this subject at considerable length, and discusses it upon principle with noteworthy ability. 1 Equity Jurisprudence, p. 629, *et seq.* He says: "When we say that equity implies a condition in the instrument annexed to the donation, we are, in fact, only stating the doctrine of election in other words: the very obligation to elect consists in the conditional nature of the devise. Judges have therefore gone a step further back, and have said that the condition is implied, because such result — such tacit addition to the instrument — must be regarded as being in accordance with the actual intention of the testator or other donor. This, then, is said to be the foundation of the doctrine, — the actual intention of the donor assumed, from the nature of the gifts, to have existed. A disposition calling for an application of the doctrine of election may be made under two following different states of circumstances: Either the donor may know that the property which he assumes to deal with is not his own, but belongs to another, and notwithstanding such knowledge he may assume to give it away; or he may give it away, not knowing that it belongs to another, but erroneously and in good faith supposing that it is his own. In the first of these two cases, the presumption of an intention on the part of the donor to annex a condition to the gift calling for an election by the beneficiary plainly agrees with the actual fact; at all events it violates no probabilities. When a testator devises an estate belonging to A. to some third person, and at the same time bestows a portion of his own property upon A., he undoubtedly must rely upon the benefits thus conferred upon A. as an inducement to a ratification by A. of the whole disposition. To give A. the property which the testator was able to dispose of, and at the same time to allow him to claim his own estate,

which had been devised to the third person, by his own paramount title, would be to frustrate the evident intention of the testator. In the second case, where the testator, or other donor, erroneously supposes that the property which he undertakes to give away is in fact his own, the doctrine of election applies with the same force and to the same extent as in the former. Here it is in the nature of things simply impossible that the donor could actually have had the *intention* which the theory imputes to him, since he really believes himself to have a disposing power of the property, or to be dealing with property which is his own. And yet the earlier decisions, at least, regarded the presumed intention to annex a condition to the gift as the true foundation of the doctrine in this case as much as in the other. The course of reasoning through which the judicial mind passed in reaching these conclusions is very plain, and, as I think, very natural. In an early case of the first kind, where a testator had designedly assumed to devise property over which he knew that he had no disposing power, the court saw, and were compelled to see, an actual intention of the testator to annex the tacit condition to his gift, and this intention was made the basis of the doctrine of election as applied under such circumstances. When another case arose of the second kind, where the testator had acted under an erroneous supposition, the court, having concluded that the doctrine of election must also be applied here, naturally, and as a part of their verbal judicial logic, gave to it the same foundation in an assumed intention of the testator, although under the circumstances, no such intention actually existed or could exist. The doctrine, therefore, although originally springing from an actual intention, and although professing always to be based upon the intention, is really independent of intention; while the language may still be repeated, that the court *presumes* an intention, no evidence would ever be admitted for the purpose of showing its existence or non-existence. In short, the doctrine of election has become a positive rule of the law governing the devolution and transmission of property by instruments of donation, and is invoked wholly irrespective of the intention of the donor, although in the vast majority of cases it undoubtedly does carry into effect the donor's real purpose and design.

"What, then, is the real foundation? It is possible to answer this question. There is, in my opinion, a true *rationale* which at once relieves the doctrine of election from all the semblance of technicality and untruth attaching to it when it is referred to a presumed intention, which prevents it from being regarded as a stretch of arbitrary power on the part of the court, and which shows it to be in complete harmony with the highest requirements of righteousness, equity, and good faith. I venture the assertion that the only true basis upon which the doctrine can be rested is that maintained in the preceding chapter, namely, the grand principle that he who seeks equity must do equity."

As to compensation, Mr. Pomeroy observes: "In any case for an election, where the party upon whom the necessity devolves elects to take in opposition to the instrument of donation, and therefore retains his own estate which had been bestowed upon the third person, does he thereby lose all claim upon or benefit of the donor's property given to himself? or does he only lose such part

of it or so much of its value as may be needed to indemnify the disappointed third person? In adjusting the equities between himself and the third person, must he necessarily surrender to that person the entire gift made to himself? or must he simply make adequate compensation? Few, if any, of the cases have required a decision of this question; and what has been said concerning it has chiefly been by way of argument and of judicial *dictum*. The rule may be regarded, however, as settled by the weight of judicial opinion very strongly in favor of *compensating* the donee who is disappointed by an election against the instrument. If the gift which he takes by way of substitution is not sufficient in value to indemnify him for that which he has lost, he of course retains the whole of it." See notes by Randolph & Talcott to 5th American edition of Jarman on Wills, vol. 2, p. 1, *et seq.*: 2 Story's Equity Jurisprudence, secs. 1075, 1077, *et seq.*

This general doctrine is supported by *Lewis* v. *Lewis*, 13 Pennsylvania State, 79; 53 Am. Dec. 443: "Now all the authorities show that equity relieves, in a case of this kind, on the ground of trust. The devise passes the legal title; but a chancellor holds the recusant devisee bound as a trustee, to compensate the devisee he has disappointed;" *Marriott* v. *Badger*, 5 Maryland, 306; *Jennings* v. *Jennings*, 21 Ohio State, 56, 81: "the doctrine of compensation, as applied to testamentary election, is an old and well established one;" *Wilbanks* v. *Wilbanks*, 18 Illinois, 17; *Clay* v. *Hart*, 7 Dana (Kentucky), 6; *Smith* v. *Guild*, 34 Maine, 443; *Gore* v. *Stevens*, 1 Dana (Kentucky), 201: 25 Am. Dec. 141; *Weeks* v. *Patten*, 18 Maine, 42; 36 Am. Dec. 696 (citing *Whistler* v. *Webster*); *Barbour* v. *Mitchell*, 40 Maryland, 163; *Schley* v. *Collis*, 47 Federal Reporter, 250; 13 Lawyers' Reports Annotated, 567; *Penn* v. *Guggenheimer*, 76 Virginia, 839, citing *Wilson* v. *Lord Townsend*, 2 Vesey, Jr. 697, and observing: "The doctrine of election is said to rest upon the equitable ground that no man can be permitted to claim inconsistent rights with regard to the same subject, and that any one who asserts an interest under an instrument is bound to give full effect, as far as he can, to that instrument. Or as it is sometimes expressed, he who accepts a benefit under a deed or will must adopt the contents of the whole instrument, conforming to all its provisions and relinquishing every right inconsistent with it." See *Havens* v. *Sackett*, 15 New York, 365. "If a testator has affected to dispose of property not his own, and has given a benefit to the person to whom that property belongs, the legatee or devisee accepting the benefit so given to him, must make good the testator's attempted disposition. If he insist on retaining his own property which the testator has attempted to give to another person, equity will appropriate the gift made to him for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of his rights. If the parties have done nothing to conclude themselves — and the court will not consider anything done in ignorance of their rights as binding them — the party whose property has been given to another will be put to his election either to take that which is offered to him in the instrument, yielding up to the party, who would otherwise be disappointed, his own property, or to keep what was his own, abandoning the provision made for him in the instrument." See also to the same pur-

port, *Moore* v. *Harper*, 27 West Virginia, 362; *Woolley* v. *Shrader*, 116 Illinois, 29; *Sigmon* v. *Hawn*, 87 North Carolina, 450; *Fitzhugh* v. *Hubbard*, 41 Arkansas, 64.

But if the testator had some interest, other than merely possessory, in the thing bestowed, he will be deemed to have bestowed only his interest, and the owner will not be put to an election. *McGinnis* v. *McGinnis*, 1 Georgia, 496; *Havens* v. *Sackett*, 15 New York, 365; *Leonard* v. *Steele*, 4 Barbour (N. Y. Sup. Ct.), 20; so where the testator devised the "wheat lot," which belonged to A. subject to a mortgage to the testator, and bequeathed a writing-desk to A.: *Beal* v. *Miller*, 1 Hun (N. Y. Sup. Ct.), 390. "The intention on the part of the testator to give that which is not his own must be clear and unmistakable:" *Penn* v. *Guggenheimer*, 76 Virginia, 846.

No. 3. — BALFOUR *v.* SCOTT. (ET È CONTRA.)

(H. L. 1793.)

RULE.

THE heir of an intestate who has died domiciled in England takes his share of the personal estate according to the English Statute of Distributions without being obliged to elect or to bring into distribution the land or heritable estate to which he succeeds as heir.

And the same rule applies although by the law of the country in which the heritable estate is situate he could not claim any share of the moveable or personal estate without collating or bringing into distribution the heritable estate.

Balfour v. Scott. (Et è contra.)

6 Brown P. C. 550–566, Lords Journals.

Intestate Succession. — Heir to Scotch Heritage. — English Statute of Distributions. — Election or Collation.

If a Scotchman dies intestate, having his domicil in England, his [550] whole personal estate as well in Scotland as England shall be distributed according to the law of England: and an heir to whom his heritable or real estate in Scotland descends shall not be obliged to collate (or bring into distribution) such heritable estate; inasmuch as the title of the heir to a share of the intestate's personal estate accrues by the law of England.

No. 3. — Balfour v. Scott, 6 Brown P. C. 550, 551.

David Scott, great-grandfather of both parties, stood vested in the unlimited fee of the estate of Scotstarvet in Scotland.

His son David married (Nov. 30, 1716) Louisa Gordon, daughter of Sir Robert Gordon of Gordonstown, and by their contract of marriage, David the first provided his estate of Scotstarvet to his son David the second, and the heirs male of the marriage; whom failing, to the heirs male of his son of any other marriage; whom failing, to his other heirs and assignees whatsoever.

Of this marriage there were several children, *viz.* David third, last of Scotstarvet, General John Scott the respondents' father, Elizabeth Scott, who married Peter Hay of Leys, Esquire, grandfather to the appellant David Hay Balfour, Katherine a party in the court below, but who has not appealed, and Lucy one of the present appellants.

[* 551] * David the second executed a settlement (Jan. 7, 1743) of his land of Scotstarvet, and whole other estate, on himself for life, and David third, his eldest son, in fee and the heirs male of his body; whom failing, to his second son John and the heirs male of his body; whom failing, to the other heirs male of his body; whom failing, to the heirs whomsoever of his own body; whom all failing, to his other heirs and assignees whatsoever; "the eldest heir female excluding heirs portioners, and succeeding without division through the whole course, and in every degree of the succession, in all time coming."

By this settlement, David second reserved power to alter; and it is provided, that the whole heirs of entail, male and female, succeeding to the estate, shall be obliged to use and bear the surname, arms, and designation of Scott of Scotstarvet; and that a female so succeeding shall be obliged to marry a gentleman of the name of Scott, or who shall assume that surname; and in case of contravention by any of the heirs, it is provided, that the person so contravening, or the wife where the husband contravenes, shall for him or herself only, forfeit the estate which shall descend to the person, though procreated of the contravener's body, who would succeed if the contravener were naturally dead.

In consequence of the reserved power, David the second executed (June 4, 1762) a new settlement of his estate to the said David his eldest son, and the heirs male of his body; whom failing, to the same destination of heirs as before, under the fetters of a strict entail directed against David alone.

No. 3. — Balfour v. Scott, 6 Brown P. C. 551, 552.

David the second died (1767), whereupon his eldest son David the third entered to the possession of the estate.

David the third brought (1771) an action in the Court of Session against his younger brother John (the respondents' father), and the whole other heirs of entail then in life, for setting aside the deed executed by his father in 1762, as being granted *contra fidem tabularum nuptialium:* and also in regard that he, as heir male of the marriage between his father and Miss Lucy Gordon, was entitled to the fee-simple of the whole estate in the contract of marriage, and that his father had no power to impose upon him any restrictions or prohibitions whatever. In this action, the Court of Session reduced and set aside the deed in question. From this period (March 11, 1773) downwards to his death, David the third enjoyed the estate of Scotstarvet, under the settlement of 1743, by which the fee was vested in him.

His younger brother, General John Scott, predeceased him in 1775, leaving issue three daughters, the respondent and her two younger sisters, Lucy and Johanna.

David the third resided in Scotland for some years after his father's death; but in 1774 he sold off all the furniture of his mansion-house of third part, the furniture in one room excepted, and went to London, where he took the lease of a house, and also the lease of chambers in Gray's Inn, and there he continued till his death, bestowing his whole time and attention on a very considerable property he had in the public funds. He came to Scotland on different *occasions to visit his [*552] friends, but never resided at his mansion-house of third-part, and for the last three years of his life never was in Scotland. He died at London, and was buried there, in February, 1785, leaving no issue, and no settlement whatever of his affairs.

His property at his death consisted of a monied estate in England, where his residence was, to the amount of between £60,000 and £70,000 sterling invested in navy and victualling bills, and other government securities.

His property in Scotland consisted 1st of his estate of Scotstarvet; 2dly, an adjudication led at his instance against David Loch's estate of Carnbee for about £1,000 sterling; and lastly, his personal estate, amounting to £1,200 or £1,500, and chiefly composed of arrears of rent.

The titles made up to the Scotch property were as follows: the

No. 3. — Balfour v. Scott, 6 Brown P. C. 552, 553.

respondent obtained herself served heir of entail and provision in special to her uncle in the estate of Scotstarvet, in terms of the settlement, 1743; but no titles as yet have been made up to the adjudication, or any other right descendible to the heirs of line.

Mr. Scott's nearest in kin at his death were six in number; the respondent and her two sisters, his nieces by the deceased General Scott, his brother; John Hay Balfour of Leys, and Katherine and Lucy Hay, his nephew and nieces by the deceased Mrs. Hay of Leys, his sister. The Scotch executry was confirmed by five of the said six nearest in kin, *viz.* the respondent's two sisters, and her three cousins. The respondent entered a caveat, that the procedure should in no respect prejudice her right and interest in the said personal estate, or any part thereof. This method was taken on account of a question which it was foreseen might arise respecting collation.

As to the personal estate in England, the guardians of the respondents, with the other five nearest in kin and their guardians, concurred in granting powers to John Way of Lincoln's Inn Fields, Esq. to take out letters of administration, and manage the same; he has made some payments to the appellants, and the remainder continues in his hands.

John Hay of Leys, father of the present appellant, David Hay Balfour, and Katherine and Lucy Hays, sisters to John, and their husbands for their interest, soon after brought a declaratory action before the Court of Session against the respondent Henrietta Scott. The summons prays to have it found and declared, "that the succession to the personal estate or executry of the said David Scott, wherever situated, ought to be regulated by the law of Scotland, of which he was a native, and according to the ordinary and usual rules of succession, in the case of persons natives of that country dying intestate; and that of course the said defender, Miss Henrietta Scott, cannot claim any share of the said executry, and at the same time claim in the character of heir without collating; that if she takes up, or has taken up the succession to her uncle's heritable estate exclusive, as heir to him, whether of provision or otherwise, she will fall to collate the same with the pursuers and the other executors of Mr. Scott, in the event of and im-
[*553] mediately * upon her taking a share as one of the nearest of kin of the executry belonging to him, situated at the

No. 3. — Balfour v. Scott, 6 Brown P. C. 553–563.

time of his death either in Scotland or England; and in case she has already drawn or received such share, she ought to be decerned to collate with the executors the heritage of her said uncle, taken up by her in the character of heir to him as aforesaid, or otherwise; and at any rate to repeat and pay back to the pursuers such sum or sums as she may have so drawn from the said moveable estate and executry."

This action came before Lord Justice Clerk (Sir THOMAS MILLER) (Feb. 19, 1787) ordinary, who, after hearing counsel and advising memorials, took the cause to report, and ordered informations, which were prepared and lodged accordingly. . . .

The Court of Session, upon advising the informations, [561] pronounced the following judgments, (Nov. 16, 1787):

"Upon the report of the Lord Justice Clerk, and having advised the informations given in by both parties, the Lords find the defender, Miss Scott, is not entitled to claim any part of the executry of her uncle David Scott, of Scotstarvet, in Scotland, without collating her heritable estate, to which she succeeds as heir: finds the succession to the said David Scott his personal estate in England falls to be regulated by the law of England; and therefore, in so far as respects it, assoilzies the defender from the process of declarator, and decerns."

Mutual reclaiming petitions were presented by both parties against this judgment; the appellants reclaiming against the last part of the interlocutor, which found, that the succession to the personal estate in England was to be regulated by the law of England; and the respondent reclaiming against the first part of it, by which she was excluded from the personal estate in Scotland, unless she chose to collate the estate of Scotstarvet. But the Court of Session, upon advising these petitions, with answers to each, by interlocutor of June 17, 1788, adhered to their former judgment in both points.

The appellants (in the original appeal) conceiving themselves to be aggrieved by so much of the aforesaid two interlocutors, as found the succession to the said David Scott's personal estate in England was to be regulated by the law of England, prayed that the same might be reversed.

The respondent (in the original appeal) conceiving her- [563] self to be aggrieved by so much of the two aforesaid interlocutors of the 16th November, 1787, and 17th June, 1788, has

found that the defender, Miss Scott, was not entitled to claim any part of the executry of her uncle David Scott of Scotstarvet, in Scotland, without collating her heritable estate, to which she succeeded as heir, entered a cross appeal therefrom to the House of Lords.

[565] On the part of the appellants in the original, who were consequently respondents in the cross appeal, the following reasons were assigned:

(Upon the original appeal.)

I. Because, under all the circumstances, the right to, and distribution of, the personal estate of the late David Scott, must be regulated by the law of Scotland to which country he is to be held as having belonged at his death; and therefore, though the Courts of England were necessarily resorted to in order to make a title for the recovery and receipt of his effects, that, and even the respondent Henrietta's actually taking a share as entitled by the law of England, makes no difference on the substantial rights of the parties; and she is under every obligation which would have attached on her if the effects had been in every sense situated in Scotland, or the deceased literally domiciled there.

II. Because, even if the deceased should be accounted as domiciled in England, and his personal estate there distributable according to the rules of the law of England, the respondent Henrietta, by taking the real estate in Scotland, has subjected herself to all the obligations which are consequential by the law of the latter country, one of which is, either to refrain from touching the personal estate to the prejudice of the other next of kin, or to collate the real; and when the law is sought to be applied in Scotland against her and an estate subject to the jurisdiction of the Courts of Scotland, it can have no influence that the act was done in a country where such obligation is unknown, or where the same consequences do not follow as to real estates situated in that country.

(Upon the cross appeal.)

Because it is established in the law of Scotland, that one cannot take real estate as heir, and at the same time claim a share of the personal estate, if there are persons in the same degree of kindred to the ancestor, without collating the real estate; and

[*566] there is *neither reason nor authority for the respondents' proposition, that the rule does not apply to those who

succeed collaterally; and as little for the argument, that her case forms another exception, because she does not take as heir of line, or *ab intestato*, by the act of the law, but by virtue of a special destination, in the character of heir of provision. In fact, she does take *ab intestato*, the late Mr. Scott, though he had it in his power, having made no will or disposition of his estate, but suffered it to go agreeably to the former limitations. But, at any rate, an heir of provision is as much barred from interfering with the executry or personal estate, or, if he does interfere, is as much liable to collate as an heir of line, in competition with those who do not stand in the relation of heirs to the deceased. The heir, however he comes by that character, is as such, barred from taking that of an executor or personal representative, if there be another equal in blood or degree, who is not an heir; and he has no way of surmounting that bar, but by divesting himself of the first character by collation; it is a privilege which he may exercise or not at his pleasure, but, till he exercises it, he is an absolute stranger to the movable succession.

But after hearing counsel —

11 April, 1793: —

The House ordered and adjudged, "That the said original appeal be, and the same is hereby dismissed this house: And it is hereby ordered and adjudged, That the said interlocutors of the 16th Nov. 1787 and 17 June, 1788, complained of by the said Henrietta Scott in the said cross-appeal be, and the same are hereby reversed. And it is hereby declared that the said Henrietta Scott is entitled to claim her distributive share in the whole personal estate of her uncle, David Scott of Scotstarvet in Scotland, without collating his heritable estate, to which she succeeded as heir, in so much as she claims the said share of personal estate by the law of England, where the said David had his domicil at the time of his death." ("Lords Journals," Vol. xxxix. p. 602.)

ENGLISH NOTES.

The principal case has already been stated briefly in the notes to No. 1 of "Administration," 2 R. C. 74.

In the case of *Drummond* v. *Drummond* (H. L. 1799), 6 Brown P. C. 601, it was further decided that where the heir of Scotch land paid off a heritable bond (which by the common law of Scotland, is

primarily chargeable upon the heir,) he cannot come for relief upon the personal estate of the ancestor who died domiciled in England.

Both these cases are cited in the judgment of Sir WILLIAM GRANT, M. R. in *Brodie* v. *Barry*, (1813) 2 Ves. & Beames 127, 13 R. R. 37. In this case the question was whether the Scotch heir was bound to elect between his right as heir and his interest under the trusts of the will of a person who died domiciled in England, and who devised and bequeathed his whole property, expressly including land in Scotland, to trustees for the purposes of that will. Sir WILLIAM GRANT commenced by observing that a distinction had been established in English law (though he doubted whether there was any good reason for it) by decisions that a will defectively executed is not to be read against the freehold heir, while the rule is different as to copyhold estates, if the intention to deal with them appears. He recognised the authority of the principal case as showing that in the case of intestacy the Scotch heir, in claiming a share of the personal estate under the English Statute of Distributions, was not affected by any condition which the Scotch law would have imposed upon him if the personal estate had been moveable estate distributable by Scotch law. But the case in point was not one of intestacy but whether the will was to be read against the heir for the purpose of raising a question of election. On this, he observed: — "Now what law is to determine, whether an instrument of any given nature or form is to be read against an heir at law for the purpose of putting him to an election by which the real estate may be affected? According to Lord HARDWICKE, and the judges who have followed him (referring presumably to *Hearle* v. *Greenbank*, 1740, 1 Ves. Sen. 298; *Boughton* v. *Boughton*, 1750, 2 Ves. Sen. 12; *Cary* v. *Askew*, 1786, 1 Cox, 241; *Sheddon* v. *Goodrich*, 1803, 8 Ves. 481) that is a question belonging to the law of real property; for they have decided it by a statute (the Statute of Frauds) which regulates devises of land. Upon that principle, if the domicil were in Scotland, and the real estate in England, an English will, imperfectly executed, ought not to be read in Scotland for the purpose of putting the heir to an election; and upon the same principle, if by the law of Scotland no will could be read against the heir, it would follow, that a will of land, situated in Scotland, ought not to be read in England to put the Scotch heir to an election.

"Doubting much the soundness of that principle, I am glad, that the case of *Cunningham* v. *Gainer*, relieves me from the necessity of deciding the question; as, whichever law is applied to the decision of the present case, the result will be the same. As to the law of England, a will of land in Scotland must be held analogous to that of copyhold estate in England; and the will is equally to be read against

the heir. It was said, a will of copyhold estate may have some effect here upon the copyhold: that is, if there is a previous surrender; but then the estate does not pass by the will; which operates only as a declaration of the use. In that respect there is no difference between a copyhold and land in Scotland; for if in Scotland there be a conveyance previously executed according to the proper feudal forms, the party may by will declare the use and trust, to which it shall enure. If the law of Scotland is resorted to as the rule, the case alluded to determines, that the English will may be read against the Scotch heir for the purpose of putting him to an election; that too in the strongest case, that could occur; for the will is stated to have been made on death-bed; liable therefore to the double objection: first, that a will cannot affect land; and secondly, that on death-bed no valid conveyance whatever could have been made; yet it was held, that, as the heir took benefits under that will, it was not competent to him to dispute any part of its operation. Upon the whole therefore the heir must make his election."

The case of *Cunningham* v. *Gainer*, which is apparently the one referred to in this judgment, is reported (as of date 17 January 1758) in Morrison's Dictionary No. 10 of "Approbate and Reprobate." There is another report printed in Lord KAIMS' decisions, vol. 3 p. 25, and reprinted along with the case of *Ker* v. *Wauchope* in 1 Bligh, 40, 20 R. R. 31. The substance of the report is as follows: — A testator having entered into a contract to purchase certain lands in Scotland called the Holms, made a will in these words: — "I give and bequeath to my wife . . . all my lands plate . . . and whatever I have or shall have in Scotland at the time of my decease, for and during her life" . . . and there was an ultimate trust in favour of Daniel Cunningham who appears to have been the heir at law. The testator's property included a valuable estate in the Island of St. Christopher. After the testator's death, the purchase money of the Holms being unpaid, the vendor instituted proceedings to adjudge (or attach) the Holms and all other lands of the testator for the price. The will, which was disputed, was established in a suit in the English Court of Chancery, and under the decree of that Court[1] which expressly decreed that the lands in Scotland should be exonerated of the debts, the purchase money of the Holms was paid out of the proceeds of the St. Christopher's estate. It appears that the vendor thereupon conveyed the Holms to Daniel Cunningham. An action in the Scotch Court, in the nature of an interpleader, was then brought by the

[1] There is a report of this decision, which appears to have been by Lord HARDWICKE, printed along with the report in *Ker* v. *Wauchope*, in 1 Bligh, 17, 20 R. R. 19.

tenant of the Holms, to determine as between the widow and Daniel Cunningham which of them was entitled to the rent. The Court found "That the right which the deceased had to the lands of the Holms falls by the legacy left to the testator's widow, in the testament made by him in favour of Daniel Cunningham his son; and that, therefore, the said Daniel Cunningham cannot quarrel the said legacy; and preferred the widow to the rents of the said lands."

It is thus obvious, that whatever title Daniel Cunningham had to the Holms was obtained by means of the establishment of the will and the decree of the Court of Chancery pronounced in the suit for carrying the trusts into effect. The construction therefore put upon the will by the Scotch Court was a simple application of the doctrine of "Approbate and reprobate" properly so called, as explained in 3 R. C. 310, and as applied by Lord ELDON in the case of *Ker* v. *Wauchope* there set forth. That the case determines, as a rule of Scotch law, "that the English will may be read against the Scotch heir for the purpose of putting him to an election," is perhaps putting a strain upon the actual decision; and, it would seem hardly consistent with the general tenor of Scotch authority which, until the Statute of 1868 (31 & 32 Vict. c. 101, s. 20), required the intention to convey the estate away from the heir to be expressed in technical language. See the decision of the House of Lords in *Wilson* v. *Henderson* (1802), 4 Paton, 316; and McLaren on Wills, 3rd ed. p. 246 *n.*

It is not therefore to be assumed that the judgment of Sir WILLIAM GRANT, in the case of *Brodie* v. *Barry*, was correct, in so far as it implies that the Scotch Courts under the old law would put to his election the heir claiming under a will which, as construed by popular language, would appear to have been intended to dispose of heritable estate. The question raised by the law of deathbed was quite different. It was always for the heir to elect whether he would confirm the deed or avoid it under the law of deathbed.

In *Allen* v. *Anderson* (1846), 5 Hare, 163, the question was whether the will of a testator, who died domiciled in England and who devised to trustees "all the rest and residue of his real, personal and mixed estate and effects," was to be read against the Scotch heir claiming the benefit of a Scotch heritable bond, in order to raise a question of election. The VICE CHANCELLOR WIGRAM decided it was not. According to the judgment, as reported, the VICE-CHANCELOR cited Sir WILLIAM GRANT, as having observed (in *Brodie* v. *Barry*), that "the cases up to that time had established that the question was to be governed by English law, and that in applying the English law to the case, the Court would deal with real interests in Scotland as it would with copyholds in England." The VICE CHANCELLOR proceeds:—"Now,

as a general devise of all 'my real estate in England' would not have the effect either of a devise or of a declaration of uses of copyholds not surrendered to the uses of the will, so in the case of Scotch lands, a devise of all his real estate by a testator would not have the effect, by way of devise or declaration of uses of land in Scotland, which had not previously been conveyed in such a manner as to allow the will to operate upon them . . . The reasoning therefore, of Sir WILLIAM GRANT in *Brodie* v. *Barry* (though opposed to his private opinion), shows that this is not a case of election." If both judgments are correctly reported, that of WIGRAM, V. C., does not seem accurately to represent the reasoning of Sir WILLIAM GRANT. But, from the point of view of Scotch law, no fault could be found with the decision of the VICE CHANCELLOR.

In *Maxwell* v. *Maxwell* (1852), 2 De G. M. & G. 705, the question was the same as in *Allen* v. *Anderson*. The bequest was general of "all my real and personal estate whatsoever and wheresoever." The Lords Justices KNIGHT BRUCE and CRANWORTH, affirming the judgment of Sir JOHN ROMILLY, M. R., held that the heir was not put to his election. It was left an open question whether a case for election would have arisen if the testator had, as in *Brodie* v. *Barry*, specifically included "land in Scotland" in the bequest. CRANWORTH, L. J., said: — "I take the general rule to be that which was referred to by Sir JOHN LEACH in *Wentworth* v. *Cox* (6 Madd. 363), that a designation of the subject intended to be affected by an instrument in general words, imports *primâ facie* that property only upon which the instrument is capable of operating. The rule, therefore, would not apply to a case where, on the face of the instrument, it appeared intended to operate on other property, as where property which could not pass is expressly denoted, which was the case in *Brodie* v. *Barry*."

In *Orrell* v. *Orrell* (1871), L. R., 6 Ch. 302, 40 L. J. Ch. 539, the testator devised to trustees for the purposes of his will "all the residue of my real estate situate in any part of the United Kingdom or elsewhere." The Lords Justices JAMES and MELLISH, reversing the judgment of the VICE CHANCELLOR of the Court of the Duchy of Lancaster, held that the heir of Scotch heritable property claiming under this will was put to his election. It is to be observed that in the judgments of the Lords Justices in this case, the view that the law of Scotland has anything to do with the question whether the English will is to be read against the Scotch heir for the purpose of raising a question of election, is entirely ignored or abandoned.

In *Harrison* v. *Harrison* (1872), L. R., 8 Ch. 342, 42 L. J. Ch. 495, a testator who died domiciled in England before the coming into operation of the Titles to Land Consolidation Act (Scotland) 1868,

(31 & 32 Vict. c. 101), by his will purported to make express bequests of certain lands in Scotland. A suit was instituted for the administration of the estate. The heir did not until the institution of the suit become aware that the will was ineffectual by Scotch law to carry the heritable estate. It was then admitted that he was bound to elect, and he was allowed to elect to take the Scotch estates and to refund a legacy of £2000 which he had already received. A question having then arisen as to the incidence of debts, Lord SELBORNE, L. C. and the Lords Justices JAMES and MELLISH concurred in holding that all questions as to the burdens and liabilities of the Scotch land depended upon the law of Scotland. And it having been ascertained that Scotch law threw the liability for heritable debts (*i. e.* debts secured on land) primarily upon the heir, and that for personal debts primarily on the personal representative, it was held that this rule must be followed; and accordingly that the personal debts, funeral and testamentary expenses, and general costs of the suit should be borne entirely by the personal estate; although the law of England would have thrown a considerable portion of these debts and costs on the descended real estate.

In *Baring* v. *Ashburton* (1886), 54 L. T. 463, the testatrix, who was domiciled in England, by her will in the French language gave the residue of her fortune — "le surplus de ma fortune" to her grandson. The question was whether the immovable estate in France, devolving to her French heirs, could be taken as intended by the testatrix to be comprised in her will, to the effect of putting the French heirs to their election. CHITTY, J., after commenting on most of the authorities above mentioned, held it could not. He cited and relied on the passage above cited from the judgment of Lord CRANWORTH, as Lord Justice, in *Maxwell* v. *Maxwell*.

Upon the whole question whether the heir of foreign land claiming under the will of a domiciled Englishman is put to his election, the authorities may be summed up as follows.

I. The right as heir is of course determined by the foreign law; but the notion of calling in foreign law to determine whether the will is to be read against the heir in order to raise the question of election, as applied by Sir WILLIAM GRANT in *Brodie* v. *Barry*, is a solecism, and is now abandoned.

II. If the question were purely one of Scotch law (before the Act of 1868), the difficulty would be very great of reading into an instrument not containing technical words of conveyance according to Scotch law, the intention that the estate should be conveyed. But if such a construction of the will has been acted on, and a conveyance has been executed accordingly under which the heir has benefited (*e. g.* by

acquiring the estate free from incumbrances), he is bound on the principle of approbate and reprobate to give effect to the whole will. If the will was so expressed and executed as to be capable of taking effect, only challengeable under the law of deathbed, the heir was put to his election whether to give effect to the whole instrument or to set it aside altogether.

III. The questions arising out of the state of the Scotch law as above described are now practically put an end to by the Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101) s. 20, and there is probably now no difference in the rule of construction, as affecting the question of election, between English and Scotch law.

IV. The rules now adopted by the English Court are that general words, describing the property intended to be given, import *primâ facie* that property only on which the instrument is capable of operating. But this yields to the interpretation necessary to give effect to express words describing property of another kind.

AMERICAN NOTES.

Mr. Pomeroy cites the principal case with the statement (1 Equity Jurisprudence, p. 654): "Prior to statutes comparatively modern, a will of freehold estates in land required certain formalities in its execution which were not necessary to the validity of a will of personal property. Under that condition of the law, it was a well settled rule that where a testator, by a will not executed with the formalities necessary to pass freehold estates in land, purported to devise such freehold estates away from his heir to a stranger, and by the same will gave a legacy to his heir, the heir was not obliged to elect, but could take both the legacy and the lands which descended to him, notwithstanding the attempted devise. In other words, the law would not, in the absence of any *express* condition inserted in the will by the testator himself, impose any *implied* condition upon the heir, and thus compel him to carry out the supposed intent of the testator by conforming to all the conditions of the will." But "this has become practically obsolete in the United States as well as in England, since by statutes the same modes of execution have been prescribed for wills of real estate and of personal property."

"The cases in England have generally arisen upon wills made in England, and valid with respect to the testator's property situated there, but invalid according to the peculiar law of Scotland, so that they were inoperative to carry the testator's heritable property, or landed estates situate in that country." "The English courts have settled the two following conclusions: If the language by which the testator describes and disposes of his property is general in its terms, and makes no specific reference to his Scotch heritable property, and contains no words or phrases which, by a reasonable interpretation, necessarily refer to such property, then the general rule of construction governs the case, that the testator must be assumed to have intended to confine the dis-

positions to the property which he had the power to dispose of *by that will*, — namely, the English property. The Scotch heritable property is not disposed of and was not intended to be disposed of, and the heir is not put to an election. In short, the case falls under the familiar rule stated in the last paragraph. If, on the other hand, the testator makes an express reference to his Scotch property, or uses such specific language of description, that, upon a reasonable interpretation, he must have intended such a reference, and a clear intention is thereby shown to dispose of the Scotch as well as the English estate, then, although the disposition is void with respect to the Scotch heritable property, the heir at law is compelled to elect between this property thus descending to him, and the benefits conferred upon him by the will. Similar cases have arisen in this country upon wills executed in one State, and valid for all purposes by the law thereof, but not valid as effective devises of land by the law of another State in which was situate real property owned by the testator. The same twofold rule has been adopted and enforced by the American courts, and it is plain that such cases may constantly arise from the varying legislation of different commonwealths."

In *Jones* v. *Jones*, 8 Gill (Maryland), 197, it was held that a will executed in Pennsylvania, with only two witnesses, and therefore inoperative to pass lands in Maryland, where three are required, would not put the heir to his election between a legacy and a devise, nor divest him of his inheritance of Maryland lands. See *Kearney* v. *Macomb*, 16 New Jersey Equity, 189.

In *Van Dyke's Appeal*, 60 Pennsylvania State, 481, a testator in Pennsylvania gave legacies to his daughters which absorbed most of his estate in Pennsylvania, and gave his lands in New Jersey to his sons. The will was not executed so as to pass that real estate. *Held*, that the daughters should be held to election and compensation. Sharswood, J., observed: "It may certainly be considered as settled in England, that if a will, purporting to devise real estate, but ineffectually, because not attested according to the Statute of Frauds, gives a legacy to the heir at law, he cannot be put to his election: *Hearle* v. *Greenbank*, 3 Atk. 695; *Thellusson* v. *Woodford*, 13 Ves. 209; *Buckeridge* v. *Ingram*, 2 Ves. Jr. 652; *Sheddon* v. *Goodrich*, 8 Ves. Jr. 482. These cases have been recognized and followed in this country: *Melchor* v. *Burger*, 1 Dev. & Batt. 634; *McElfresh* v. *Schley*, 1 Gill, 181; *Jones* v. *Jones*, 8 Gill, 197; *Kearney* v. *Macomb*, 1 C. E. Green, 189. Yet it is equally well established, that if the testator annexes an express condition to the bequest of the personalty, the duty of election will be enforced: *Boughton* v. *Boughton*, 2 Ves. Sen. 12; *Whistler* v. *Webster*, 2 Ves. Jr. 367; *Ker* v. *Wauchope*, 1 Bligh, 1; *McElfresh* v. *Schley*, 1 Gill, 181. That this distinction rests upon no sufficient reason, has been admitted by almost every judge before whom the question has arisen. Why an express condition should prevail, and one, however clearly implied, should not, has never been, and cannot be, satisfactorily explained. It is said, that a disposition absolutely void is no disposition at all, and being incapable of effect as such, it cannot be read to ascertain the intent of the testator. But an express condition annexed to the bequest of the personalty does not render the disposition of the realty valid; it would be a repeal of the Statute of Frauds so to hold. How then can

it operate any more than an implied condition to open the eyes of the court so as to enable them to read those parts of the will which relate to the realty, and without a knowledge of what they are, how can the condition be enforced? 'As to the question of the election,' said Lord Kenyon, while Master of the Rolls, 'the cases which have been cited are certainly great authorities, but I must confess I should have great difficulty in making the same distinctions, if they had come before me. They have said you shall not look into a will unattested so as to raise the condition which would be implied from the devise if it had appeared; but if you give a legacy on condition that the legatee shall give the lands, then he must elect. However, I am bound by the force of authorities to take no notice whatever of the unattested will, as far as relates to the freehold estate.' *Cary* v. *Askew*, 1 Cox, 241. 'I do not understand,' said Sir William Grant, 'why a will, though not executed so as to pass real estate, should not be read for the purpose of discovering in it an implied condition, concerning real estate, annexed to a gift of personal property, as it is admitted it must be read, when such condition is expressly annexed to such gift. For if by a sound construction such condition is rightly inferred from the whole instrument, the effect seems to be the same as if it was expressed in words:' *Brodie* v. *Barry*, 2 Ves. & Beames, 127. So Lord Eldon declared, that 'the distinctions upon this head of the law appear to be rather unsubstantial,' and that, 'there are, undoubtedly, these distinctions, and a judge, having to deal with them, finds a difficulty in stating to his own mind satisfactory principles on which they may be grounded:' *Ker* v. *Wauchope*, 1 Bligh, 1. And in another place: 'The reason of that distinction, if it was *res integra*, is questionable.' 'With Lord Kenyon, I think the distinction such as the mind cannot well fasten upon:' *Sheddon* v. *Goodrich*, 8 Ves. Jr. 482. Mr. Justice Kennedy has expressed the same opinion: 'When a condition is necessarily implied by a construction in regard to which there can be but one opinion, there can be no good reason why the result or decision of the court should not be the same as in the case of an express condition, and the donee bound to make an election in the one case as well as the other:' *City of Philadelphia* v. *Davis*, 1 Whart. 510. There is another class of cases in England wholly irreconcilable with this shadowy distinction; for the heir at law of a copyhold was formerly put to his election, though there had been no surrender to the use of the will. This was previous to 55 Geo. III., c. 192, 1 White & Tudor's Leading Cases, 239, note; yet, as Sir William Grant has remarked, 'a will, however executed, was as inoperative for the conveyance of copyhold as a will defectively executed is for the conveyance of freehold estates:' *Brodie* v. *Barry*, 2 Ves. & Beames, 130.

"The mind instinctively shrinks from the task of frustrating the clear intention of a testator, aiming too to make all his children equal, upon authorities establishing a distinction without any difference. The precise point can never arise in this state, for happily our Statute of Wills, of April 8th, 1833, Pamph. L. 249, wisely provides that the forms and solemnities of execution and proof shall be the same in all wills, whether of realty or personalty. The case before us is of a will duly executed according to the laws of Pennsylvania, devising lands in New Jersey, where, however, it is invalid as to

the realty by not having two subscribing witnesses. A court of New Jersey might hold themselves on these authorities bound to shut their eyes on the devise of the realty, and consider it as though it were not written, and so they have held *Kearney* v. *Macomb*, 1 C. E. Green, 189. They might feel themselves compelled to say, with Lord Alvanley, however absurdly it sounds, 'I cannot read the will without the word "real" in it; but I can say, for the statute enables me, and I am bound to say, that if a man, by a will unattested, gives both real and personal estate, he never meant to give the real estate:' *Buckeridge* v. *Ingram*, 2 Ves. Jr. 652. But a statute of New Jersey has no such moral power over the conscience of a court of Pennsylvania to prevent it from reading the whole will upon the construction of a bequest of personalty within its rightful jurisdiction. If a question could arise directly upon the title of the heirs at law to the New Jersey land, doubtless the court of any other State, upon the well settled principles of the comity of nations, must decide it according to the *lex rei sitae*. We are dealing only with the bequests of personalty, and the simple question is, whether the testator intended to annex to them a condition. If, without making any disposition whatever of the New Jersey estates, dying intestate as to them, he had annexed an express proviso to the legacies to his daughters that they should release to their brothers all their right and title as heirs at law to these lands, it is of course indubitable that such a condition would have been effectual. We are precluded by no statute, to which we owe obedience, from reading the whole will, and, if we see plainly that such was the intention of the testator, from carrying it into effect.

"Some cases have arisen in England upon wills disposing of English and Scotch estates, in which the judgments have not been harmonious, nor can any general principle be extracted from them bearing upon this question. In *Brodie* v. *Barry*, 2 Ves. & Beames, 127, an heir at law of heritable property in Scotland, being also a legatee under a will not conforming to the law in Scotland as to heritable property, was put to his election. By that law a previous conveyance by deed was necessary, according to the proper feudal forms, upon which the uses declared by the will might operate. As by the law of Scotland the heir at law in such a case was put to his approbate or reprobate (the Scotch law term for election), and it was very similar to a will of copyhold, Sir William Grant considering the law of both countries to be the same, felt himself relieved from the necessity of determining by which law the decision should be made. *Dundas* v. *Dundas*, 2 Dow & Clark, 349, was a case in the House of Lords from Scotland. The will was formal according to the Scotch laws, but was invalid as to real estate in England under the Statute of Frauds. Yet the decision of the Court of Session putting the English heir at law to his approbate or reprobate was affirmed. This case is certainly in point, in favor of the position taken in this opinion. It is true, that in the judgment pronounced by Lord Chancellor Brougham, then but recently raised to the wool-sack, it is not put on that ground. He assumes that in England, while a court of law would be precluded by the statute from looking at the disposition made of the realty, it was competent for a court of equity to do so, and that the Court of Session in Scotland had only done what

a chancellor in England had a right to do; a distinction, it must be allowed, not adverted to in any of the previous cases, which were all in courts of equity. In *McCall* v. *McCall*, Drury, 283, Lord Chancellor Sugden held that an heir at law of heritable property in Scotland, who was also the devisee of real estate in Ireland, under a will duly executed as to the Irish, but ineffectual as to the Scotch estate, was bound to make his election. In the later case of *Maxwell* v. *Maxwell*, 13 Eng. L. & Eq. 443, which arose in England, the heir at law in Scotland was not put to his election but distinctly on the ground, that the will in the alleged disposition of the Scotch estate had used only general words. 'If the will had mentioned Scotland in terms,' said Sir Knight Bruce, Lord Justice, 'or the testator had not any real estate except real estate in Scotland, that might have been a ground for putting the heir to his election. The matter, however, standing as it does, we are bound to hold that the will does not exhibit an intention to give or affect any property which it is not adapted to pass,' and Lord Cranworth concurred in this view."

Of the opinion so largely quoted from, Mr. Pomeroy observes: "This admirable judgment of Mr. Justice Sharswood is in perfect harmony with the decision of the English court in *Brodie* v. *Barry*, 2 Ves. & B. 127; *Orrell* v. *Orrell*, L. R., 6 Ch. 302, and cases of that kind, since the devise of the New Jersey lands was made in express specific terms of description and gift, and was not merely inferred from such general words as 'all my real estate, whatever and wheresoever,' and the like."

The effect of a conflict of laws upon provisions in lieu of dower is illustrated by *Staigg* v. *Atkinson*, 144 Massachusetts, 564. A testator domiciled in Massachusetts died, leaving lands in that State and in Rhode Island and Minnesota. By his will made while domiciled in Rhode Island he had made provision for his widow, but without expressing it to be in lieu of dower. By the laws of Rhode Island and Minnesota this gave his widow dower in other lands, the contrary intention not appearing in the will. But by the Massachusetts law a widow gets no dower in addition to the provision in the husband's will, "unless such plainly appears to have been the intention of the testator." It was held that the Massachusetts statute could not apply to land out of that State, and that the widow was dowable of the lands in Minnesota, but must contribute to the payment of debts secured by mortgage upon the Massachusetts land. This is a learned review by Holmes, J.

No. 4. — LAWRENCE *v.* LAWRENCE

(WRIGHT, LORD KEEPER, 1702, H. L. 1717.)

RULE.

A DEVISE by a testator to his widow of part of the lands out of which she is dowable is not inconsistent with the intention that she may claim dower in the rest; and, but for the provision of the Act (of 1833) for the Amend-

ment of the Law relating to Dower (3 & 4 Will. IV. c. 105, s. 9), such a devise would not put the widow to her election.

Lawrence v. Lawrence.

2 Vern. 365–366 (s. c. 3 Bro. P. C. 483).

Election. — Devise. — Dower.

365] One by will gives a legacy to his wife, and devises to her part of his real estate, during her widowhood, and devises the residue of his whole estate to J. S. for life, remainder to his first son, &c. If the wife accepts of this devise, it does not bar her of her dower.

Mr. Lawrence by his will, devised some legacies out of his personal estate to his wife, and devised to her part of his real estate during her widowhood, and devised the residue of his estate to trustees for twenty-one years, for payment of debts and legacies; the remainder of the whole estate he devised to the plaintiff (who was his godson, and of his name, but a remote relation) for life, and to his first and other sons in tail, &c.

In this case Lord Chancellor Somers was of opinion, that although what was given to the wife was not declared to be in lieu and satisfaction of dower, and although no estate for life was devised to her, but only during widowhood; yet that in equity it ought to be taken, that what was so devised was intended to be in lieu [366] and satisfaction of dower, and that it might be plainly collected and intended from the will, that it was so intended, because he has thereby devised all other his real estate to other uses; and a collateral satisfaction may be a good bar to dower in equity, though not pleadable at law, and decreed that she must either take her dower, and waive the devise, or accept the devise, and waive her dower. This decree was afterwards reversed by Lord Keeper Wright.

The following note is given in Vernon's Reports (vol. 2, 2nd ed. p. 365 n.) of Lord Keeper Wright's opinion, and of the subsequent proceedings: —

18th Nov. 1702, Lord Keeper Wright conceived there was nothing in the testator's will that showed an intention to bar defendant of her dower, and in case any such thing did appear by the will, it would only be a bar at law where the matter had been already determined. His lordship therefore reversed so much of

Lord SOMERS'S decree as awarded an injunction against defendant's proceeding at law, and ordered that so much of the bill as sought relief touching the dower, should stand dismissed. Afterwards in Hill. term. 1712, the next remainderman brought his bill to be relieved against defendant's judgment in dower, and for an account, which cause came on before COWPER, Lord Chancellor, 5th December, 1715, who declared that Lord Keeper WRIGHT'S determination having ever since remained unquestioned, he should not vary it, but nevertheless decreed an account. Afterwards, 17th May, 1717, the widow appealed to the Lords from the decree of Lord COWPER, so far as it concerned the point of dower, and there appearing to their lordships no direction in decree that so much of the bill as related to the question of dower should be dismissed, their lordships ordered the bill to stand dismissed as to that point.

ENGLISH NOTES.

The above rule, as established by the principal case, has been fully recognized in subsequent cases; of which the decision by Lord REDESDALE in *Birmingham* v. *Kirwan* (1805), 2 Sch. & Lef. 444, may be taken as an example. But upon the question what other gifts may be construed as implying an intention to exclude the widow from dower, it was observed by Lord ST. LEONARDS in his judgment in *Hall* v. *Hill* (1841), 1 Drury & Warren, 94 — which may itself be taken as a landmark — that it is hopeless for any Judge to reconcile all the cases on the subject.

In *Hall* v. *Hill* the testator by his will devised and bequeathed all his real and personal estate to his nephew C., upon trust to permit and suffer his "dearly beloved wife E. to take one annuity or yearly sum of £200 per annum during the term of her natural life, with power of distress and entry for recovery of the same, as in cases of non-payment of rent," and then, after some bequests to relations upon trust to pay to his daughter certain sums, he proceeded: — "My will further is, that my farm and lands of M. shall go to and be enjoyed by my dear wife during her life, free from any debts and legacies, with power to her to devise the same by deed or will to any person or persons she may think fit; and I also bequeath to her all my household furniture, plate, linen, china, horses, carriages, and other personal property now immediately in use by me; I further direct my trustees to pay out of the property devised, my debts, and funeral and testamentary expenses; and subject to such debts and legacies, I direct my said nephew C. to permit my son B. to take the residue of the rents and profits of my said estates to his own use during his life, and after his decease I devise

and bequeath the same to my son T. and his issue lawfully to be begotten, and in default of such issue, to my own right heirs for ever." There was a codicil giving his trustee power to raise his debts and legacies by sale or mortgage of his estates, and also a power to let his estates for a term of 31 years, in possession without fine. The Lord Chancellor (Sugden, afterwards Lord St. Leonards), upon looking at the whole will, and spelling out the intention from its several provisions, was of opinion that the widow was barred of her dower. He came to that conclusion, "not alone from the circumstance that an annuity has been given her, nor because a part of the estate has been devised to her, but from a full consideration of the different provisions of the will." This decision was followed by Vice-Chancellor Wickens in *Thompson* v. *Burra* (1873), L. R., 16 Eq. 592, 42 L. J. Ch. 827, where the testator gave a legacy of £200 and an annuity of £700 to his widow (for life or until second marriage) charged upon part of his freehold and copyhold hereditaments, with a direction that she should occupy and enjoy his mansion-house with the furniture, &c., and enjoy the rents of a portion of the property. There were powers given to the trustees for partition of his estates, and also full powers of management, including leasing for agricultural purposes of 21 years and for building of 99 years. A large part of the estate consisted of customary lands, out of which the widow was entitled to free-bench. The Vice-Chancellor held that she was bound to elect.

The rule is altered for England and Ireland, as to rights constituted under a marriage and a will on and after 1st January, 1834, by the 9th section of the Dower Act 3 & 4 Will. IV. c. 105, which enacts that where a husband devises to or for the benefit of his widow any land out of which she would be entitled to dower, she shall not be entitled to dower out of any land of her husband unless a contrary intention shall appear by the will. This section was held to apply, by Lord Romilly, M. R., in *Rowland* v. *Cuthbertson* (1869), L. R., 8 Eq. 466, where a testator, after directing his debts to be paid by his executors, devised his real and personal estate, subject as aforesaid, to trustees upon certain trusts, being partly for the benefit of his widow. So in *Lacey* v. *Hill* (1875), L. R., 19 Eq. 346, 44 L. J. Ch. 215, where a testator gave his wife an annuity charged upon a mixed fund the proceeds of sale of real and personal estate, the Master of the Rolls (Sir G. Jessel) held the widow to be barred of dower by the above section. This was followed by Kay, J., in *Re Thomas, Thomas* v. *Howell* (1886), 34 Ch. D. 166, 56 L. J. Ch. 9; 55 L. T. 629.

No. 4. — Lawrence v. Lawrence. — Notes.

AMERICAN NOTES.

The matter in question is generally regulated by statute in the different States of the Union, and a very good view of the various provisions may be found in Mr. Pomeroy's classification (1 Equity Jurisprudence, p. 673 *et seq.*).

Where common-law dower, or some equivalent interest exists, any provision in the will for the widow is presumed to be additional to dower unless expressly declared to be in lieu of dower, or it is evident from the whole will that the contrary was the testator's intention. *Adsit* v. *Adsit*, 2 Johnson Chancery (New York), 448; *Evans* v. *Webb*, 1 Yeates (Penn.), 424; 1 Am. Dec. 308; *Stark* v. *Hunton*, 1 New Jersey Equity, 217; *O'Brien* v. *Elliot*, 15 Maine, 125; 32 Am. Dec. 137; *Brown* v. *Brown*, 55 New Hampshire, 106; *Lord* v. *Lord*, 23 Connecticut, 327; *Chapin* v. *Hill*, 1 Rhode Island, 446; *Hall's Case*, 1 Bland Chancery (Maryland), 203; 17 Am. Dec. 275; *Wiseley* v. *Findley*, 3 Randolph (Virginia), 361; 15 Am. Dec. 712; *Gordon* v. *Stevens*, 2 Hill Chancery (So. Car.), 46; 27 Am. Dec. 445; *Worthen* v. *Pearson*, 33 Georgia, 385; 81 Am. Dec. 213; *Adams* v. *Adams*, 39 Alabama, 274; *Apperson* v. *Bolton*, 29 Arkansas, 418; *Carroll* v. *Carroll*, 20 Texas, 731; *Shaw's Devisees* v. *Shaw's Adm'r*, 2 Dana (Kentucky), 342; *Douglas* v. *Feay*, 1 West Virginia, 26; *Pemberton* v. *Pemberton*, 29 Missouri, 408; *Metteer* v. *Wiley*, 34 Iowa, 214; *Herbert* v. *Wren*, 7 Cranch (U. S. Supreme Ct.), 370. See especially, *Lewis* v. *Smith*, 9 New York, 502; 61 Am. Dec. 706; *Asche* v. *Asche*, 113 New York, 232; *Hatch's Estate*, 62 Vermont, 300; 22 Am. St. Rep. 109; *Hall* v. *Hall*, 8 Richardson Law (So. Car.), 407; 64 Am. Dec. 758; *White* v. *White*, 16 New Jersey Law, 202; 31 Am. Dec. 232; *Pollard* v. *Slaughter*, 92 North Carolina, 72; 53 Am. Rep. 402; *Konvalinka* v. *Schlegel*, 104 New York, 125; 58 Am. Rep. 494. The inadequacy of the testamentary provision, known to the testator, is a strong indication against the intention to substitute it for dower. *Atkinson* v. *Sutton*, 23 West Virginia, 197.

Mr. Bench states the general rule (Wills, p. 293): "A widow who accepts a provision under her husband's will is not required to relinquish her dower, unless either from express statement or necessary inference, the provision for her is clearly intended to be in lieu of dower, or the terms in which the land have been devised are clearly and manifestly repugnant to the assertion of her dower right in them."

Andrews, J., in *Konvalinka* v. *Schlegel*, *supra*, said: "Dower is favored. It is never excluded by a provision for a wife, except by express words or by necessary implications. Where there are no express words there must be upon the face of the will a demonstration of the intention of the testator that the widow shall not take both dower and the provision. The will furnishes this demonstration only where it clearly appears, without ambiguity or doubt, that to permit the widow to claim both dower and the provision would interfere with the other dispositions and disturb the scheme of the testator as manifested by his will. The intention of the testator to put the widow to an election cannot be inferred from the extent of the provision, or because she is a devisee under the will for life or in fee, or because it may seem to the Court that to permit the widow to claim both the provision and dower would

be unjust as a family arrangement, or even because it may be inferred or believed, in view of all the circumstances, that if the attention of the testator had been drawn to the subject he would have expressly excluded dower. We repeat, the only sufficient and adequate demonstration which in the absence of express words will put the widow to her election, is a clear incompatibility, arising on the face of the will, between a claim of dower and a claim to a benefit given by the will." So where the residuary estate, after payment of debts and some specific legacies, was given to the executors to sell and divide proceeds equally between the widow and children, it was held that the widow was not put to her election. Citing *Ellis* v. *Lewis*, 3 Hare, 310; *Foster* v. *Cook*, 3 Bro. Ch. 347.

In some States, including some of the foregoing by force of recent statutes, the common-law dower has been abolished, and a fixed portion of the husband's lands substituted, and in some of these States this is declared to be in lieu not only of dower but of all interest in the personalty of the husband, and frequently the mode of her election is provided by the statute. In such States the widow must elect unless the intention to give her both the testamentary gift and dower expressly appears in the will. This is the rule in Alabama, Illinois, Indiana, Kansas, Maine, Massachusetts, Maryland, Michigan, Minnesota, Mississippi, Nebraska, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Wisconsin.

In a few States the rule last above stated prevails except as to the widow's share in the personalty. So in Arkansas, Delaware, Georgia, Missouri, New Jersey.

In some States the equitable doctrine seems to be left unaltered by statute: Connecticut, Florida, Iowa, Kentucky, New Hampshire, Vermont, Rhode Island, New York.

The decisions are liberal toward the widow in their construction of what constitutes an expression of an intention to substitute the testamentary provision for dower. The following have been held not to indicate this intention: A direction that the estate be equally divided between the doweress and others. *Konvalinka* v. *Schlegel*, 104 New York, 125; (but *contra*: *Ex parte Durfee*, 14 Rhode Island, 47). A devise to the widow of the whole estate for life: *Potter* v. *Worley*, 57 Iowa, 66. A gift of all the rents and profits to educate and rear the children: *Rittgers* v. *Rittgers*, 56 Iowa, 218. A direction that any surplus after paying debts shall pass to the widow: *Nelson's Adm'r* v. *Kownslar's Exec'r*, 79 Virginia, 468. A general devise of the whole estate on trust to sell: *Colgate's Exec'r* v. *Colgate*, 8 C. E. Green (New Jersey Chancery), 370. An annuity: *Gibson* v. *Gibson*, 15 Massachusetts, 106.

In *United States* v. *Duncan*, *supra*, the court said, in speaking of the Illinois statute, that "any provision by will bars dower, unless it be otherwise expressed in the will:" "Now this provision must have a reasonable construction. Will it be contended that any bequest in the will for the wife, however small, will bar dower? Such could not have been the intention of the Legislature. And if this construction be not sustainable, is there any other rule than that the bequest should be such as would be a reasonable compensation

for dower in the real estate? Can the wife be divested of her dower, which is a legal right, on any other principle? Is she barred of her dower if she accept a gift of five or twenty dollars, or some piece of furniture under the will from her dying husband, as an evidence of his affection? Certainly she is not. When any property was bequeathed to the wife, which from the amount might be presumed under the statute to be in lieu of dower, and there was nothing in the will to contradict this presumption, she would be bound by it ordinarily, unless her election of dower were made in six months."

On the other hand, the following have been held to put the widow to election: A gift of an annuity, and the use of the homestead: *Endicott* v. *Endicott*, 41 New Jersey Equity, 93. A specific devise of certain lands: *Pratt* v. *Douglas*, 38 New Jersey Equity, 516; a handsome legacy and an estate for life or widowhood in nearly one third of the realty, where there were children who took in remainder, with the rest of the lands, all to be sold for their benefit: *Callaham* v. *Robinson*, 30 South Carolina, 219; 3 Lawyers' Reports Annotated, 497 (one judge dissenting, citing *Birmingham* v. *Kirwan*, 2 Sch. & Lef. 452, and *Adsit* v. *Adsit*, *supra*). *In Matter of the Estate of Gotzian*, 34 Minnesota, 159; 57 Am. Rep. 43, the testator first provided for the payment of debts, secondly gave his homestead, furniture, and all the personalty to his widow; thirdly, gave all the residue one-third to his widow, clear of incumbrances, and the rest to relatives. *Held*, that the widow was required to elect. The court admitted the general rule that unless the contrary appears, the presumption is that the testamentary provision is intended as an additional bounty above the dower, and observed: "It is manifest that the general rule referred to may be extended too far, and some of the English cases, which have been followed in several of the States, have adopted a construction so technical and restricted as to defeat the obvious purpose of the testator. The presumption that by the use of general words of donation, he intends strictly to dispose only of what is capable of being disposed of, may be rebutted by the character and terms of the will, and it is therefore a fair question of construction in what sense the words 'estates' or 'lands' or 'property' are used by the testator, whether it is limited to the partial or undivided interest which in contemplation of law will be subject to be disposed of under the will after his decease, or is intended to include the entire property owned, possessed, and enjoyed by him in his life-time. *McGregor* v. *McGregor*, 20 Grant (U. C.), 450. Upon a careful consideration of this case, we think the indications are sufficiently manifest from the will that the testator had in mind the disposition of the entire estate as possessed by him at his death, and that he did not mean that the ample and carefully secured provisions given his wife by the will, and exceeding the value of her dower, should be in addition thereto." *Lord* v. *Lord*, 23 Conn. 327; *Hickey* v. *Hickey*, 26 Conn. 261.

"Where a testator, as is not unfrequently done, bequeaths to his wife such portion of his estate as she would be entitled to under the statutes of distribution or descent, she takes as legatee or devisee under the will, such share of his property as she would receive if he had died intestate, and she is not entitled to dower in addition thereto, but is put to an election. *Warren* v.

Morris, 4 Del. Ch. 289, 300, 301; *Kelly* v. *Reynolds*, 39 Mich. 464; *Adamson* v. *Ayres*, 5 N. J. Eq. 349.

"In respect to her third of the residue, he gives her 'an undivided one-third of all the balance, rest, residue and remainder of all my estate and property.' This includes both real and personal property, which are blended together in the will, and the whole if necessary subjected to the payment of debts. It will be observed also from the terms of the will, that the residue referred to is what remains after the debts are paid and the second bequest satisfied; that is to say, the real as well as the personal property, other than mentioned in the second bequest, must be first applied in satisfaction of the debts in order to secure to the widow the full benefit of the second bequest in accordance with the purpose of the testator. But if she is to take as heir, her third of the residue of the realty must, unlike the former estate in dower, bear its just proportion of such debts as are not paid from the personal estate, and here there is or may be a large proportion of the personal property included in the second bequest subject to the payment of debts in the order of distribution provided by law before the realty is liable therefor. The fee of the homestead is also liable to its just proportion thereof. But it is clear, that in case of a deficiency of assets, a different and entirely inconsistent plan and order of distribution is contemplated by the will. The deficiency is not to be ascertained by first applying the personalty, but personalty is preferred to realty, and the realty, which with the widow's third is to share its ratable proportion of the debts (if it contributes at all), must be first applied, and with no rule, or a different one from that provided by the statute for ascertaining the proper proportion of its liability. The same line of argument is applicable measurably to the provision of the will in the third bequest, requiring that the widow's third of the estate, real and personal, should be given her free and clear of incumbrances; but it is unnecessary to pursue it further. She could not be entitled to the full enjoyment of her rights as heir without disturbing the provisions of the will, some of which are clearly inconsistent with such rights. She cannot therefore take both. *Matter, &c., of Zahrt*, 94 N. Y. 605; *Dodge* v. *Dodge*, 31 Barb. 413; *Savage* v. *Burnham*, 17 N. Y. 561, 577; *Sullivan* v. *Mara*, 43 Barb. 523."

This subject is extensively and judiciously treated in Scribner on Dower, who cites the principal case as "a leading case." (Vol. II. p. 444.)

No. 5. — PUSEY *v.* DESBOUVRIE.

(TALBOT, L. C. 1734.)

No. 6. — DOUGLAS *v.* DOUGLAS.

DOUGLAS *v.* WEBSTER.

(1871.)

RULE.

In order that an election should be binding, the party must have manifested his election by an unequivocal act, done with the necessary amount of knowledge both as to his rights and as to the value of the respective benefits: and, where there is a cause pending involving a question as to the right of election, the Court will before an election is made determine the question as to the right to elect, and direct enquiries for the purpose of ascertaining the value sufficiently to guide the person having to make the election.

Pusey v. Desbouvrie.

3 Peere Williams, 315–322.

Election. — Unequivocal acts with Knowledge.

[315] Where a daughter of a freeman of London accepts of a legacy of £10,000 left her by her father, who recommended it to her to release her right to her orphanage part, which she does release accordingly; if the orphanage part be much more than her legacy, though she were told she might elect which she pleased; yet, if she did not know she had a right first to enquire into the value of the personal estate and the quantum of her orphanage part, before she made her election; this is so material, that it may avoid her release.

Sir Edward Desbouvrie was a freeman of London, and possessed of a very great personal estate. He had a wife, with whom he had compounded as to her customary part; and had a son (the defendant), to whom he had given very considerable sums of money, in order to enable him to trade. He had also one daughter.

No. 5. — Pusey v. Desbouvrie, 3 P. Wms. 316, 317.

[316] The father made his will, giving (*inter alia*) to his daughter £10,000, upon condition that she should release her orphanage part, together with all her claim or right to his personal estate by virtue of the custom of the City of London, or otherwise, and made his son executor, his daughter being about the age of twenty-three years.

After the father's death it was agreed between the daughter and her brother, that she should accept of her legacy of £10,000 and upon the terms whereon it was given her by her father's will, that is, she to release all her right by virtue of the custom, &c., which release was accordingly prepared, and before she executed it her brother informed her that she had it in her election to have an account of her father's personal estate and to claim her orphanage part, and her uncle was then present. But the daughter at that time declared she would accept of the legacy left her by her father, that being a sufficient provision for any young woman; and thereupon she executed the release, being then about twenty-four years old, and the brother paid to her the £10,000 and interest. The daughter afterwards married one Mr. Pusey, an attorney at law, who brought a bill to set aside this release, charging that the personal estate of which the father died possessed was much above £100,000, the daughter's share of which by the custom would amount to upwards of £40,000; that the mother having been compounded with for her customary part, the freeman's personal estate was to be distributed as if there was no wife, [317] consequently the dead man's part was one moiety, and the children's part the other; and that the brother, the defendant Sir Edward Desbouvrie, had been advanced in his father's lifetime by his father at different times, with several great sums of money, the whole whereof would amount to a full advancement of the son: so that the plaintiff Pusey, in right of the daughter his wife, was entitled to a moiety of her father, the freeman's personal estate.

The defendant, the brother, pleaded this release.

Against which, on behalf of the plaintiff at first it was argued, that as the bill was brought to set aside this release, the defendant ought not to be admitted to plead it in bar, the rule being "non potest adduci exceptio ejusdem rei cujus petitur dissolutio." But the Lord Chancellor here interrupted the counsel, saying, this was every day's practice; and that otherwise no release or award could be pleaded to a bill that was brought to set aside the same.

No. 5. — Pusey v. Desbouvrie, 3 P. Wms. 317–319.

Then it was urged, that no computation or account had as yet been taken of the father's personal estate, and that it could not be imagined the daughter intended to present her brother with [318] £30,000, or that she knew what her right was: that she was not apprised that, by reason of her mother's being compounded with, the children's share, instead of a third, was a moiety; or that her brother the defendant, being fully advanced by his father in his lifetime, this was a bar to him of his orphanage part; and though at law it was said *ignorantia juris non excusat*, yet if any one should take advantage of another's mistake in the law, even without any fraudulent suggestion or practice made use of by him, it would be against conscience so to do. And they put this case: Suppose A. should devise lands to B. and his heirs, and B. should die in the life of the testator, and then the testator dies, after which the testator's heir, not knowing that by law the devise to B. is void (by B.'s dying in the life of the testator), should for a trifle release his right to a valuable estate, to the heir at law of such devisee; surely such release would not stand good. And as it was out of the father's power by devise or otherwise, to debar any of his children of that share which they are entitled to by virtue of the custom; so here it was somewhat hard in the father to induce his daughter by any words in his will to give away and release what she had an undoubted right to; and admitting there was no direct fraud or misrepresentation, [319] here was, however, *suppressio veri*, though not *suggestio falsi;* and in this case, since it would not be pretended that the daughter could have meant to give away £30,000 to her brother, though he had asked for it, therefore this release ought not to be made use of in a court of equity to bar the daughter of that right which she did not know she herself had, and much less intended to give away.

On the other side, it was said to deserve consideration, that the father did by his will give this legacy of £10,000 to his daughter, upon condition that she should release all her right by the custom; and though it could not be said here was a positive injunction on the daughter to do so, yet in all probability it was intended as a recommendation by the father, who might think £10,000 a reasonable and honourable provision for the daughter, as she herself declared she thought it was, when she gave this release; and the father might be desirous that his son, who was to support his

name, should have the rest of his estate: that the daughter might reasonably have a great regard for the intentions of her deceased father, (for which she was highly to be commended,) and might thereby be induced to comply with such intention, at the [320] same time that she knew in strict justice there was more due to her by virtue of the custom.

That however it was plain the brother had acted in this case without the least appearance of fraud, when he told her, before she executed the release, that she might if she pleased call him to account for the whole personal estate of her father, and have her orphanage part thereof: that this being the solemn act and deed of the party, executed by her freely and without any sort of compulsion or misrepresentation, and in compliance with her own father's will: and since, if the daughter was not informed of the custom of London, it was her own fault, and not her brother's; for these reasons it was said the deed of release ought not to be set aside.

Lord Chancellor (Talbot). — I do not see that any manner of fraud has been made use of in this case, but still it seems hard, a young woman should suffer for her ignorance of the law, or of the custom of the city of London; or that the other side should take advantage of such ignorance. I remember well, that in this very case where the wife has been compounded with as to her customary part, not only the counsel have differed, but the Court themselves have varied, in their determinations. It has, for instance, been held and determined by the Court, that if the husband, a freeman of London, has compounded with the wife before the marriage as to her customary part, this being the husband's own purchase, he ought to have as well his wife's customary part as his own: but now a different resolution seems to have prevailed, viz., that where the wife is compounded with before marriage, [*321] * it should be taken as if there was no wife, and consequently the testator shall have one-half, and the children the other. And if the Court themselves have not, till very lately, agreed in what shares or proportions these customary parts shall go, the daughter, surely, might be well ignorant of her right, and ought not to suffer, or give others any advantage, by such her ignorance. Neither can it be inferred with sufficient certainty what the father recommends in this case: he rather seems to leave it to his daughter's option, either to claim her customary part, or release her right thereto and accept the legacy.

It is true, it appears, the son the defendant did inform the daughter, that she was bound, either to waive the legacy given by the father, or to release her right by the custom; and so far she might know, that it was in her power to accept either the legacy, or orphanage part: but I hardly think she knew she was entitled to have an account taken of the personal estate of her father, and first to know what her orphanage part did amount to; and that, when she should be fully apprised of this, then, and not till then, she was to make her election, which very much alters the case; for probably she would not have elected to accept her legacy, had she known, or been informed, what her orphanage part amounted unto, before she waived it, and accepted the legacy.

It would give light into this cause, to know what might be the value of the father's personal estate at his death, and (if the parties think fit) what was the value thereof, when the will was made; because it has been said to have been increased by the father between the time of making his will and his death; and also to know, what the son has received in his father's [322] life-time from his father for or towards his advancement.

Therefore let the plea stand for an answer, saving the benefit thereof until the hearing; and let the defendant the son answer, not as to particulars, (for that I do not expect) but by way of computation in gross, as to these points.

It appears from the Register's book, that on the 8th of May, 1735, upon the defendant's motion it was alleged, that the suit was agreed between the parties; it was therefore prayed, that the plaintiff's bill might be dismissed without costs; which, on consent of the plaintiff's counsel, was ordered accordingly.

Douglas v. Douglas.

Douglas v. Webster.

L. R., 12 Eq. 617–649 (s. c. 41 L. J. Ch. 74).

Election. — Pleading. — Suit to ascertain Value with a view to elect. — Domicil.

Consideration of the circumstances under which a person, who is put [617] to election, may file a bill to have the value of the property, subject to the election, ascertained.

William Douglas, a domiciled Scotchman, the grandfather of the testator, on the 28th of November, 1767, on his marriage

with Elizabeth Graham, settled his hereditary estate of Brigton, Forfarshire, on himself and his heirs male, with a provi-
[* 618] sion for * younger children. William Douglas was also proprietor of other family estates, situated at Glammis and Broughty Ferry, in Scotland. On the 12th of April, 1773, his eldest son, Robert Douglas, was born at Dundee, and was brought up in Scotland till 1790, when he was sent to France to be educated, in order to qualify him for an office under the British Government. In 1792 Robert returned to England, and shortly afterwards was appointed to a clerkship in the Home Office, which office he held till 1802. During this time he lodged in Pall Mall, but spent a great deal of his spare time at Clapham, at the house of an intimate friend named Webster. About the year 1800 Mr. Webster died, and his widow after his death rented a house called Langham House, Suffolk. In June, 1802, Robert Douglas, who was then lodging in London, was married to Mrs. Webster, who had considerable means, in the parish church of Langham, Suffolk. In November of the same year he resigned his clerkship in the Home Office, which was worth then about £300 a year.

In the entry in the parish book, Robert Douglas was described as of the parish of St. George, Hanover Square, London. From the time of his marriage Robert Douglas maintained himself on his wife's property, and resided till 1814 at Aldborough, Suffolk, Newby Wiske, Yorkshire, and other places in England, where he engaged houses for short terms, paying occasional visits to Scotland.

On the 4th of August, 1803, William Douglas, the eldest son of Robert Douglas, was born in London, while his parents were on a visit, and during their occupancy of Langham House.

In 1804 William Douglas, the grandfather, executed a trust deed of Brigton in favour of creditors, with a power of sale, but continued to reside there till 1810, when he removed to Broughty Ferry, where he died in 1814.

In 1811 the Brigton estate was sold in lots, and the mansion house and grounds, with part of the land surrounding it, were purchased by Robert Douglas, principally with money borrowed from his wife's trustees. The remainder of the estate was sold to Lord Strathmore.

In a letter written to his father by Robert Douglas, and dated

the 8th of October, 1811, occurs the following passage: — "In consequence of my wife's determination of having a home of her *own, she delayed writing until it could be ascer- [*619] tained what you could do for me to enable us to make Brigton that home; and upon receipt of your letter of the 22nd of November, containing your promise to assist me she wrote to her trustees."

Shortly after his father's death, in 1814, Robert Douglas refurnished Brigton, and resided there, with his wife and son, till his death on the 8th of August 1835.

The furniture in the house at the time of his death belonged to Mrs. Douglas.

William Douglas, the testator, at his father's death was thirty-two years of age. From 1815 or 1816 he had always resided with his father and mother at Brigton as his home, which, after the sale in 1811, consisted of the mansion-house and grounds and the home farm. After Robert Douglas's death Mrs. Douglas lived with her son at Brigton, defraying all the household expenses, and her son, the testator, managed the farm, which was kept in hand and was his own property. In June, 1846, Mrs. Douglas bought a house at Broughty Ferry called Carbat House, distant about twelve miles from Brigton, which she occupied as a winter residence, and Brigton as a summer residence, till her death on the 9th of September, 1857. Between the death of his father and mother the testator occasionally paid short visits to England. During these visits he became acquainted with a Mrs. Rigge, the widow of a perfumer, who, with her two daughters, who were milliners, lived in New Bond Street. On the 30th of September, 1857, he wrote to the eldest daughter, announcing his intention of shortly visiting London, which he soon afterwards fulfilled.

The principal events in connection with the testator's acts and residence from his mother's death were as follows: —

1857. Sept. 9. Mrs. Douglas died.
Dec. . Testator came to London and took lodgings in St. James's Place, London.
1858. Jan. 19. Opened an account with the Royal Bank of Scotland in Dundee.
Mar. . Returned to Scotland for a short visit. Ordered sale of his mother's house at Broughty Ferry.

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Apr. . Visited Bridge of Allan, and then returned to London.

[*620] *May to July. Resident at Brigton; which he described as "dismally dull."

Aug. . Went to England. Wrote from Dover to his housekeeper at Brigton, directing letters to be sent to 42, New Bond Street, where he would get them on his way through.

Sept. and Oct. Resident at Brigton.

Nov. . Returned to St. James's Place, and on the 20th of November removed to 42, New Bond Street.

1859. Mar. . Gave directions for painting and repairing Brigton.

Apr. . Again in St. James's Place. Opened an account at Coutts's, and gave Brigton as his address, which he afterwards changed to Marlborough Terrace and Sommers Cottage.

1860. Feb. . Testator at Brigton; hired a fishing-boat, and remained in Scotland. Chiefly at Brigton till September, and in October he let the home farm at Brigton to a Mr. Guthrie.

1860. Oct. . Returned to England, and rented a house, No. 3, Marlborough Terrace, Old Kent Road, to which, shortly afterwards, he removed and lived with the plaintiff, Ellen Douglas, as his wife, till he removed to Sommers Cottage, Brigton.

1860. . During this year Brigton was managed chiefly by P. Webster, who had been appointed factor soon after Mrs. Douglas' death.

Nov. 26. Refused to let Brigton, as it would throw him out of a home altogether.

1861. May to July. Testator during part of this time at Brigton, which he spoke of as his home.

July 26. Negotiated with landlord of Sommers Cottage, Brixton Hill, near London, for purchase.

Aug. . Testator at Brigton, afterwards at Bridge of Allan; stated he "would not let Brigton."

Sept. . Removed to Sommers Cottage, of which he had taken a lease for three or seven years.

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1862. Mar., May, and July. Testator paid short visits to Brigton.
June 18. Eldest son born at Sommer's Cottage; in register * father described as independent gentleman, of Sommers Cottage, Brixton Hill. [* 621]
July . Trust disposition of property in Scotland in favour of nephew, defendant Colonel Douglas, prepared.
Sept. . Testator "thinks of letting Brigton."
Nov. 6. Plate-chest sent to Forfar Bank with a view of letting Brigton.
1863. Jan. . Brigton advertised to be let.
Feb. . Let Brigton to a Mr. Millar; but refused to grant more than two years, though a longer term had been in contemplation; and reserved two rooms and a room above the granary.
Apr. . Testator at Brigton; stored away furniture and discharged his servants.
Aug. . Millar applied for extension of lease, but was refused.
Aug. 13. Testator married Ellen Rigge at Folkestone.
Aug. 19. Made will purporting to dispose of his real property in Scotland in favour of Colonel Douglas.
Dec. . Purchased a grave at Camberwell Cemetery for the interment of his step-brother.
1864. Jan. 25. Made another will disposing of Brigton.
Aug. . Gave up pew at Brigton as "not a residenter."
Nov. . Testator made another will, disposing of Brigton.
1865. Jan. 5. Testator's second child born.
July . Testator agreed to extend Millar's lease for two years.
Contemplated purchase of a freehold estate at Harrow.
Aug. . Testator at Broughty Ferry.
Sept. 26. Execution of new lease of Brigton, reserving bowroom and bedrooms.
Dec. . Purchased long leasehold house at Putney, describing himself as of Sommers Cottage.
Plate sent up from Scotland by Mr. Webster.

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1866. May . Made an investment in the funds, and described himself of Sommers Cottage.

* June 14. Third child born at Sommers Cottage. [* 622]

Aug. . Took a pew at Brixton Church.

1867. May 25. Testator made another will in the English form, purporting to dispose of Brigton in favour of Colonel Douglas.

Aug. 30. Testator describes himself as a "residenter" in England.

Sept. . Testator, after again contemplating the purchase of a freehold, abandoned the idea, and took a lease of Heathfield, Streatham for $5\frac{3}{4}$ years, and removed there.

Sept. . Testator closed his account with the Dundee Bank, which he had opened in 1858.

Sept. . Testator made a trust disposition of Brigton in favour of Colonel Douglas.

1868. June 25. Final lease of Brigton to Mr. Millar for three years. Testator gave up the rooms he had reserved there, and removed his furniture and pictures to Heathfield.

Dec. 21. Last will, in English form, substantially identical with two previous wills in the same year, being to the effect hereinafter stated.

1869. Feb. 16. Died at Heathfield.

By his will in the English form, dated the 21st of December, 1868, after revoking all other wills, he gave to his widow his plate and household effects, and his balance in his bankers' hands. He gave to his nephew Colonel Douglas, and Patrick Webster, whom he appointed his executors, his leasehold house at Putney on trust, to allow his widow to reside in it, and after her death to retain it as a residence for his children till the youngest should attain twenty-one, or to sell it and to hold the proceeds on the same trust as a legacy of £10,000, thereinafter given, with a proviso that it might be sold, with the widow's consent, in her lifetime, in which case she was to receive the income of the proceeds during her lifetime, and the capital was to go in the same way as the £10,000. He directed his executors to set apart 3 per cent. stock, the equivalent of £7200, and to pay the income

to the widow for life, after which it was to go as the £10,000. He bequeathed to his *executors £10,000 [*623] sterling in trust for and to be equally divided among his children who should attain twenty-one, with the usual provisions for maintenance, advancement, and accumulation, with a proviso that if no child of the testator attained twenty-one the capital should fall into the residue of his estate. The testator declared that the provisions made by his will for his wife should be taken by her in lieu of all dower and thirds, and all other rights and interests at common law or otherwise, to which she might be entitled out or in respect of any estate or estates which he might die seised or possessed of or entitled to in Scotland or elsewhere; and he left, bequeathed, gave, granted, assigned, and disponed to Colonel Douglas all the residue of his goods, gear, debts, and sums of money, and in general the whole of the residue of his movable means, estate, and effects whatsoever that might pertain to, be vesting in, or owing to him at the time of his decease. But always with and under the burden of all his just debts, death-bed, and funeral charges, and legacies, and gifts, thereinbefore by him given. And he thereby gave, granted, assigned, and disponed to and in favour of Colonel Douglas, his heirs, executors and assignees, all and singular the lands and heritages, and in general the whole heritable and real estate and effects, of what kind or denomination soever and wheresoever situated, then belonging to him or that should belong to him at the time of his decease.

The executors duly proved the will, and paid to the widow certain inconsiderable sums in pursuance of the trusts of the will. She subsequently, by her solicitors, served notice that she did not accept such payments by way of election to take the benefits given her by the will. On the 9th of September, 1869, she filed this bill against the trustees and her own children, alleging that the real estate in Scotland did not pass by the will, but had devolved on defendant, William Charles Douglas, and praying, 1, that the trusts of the will of the testator might be carried into execution under the direction of the Court; 2, that for the above purpose all necessary accounts might be taken, directions given, and inquiries made, including an inquiry as to the testator's domicil, and an inquiry of what real and heritable estate he died seised or possessed of, either in Scotland or elsewhere, and what was the value of his real and heritable estate and movable property at

No. 6. — Douglas v. Douglas, L. R., 12 Eq. 624, 635.

[* 624] his death; 3, that * all questions of collation and election proper to be determined with reference to his property might be determined in this suit; 4, for further relief.

The case made by the plaintiff was stated in the tenth paragraph of the bill, as follows: —

"The plaintiff is advised, that notwithstanding the provision made for her by the will, she is entitled to insist on her legal rights in the testator's property, and to claim one-third part of his movable estate wheresoever situate, and also her terce in his heritable estate in Scotland. The plaintiff is also advised that in case it shall not be for the benefit of the defendant, William Charles Douglas, to collate or bring into hotchpot the heritable estate in Scotland, which has devolved upon him as such heir-at-law of the testator, the defendants, Robert and Mary Douglas (his brother and sister), will be entitled to insist on the exclusive right by way of *legitim* to one-third of the testator's movable estate, wheresoever situate, in lieu of the provisions made for them by the will, and that if the said William Charles Douglas shall so collate the said heritable estates, such heritable estate and *legitim* will be divisible between him and his brother and sister in equal shares."

On the 11th of November, 1869, Colonel Douglas filed a cross bill against the widow and her children, praying, 1, that it might be declared that the testator at the times of making his will and of his death was domiciled in England, and that his personal estate wherever situate became disposable by the law of England, and that the same had been effectually disposed of by the will of the 21st of December, 1868; 2, that the plaintiff (in cross bill) was entitled to the personal estate not specifically bequeathed, subject to the payment of debts, funeral expenses, legacy duty and legacies; 3, that all necessary accounts might be taken and directions given.

After argument —

[635] July 17. Sir John Wickens, V. C.: —

William Douglas, the testator in these causes, died in England on the 16th of February, 1869, leaving a widow, Ellen Douglas, and three children by her; one of whom, William Charles, was born on the 18th of June, 1862, fourteen months before the marriage of his parents.

William Douglas had, besides considerable movable property,

No. 6. — Douglas v. Douglas, L. R., 12 Eq. 635, 636.

a leasehold house at Putney, in England, and some heritable estate in Scotland. His will, in the English form, is dated the 21st of December, 1868. By it, the testator, after revoking all wills and testamentary dispositions by him theretofore made, gave to his widow his plate, furniture, wine, carriages, and horses, and stable and garden utensils, and his balance in the hands of his bankers, Messrs. Coutts & Co. And he bequeathed to his nephew Colonel Douglas, and Patrick Webster, whom he appointed executors, the leasehold house at Putney, in trust, to allow his widow to reside in * it; and after her death either to [* 636] retain it as a residence for his children till the youngest should attain twenty-one, or to sell it, and hold the proceeds on the same trust as a legacy of £10,000 mentioned afterwards, with a proviso that it might be sold, with the widow's consent, in her lifetime; in which case she was to receive the income of the proceeds during her life, and the capital, afterwards, was to go as the £10,000. The testator further directed his executors to retain or provide out of his estate £3 per cent. stock equivalent to £7200 sterling, and pay the income to his widow for life; afterwards it was also to go as the £10,000; and he bequeathed to his executors £10,000 sterling, in trust for and to be equally divided among his children who should attain twenty-one, with the provisions for advancement, maintenance, and accumulations which are usual in similar cases. If no child of the testator's should attain twenty-one, the funds were to fall into the residue. The testator declared that the provisions made by his will for his wife should be taken by her in lieu, and bar, and in full satisfaction of all dower and thirds, and other rights and interests at common law or otherwise to which she might be entitled, out or in respect of any estate or estates which he might die seised or possessed of or entitled to in Scotland or elsewhere. And he left, bequeathed, gave, granted, assigned and disponed to Colonel Douglas, all the residue of his goods, gear, debts, and sums of money, and in general the whole of the residue of his movable means, estate, and effects whatsoever, that might pertain to, be vesting in, or owing to him at the time of his decease. But always with and under the burden of all his just debts, death-bed, and funeral charges, and legacies and gifts thereinbefore by him given. And he thereby gave, granted, assigned, and disponed to and in favour of Colonel Douglas, his heirs, executors, and assignees, all and singular the lands and

No. 6. — Douglas v. Douglas, L. R., 12 Eq. 636, 637.

heritages, and in general the whole heritable and real estate and effects, of what kind or denomination soever and wheresoever situated, then belonging to him, or that should belong to him at the time of his decease.

The testator had, on the 19th of September, 1867, fifteen months before the date of his will, executed, with what his advisers and he considered the formalities required by the law of Scotland for the execution of deeds and testamentary documents, a [*637] trust disposition *and settlement; by which he gave, granted, disponed and assigned to and in favour of Colonel Douglas, and his heirs and assignees, an estate at Brigton, in Forfarshire, worth, it seems, about £400 a year; the only remaining portion of a family estate of considerable importance which had belonged to his ancestors. The testator seems to have had other heritable estate in Scotland, viz., a moiety of a house and land at Broughty Ferry, which is not noticed in the trust disposition. This latter property is said to produce about £45 a year.

Two suits are now before the Court. One (*Douglas* v. *Douglas*) by the testator's widow against the executors and the testator's three children; and the other (*Douglas* v. *Webster*) a cross suit by Colonel Douglas, the testator's residuary legatee, who was also one of his executors, against the other executor and the widow and children of the testator.

The plaintiff in the first suit asserts that the testator's domicil was Scotch, and that she, as his widow, is entitled, if she chooses, to elect between the benefits given to her by his will, on the one hand, and one-third of his movables and her terce in her heritable estate on the other. And she claims, or is alleged to claim, that the Court of Chancery shall give her the means of making such an election, by ascertaining the value of the subjects between which it is to be made, and giving her, in so far as it has jurisdiction to do so, the benefit of her election when made.

It is perhaps too broadly stated by Lord THURLOW in *Butricke* v. *Broadhurst*, 1 Ves. 172, (2 R. R. 100), whose dictum has been adopted by Mr. Swanston in the note to *Dillon* v. *Parker*, 1 Sw. 381, n., and other text writers, that the Court of Chancery will in all cases entertain a suit by a person put to election to ascertain the value of the objects between which election is to be made. No doubt there is, in almost all cases, jurisdiction in equity to compel a final election, so as to quiet the title of those

No. 6. — Douglas v. Douglas, L. R., 12 Eq. 637, 638.

interested in the objects of which one is to be chosen; and the Court, as a condition of compelling such a final election, secures to the person compelled to make it all the information necessary to guide him in doing so. It is also generally, though perhaps not universally, true that a person for whose benefit conditions will be imposed by the Court before it makes an order against him, can *entitle himself to the benefit of the [*638] conditions by filing a bill and offering by it to submit to the order. But if, for instance, the Brigton estate in the present case had been given to a stranger, I do not at present feel satisfied that Ellen Douglas, if entitled to elect between her widow's rights and her legacy, could have sustained a bill against the executors and that stranger to have the value of the Brigton estate ascertained. It is not, however, necessary to consider this. Colonel Douglas, who is one of the executors and residuary legatee, also claims the bulk of the real estate, and what he does not take has devolved on the infant heir, who is before the Court, and makes no opposition. And Colonel Douglas has himself filed a cross bill, which, although it seeks to establish an English domicil in the testator, and therefore denies the widow's right of election altogether, prays (not conditionally, but absolutely) for a general administration of the personalty. Under all these circumstances the Court has, I think, jurisdiction on the hearing of these two causes to decide the question of the testator's domicil at the time of his will and of his death, on which depends the widow's alleged right to election, and also if she is held to have that right, to direct such inquiries as may be necessary to guide her in exercising it, and as far as possible to give effect to it.

The plaintiff in *Douglas* v. *Douglas* asks, however, something beyond this; she desires to have it ascertained on whom the Brigton estate devolves; or, in other words, whether her election is to be made against her own son, or partly against him and partly and principally against Colonel Douglas, a stranger in blood to herself; and further, whether the election is to be made against her son born before the marriage, or her son born after the marriage. And she consequently asks a decision, not only on the question whether the trust disposition in favour of Colonel Douglas was revoked, but also on the question whether her first born son is legitimate, which involves the question of the testator's domicil at the time of that son's birth and of the father's

subsequent marriage. It seems to me that she is entitled to do so. Supposing the Court of Chancery to recognize and give effect to her right of election, it will also compensate, as far as possible, the persons disappointed by its exercise, which of course involves the ascertaining of them. Therefore, notwithstanding the [* 639] elaborate argument * addressed to me on the subject, I consider that the question where the testator was domiciled at the birth of his son William Charles, and the question whether the trust disposition of 1867 was revoked by the subsequent will, are properly before the Court of Chancery in this suit.

The learned Judge then went minutely into the evidence on the question of domicil, and decided that the domicil of origin of Robert Douglas the father of the testator, was Scotch, and that he never changed it: consequently that the testator's domicil of origin was Scotch. After reviewing the evidence of fact and intention relating to the testator, he concluded as follows: —

[648] The true conclusion from the facts seems to be, that the testator remained from 1863 to his death in a state of mind which might have resulted in his determining to settle in England permanently, but which never did so result; that if he had lived a few years longer, and had found by experiment that Mrs. Douglas and his children would be welcomed or tolerated in society at Brigton, he would have transferred himself there; that if this proved unfavourable, he would have sought another home in England or Scotland, as might happen to be convenient; and that, in fact, he remained to the end of his life undecided on the point which is now in question. If so, the onus which lies on those who assert a change of domicil has not been discharged; and, without denying that the case is a peculiar and difficult one, I think, after anxiously weighing all the evidence, of which, of course, I have noticed part only, that the domicil of William Douglas, the testator, was Scotch from his birth to his death.

[* 649] * If this be the true conclusion, the widow had originally a right to elect between her rights as a Scotch widow and her rights under the will. That she made no binding election before filing the bill seems to be clear, having regard to the principles on which the Court deals with such elections. And the bill, which was obviously not intended as an election, cannot be treated as amounting to one.

The decree must, I think, be made in both suits, and will be

substantially according to the minutes prepared on behalf of the plaintiff in the original suit. But it will be better to place first the declaration as to domicil, and let the account and inquiries follow.

ENGLISH NOTES.

The principle that, in order to establish a case of election by conduct, it must be shown that the person bound to elect has full knowledge of his rights to the property given up, and with that knowledge really meant to give up the property, is clearly laid down by the Lords Justices JAMES and MELLISH in *Wilson* v. *Thornbury* (1875), L. R., 10 Ch. 239, 44 L. J. Ch. 242. The same principle will be found laid down in the judgment of Sir T. PLUMER, M. R., in *Dillon* v. *Parker* (1818), 1 Swanst. 359, 381 (18 R. R. 72, 84); and a number of authorities on the point are to be found in Mr. Swanston's note to that case, referred to at p. 364, *supra*.

The principle that an act done in ignorance of the rights of the instrument which raises the question of election is not binding as an election is again recognised in the case of *Griffith-Boscawen* v. *Scott* (1884), 26 Ch. D. 358, 53 L. J. Ch. 571, 50 L. T. 386, 32 W. R. 580, although there a principle similar to that of election was applied. There a married woman, in ignorance that she was the donee of a general power of appointment of certain policy monies, concurred with her husband in executing a deed of settlement of certain estates and property including the policy moneys which were treated in that deed as belonging to her husband. The opinion was expressed that her execution of that deed could not be treated as an election against her power of disposing of the policy monies. But having survived her husband and having enjoyed under the settlement the benefit of property exceeding the value of the policy moneys, and having then purported to exercise the power of appointment by her will, it was held that she could not do so without making good to the beneficiaries under the settlement the amount of the policy monies, and accordingly that the policy monies must be paid to the settlement trustees.

Where the question relates to the right of a minor to repudiate a voidable deed, executed by him during minority, it was decided by the House of Lords in *Edwards* v. *Carter* (2 June, 1893), 1893, A. C. 360, 63 L. J. Ch. 100, 69 L. T. 153; affirming the judgment of the Court of Appeal, *Carter* v. *Silber* (1892), 2 Ch. 278, 61 L. J. Ch. 401, 66 L. T. 473, that if the minor chooses to repudiate the deed, he must do so within a reasonable time after he comes of age; and that for this purpose he must be treated as knowing the contents of the deed, whether in fact he knew of them or not. The question arose out of a marriage settle-

ment by which the father of the husband who was a minor covenanted to pay him an annuity during his life or until he should assign or charge the same, and after the determination of his interest, for the benefit of the wife and issue of the marriage. By the same settlement the husband (the minor) agreed to vest in the trustees upon certain trusts all property to which he should become entitled under the will of his father. The marriage took place and the minor came of age about a month afterwards. The father survived about four years; and during that time, and for about a year more, the husband enjoyed the annuity, after which he repudiated the settlement. The Court of Appeal held that this was not a reasonable time within which to repudiate the settlement, and that his repudiation came too late, and that he was bound by his covenant to settle the property devised under his father's will. The House of Lords unanimously affirmed this decision.

AMERICAN NOTES.

This topic is elaborately treated in Scribner on Dower, citing the first principal case, and laying down the rules that the widow is entitled to be informed, before election, of the true condition of the estate and have the respective value and amounts of her two interests ascertained; that she must elect in person; must be fully informed of her rights and intend to elect; and is not concluded by her mistake nor by an election procured by fraud. Citing *United States* v. *Duncan*, 4 McLean (U. S. Sup. Ct.), 99; *Melizet's Appeal*, 17 Pennsylvania State, 449; *Hall* v. *Hall*, 2 McCord Chancery, (So. Car.), 269; *McLaren* v. *Clark*, 62 Georgia, 106; *Grider* v. *Eubanks*, 12 Bush (Kentucky), 510; *Simonton* v. *Houston*, 78 North Carolina, 408.

Mr. Pomeroy cites both principal cases, and other English cases, adding: *Kreiser's Appeal*, 69 Pennsylvania State, 194; *Upshaw* v. *Upshaw*, 2 Hening & Munford (Virginia), 380; 3 Am. Dec. 632; *Reaves* v. *Garrett's Adm'r*, 34 Alabama, 563; *Macknet* v. *Macknet*, 29 New Jersey Equity, 54; *Waterbury* v. *Netherland*, 6 Heiskell (Tennessee), 512; *Richart* v. *Richart*, 30 Iowa, 465.

Both writers agree that the widow may maintain an equitable suit to take the necessary accounts of the properties in question.

Mr. Beach (Wills, p. 296), adds: *Payton* v. *Bowen*, 14 Rhode Island, 375; *Sill* v. *Sill*, 31 Kansas, 248; *Evan's Appeal*, 51 Connecticut, 435; *Cowdrey* v. *Hitchcock*, 103 Illinois, 262; *Millikin* v. *Welliver*, 37 Ohio State, 460.

Mr. Pomeroy deduces from the American cases the rule "that where a widow is required to elect between a testamentary provision in her favor and her dower, any unequivocal act of dealing with the property given by the will as her own, or the exercise of any unmistakable act of ownership over it, if done with knowledge of her right to elect, and not through a clear mistake as to the condition and value of the property, will be deemed an election by her to take under the will and to reject her dower." Citing *Whitridge* v. *Parkhurst*, 20 Maryland, 62; *Upshaw* v. *Upshaw*, 2 Hening & Munford (Virginia), 280; 3 Am. Dec. 632; *Caston* v. *Caston*, 2 Richardson

Nos. 5, 6. — Pusey v. Desbouvrie; Douglas v. Douglas. — Notes.

Equity (So. Car.), 1; *Bradford* v. *Kents*, 43 Pennsylvania State, 474; *Shaw's Devisees* v. *Shaw's Adm'r*, 2 Dana (Kentucky), 342; *Reaves* v. *Garrett's Adm'r*, 34 Alabama, 563; *Stark* v. *Hunton*, 1 New Jersey Equity, 216; *Sloan* v. *Whitaker*, 58 Georgia, 319; *Stoddard* v. *Cutcompt*, 41 Iowa, 329; *Mathews* v. *Mathews*, 141 Massachusetts, 511; *Payton* v. *Bowen*, 14 Rhode Island, 375; Estate of Stewart, 74 California, 98; Cunningham's Estate, 137 Pennsylvania State, 621; 21 Am. St. Rep. 901; *Cooper* v. *Cooper's Exec'r*, 77 Virginia, 198.

The interesting question of the disability of the widow to exercise an election has been considerably discussed in this country. Some statutes provide for this contingency. In the absence of such provision it has been held that the widow's insanity conclusively cuts off any possibility of election by or for her. *Collins* v. *Carman*, 5 Maryland, 503; *Lewis* v. *Lewis*, 7 Iredell Law (Nor. Car.), 72; *Newcomb's Exec'rs* v. *Newcomb*, 13 Bush (Kentucky), 544; *Wright* v. *West*, 2 Lea (Tennessee), 78; *Heavenridge* v. *Nelson*, 56 Indiana, 90; *Pinkerton* v. *Sargent*, 102 Massachusetts, 568; *Crenshaw* v. *Carpenter*, 69 Alabama, 572; *Crozier's Appeal*, 90 Pennsylvania State, 384; 35 Am. Rep. 666.

Some states however hold that the Court may make election for an insane widow: *Kennedy* v. *Johnston*, 65 Pennsylvania State, 451; 3 Am. Rep. 650; *Howell* v. *Tompkins*, 42 New Jersey Equity, 305; *Van Steenwyck* v. *Washburn*, 59 Wisconsin, 483; 48 Am. Rep. 532; *Washburn* v. *Van Steenwyk*, 32 Minnesota, 336; *Penhallow* v. *Kimball*, 61 New Hampshire, 596; *Re Andrews' Estate*, 92 Michigan, 449; 17 Lawyers' Reports Annotated, 296.

And so in respect to infant widows. *McQueen* v. *McQueen*, 2 Jones Equity (Nor. Car.), 16; 62 Am. Dec. 205; *Addison* v. *Bowie*, 2 Bland (Maryland Chancery), 606; *Haack* v. *Weicken*, 118 New York, 68

Generally, by statute, if the widow does not elect to waive the provision by will within a given time, she is deemed to have accepted it. But the presumption is to the contrary in Ohio, Indiana, Iowa, and Kansas. Stimson's Am. Stat. Law, §§ 3265, 3266. But these statutory provisions are construed liberally, and the time does not run against the widow where she impliedly accepts the will in ignorance of the value of her dower. Thus in *United States* v. *Duncan*, 4 McLean (U. S. Circ. Ct. 102), the Court said: "But there seems to have been a renunciation under the will after the lapse of eighteen months, which, it is contended, is too late, as the statute requires it to be done in six months. Here too the statute must receive a reasonable construction. Suppose the widow remains in utter ignorance of the estate of her husband, and has no means, within the time limited, to ascertain the facts which would enable her to make an election. It has often been held that years, under certain circumstances, may be allowed for this election. That the widow may file her bill to obtain a knowledge of the estate. That where she has been in possession of the bequest for years, under an ignorance of the estate, she may renounce under the will and claim dower."

No. 7. — IN RE VARDON'S TRUSTS.

(C. A. 1885.)

RULE.

A CASE for election of benefits under an instrument arises only by reason of the implied intention of the instrument, and may be excluded by an expressed intention to the contrary.

So where by a marriage settlement made when A. (the intended wife) was an infant, property was settled upon A. for life for her separate use without power of anticipation, with remainder to husband and children, and the settlement purported to contain a covenant by A. to settle after-acquired property, and subsequently a legacy is given to her for her separate use : — she is not put to her election. For in order to give effect to the election she would have to alienate the income as to which she was expressly restrained from alienation.

In re Vardon's Trusts.

31 Ch. D. 275-282 (s. c. 55 L. J. Ch. 259; 53 L. T. 895; 34 W. R. 185).

Election. — Married Woman. — Settlement on Marriage of female In- [275]
fant. — Restraint on Anticipation. — Covenant to settle after-acquired Property.

The doctrine of election is founded on the presumption of a general intention that every part of an instrument shall take effect, and the presumption of such general intention may be rebutted by an inconsistent particular intention apparent in the instrument.

Therefore, where a marriage settlement settled a fund for the separate use of the wife for life with restraint on anticipation, and contained a covenant by the wife (then an infant) to settle future property : —

Held (reversing the decision of KAY, J.), that the wife could not be compelled to elect between after-acquired property and her interest in the settled fund, but was entitled to retain both.

Appeal of Mrs. Walker from a decision of Mr. Justice KAY (28 Ch. D. 124). The facts sufficiently appear in the report of the

case in the Court below, and in the judgment delivered by Lord Justice FRY.

The question raised was whether Mrs. Walker, on whose marriage, when an infant, £5000 was settled upon trusts under which the income was to be paid to her for her sole and separate use without power of anticipation, could take £8573, which was afterwards bequeathed to her, without bringing it into the settlement in accordance with her covenant in the deed of settlement to settle after-acquired property, and without making compensation under the doctrine of election out of the £5000. The trustees of the settlement disputed her right to take both sums, and claimed to have the income of the £5000 applied in making compensation for those disappointed by her electing to avoid her covenant to * settle. The executors under the will [* 276] having paid the £8573 into Court under the Trustee Relief Act, and Mrs. Walker having petitioned the Court for the payment of it to her, the question came before Mr. Justice KAY on originating summons under Order LV.

That learned Judge decided that the income of the £5000 should be applied in making compensation to the persons disappointed by Mrs. Walker's election.

Mrs. Walker appealed.

W. Pearson, Q. C., and E. Ward, for Mrs. Walker: —

The decision of Lord HATHERLEY in *Willoughby* v. *Middleton*, 2 J. & H. 344, 31 L. J. Ch. 683, that a married woman on whom property had been settled with a restraint on anticipation must elect to bring property subsequently bequeathed to her into settlement according to her covenant to settle future property, or to make compensation out of the settled property, was strongly commented on by JESSEL, M. R., in *Smith* v. *Lucas*, 18 Ch. D. 531, who there expressed an opinion adverse to such decision. To give effect to the doctrine of election there must be some disposable property under the settlement which the married woman in this case can give up, and which the Court can sequestrate or otherwise lay hold of, for compensation for what persons under the settlement are deprived of by her election: *Bristow* v. *Warde*, 2 Ves. 336, 350 (2 R. R. 235). Here the income under the settlement is to be without power of anticipation, and as she cannot alienate it, so the Court cannot compel her to elect. Mr. Justice CHITTY in *In re Wheatley, Smith* v. *Spence*, 27 Ch. D. 606, 54 L.

J. Ch. 201, followed and adopted the view of JESSEL, M. R., in *Smith* v. *Lucas*, though in the more recent case, *In re Queade's Trusts*, 33 W. R. 816, he held that he was bound by *Willoughby* v. *Middleton*. The principle and foundation of the equitable doctrine of election are to be found in an elaborate and learned note to *Dillon* v. *Parker*, 1 Sw. 394–409. The point as to the married woman being restrained from anticipation, and therefore unable to give compensation, was neither argued nor decided in the House of Lords in *Codrington* v. *Codrington*, L. R., 7 H. L. 854.

[*277] *Hastings, Q. C., and P. Kingdon, *contrà*: —

Lord REDESDALE in the course of his judgment in *Moore* v. *Butler*, 2 Sch. & Lef. 249, 267, thus states the ground of the doctrine of election: "I see from a note which I have of a case before Lord ROSSLYN, he put it thus — 'No person puts himself in a capacity to take under an instrument without performing the conditions of the instrument; and they may be express or implied: if it is stated, or can be collected, that such was the intention of the parties to the instrument, that intention must be complied with,'" and in *Codrington* v. *Codrington*, L. R., 7 H. L. 861, Lord CAIRNS, L. C., points out that by the doctrine of election "where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them." So that this doctrine does not depend on the power of a married woman to alienate or not property, but it prevents a person taking the benefit of two things contrary to the terms of the instrument under which one of them is taken. In *Cooper* v. *Cooper*, L. R., 7 H. L. 53, 67, Lord CAIRNS, L. C., says: "It appears to me that the rule is a rule, as it was expressed by Lord TALBOT, calling on them to elect between the whole of their benefits under the two titles under which they claim, and that no distinction is to be made founded on some supposed intention or absence of intention on the part of the testatrix when she made one or other of her two testamentary dispositions." If the trustees of the settlement were, in obedience to the order of the Court, to refuse to pay Mrs. Walker her income when it became payable, there would be no question of anticipation, because it would be due then, and the doctrine of election would apply. Moreover, though a Court of Equity cannot alter the clause in

restraint of anticipation, *Jackson* v. *Hobhouse*, 2 Mer. 483, yet such clause " may be subject to paramount equities, as for raising costs of suit: " LEWIN on Trusts, 7th ed. p. 666, citing *Fleming* v. *Armstrong*, 34 Beav. 109. And in such a case as this the Court may intervene and prevent the income under the settlement from reaching the married woman if she * take [* 278] the money under the bequest contrary to her covenant to bring it into settlement. [They referred to *Codrington* v. *Lindsay*, L. R., 8 Ch. 578, 42 L. J. Ch. 526; *Wilson* v. *Lord Townshend*, 2 Ves. 693 (3 R. R. 31); *Savill* v. *Savill*, 2 Coll. 721; *Streatfield* v. *Streatfield*, Cas. t. Tal. 176, 1 W. & T. L. C. Eq. 5th ed. 412.]

Charles Parke, for the trustees of the settlement.

Stallard, for a son of the marriage.

W. Pearson, in reply.

Dec. 18. The following judgment of the Court (Lord ESHER, M. R., and BOWEN and FRY, L. JJ.) was now delivered by

FRY, L. J. : —

In the year 1860 a marriage was in contemplation between Mr. Walker and Miss Vardon. Thereupon a settlement was executed which contained, amongst other things, the recital of an agreement that the intended wife and husband should enter into the covenant thereinafter contained for the settlement of her future estate. By this settlement Mr. Walker, the intended husband, settled certain property upon trust for himself for life, then for his intended wife for life, and then for the children of the marriage; and by the same settlement Mr. Vardon, the father of the intended wife, settled other property upon the same trusts, except that as to £5000, part thereof, the intended wife took the first life interest therein, for her separate use, with a restraint on anticipation in terms to be hereafter mentioned. The settlement contained a covenant by each of them, the intended husband and wife, to settle any after-acquired property of the wife upon the trusts thereinbefore declared concerning the property of the husband, except that the ultimate trust in default of children was to be for the wife. This settlement was executed by both husband and wife, but the wife was at the date of the marriage an infant, though that circumstance does not appear on the deed.

In 1883, under a bequest to Mrs. Walker contained in the will of her deceased brother, she became entitled to £8573 for

[* 279] her * separate use. Mrs. Walker claims to receive this sum of £8573, and also the income of the £5000 in which she had a life interest in possession without power of anticipation. On the contrary the trustees of the settlement contend that she cannot take both, and that the husband and the children of Mrs. Walker are entitled to have the income of the £5000 applied in compensation of their claims under the covenant to settle. Mr. Justice KAY has decided that the trustees' contention is right. Mrs. Walker has appealed.

Mrs. Walker contends that she is entitled to retain the benefit under the settlement because it is income settled to her separate use, free from the power of anticipation: and that she is entitled to the benefit given to her by her brother's will because the will which gives it to her is operative, and the covenant which would take it away from her is inoperative.

As she was an infant at the time of the execution of the settlement and of the marriage, it is evident that her contention must prevail unless she can be reached by the doctrine of election. That doctrine rests, not on the particular provisions of the instrument which raises the election, but on the presumption of a general intention in the authors of an instrument that effect shall be given to every part of it, "the ordinary intent," to use the words of Lord HATHERLEY (*Cooper* v. *Cooper*, L. R., 7 H. L. 71), "implied in every man who affects by a legal instrument to dispose of property, that he intends all that he has expressed." This general and presumed intention is not repelled by showing that the circumstances which in the event gave rise to the election were not in the contemplation of the author of the instrument (*Cooper* v. *Cooper*), but in principle it is evident that it may be repelled by the declaration in the instrument itself of a particular intention inconsistent with the presumed and general intention.

For example, if the settlement in question had contained an express declaration that in no case should the doctrine of election be applied to its provisions, there seems to be no reason why such a declaration should not have full effect given to it. The late Mr. Swanston appears to us to have correctly enunciated the law on this point, when he said: "The rule of not claiming by

[* 280] one * part of an instrument in contradiction to another, has exceptions; and the ground of exception seems to be,

a particular intention, denoted by the instrument, different from that general intention, the presumption of which is the foundation of the doctrine of election." (1 Sw. 404, n).

The settlement in the present case declares that the income of the fund in question should be paid to Mrs. Walker for her sole and separate use, that her receipt alone should be a sufficient discharge for the same, and that she should not have power to dispose or deprive herself of the benefit thereof in the way of anticipation.

What is the force and effect of this restraint on anticipation? It provides that nothing done or omitted to be done by Mrs. Walker at any given time shall deprive her of the right to receive from the trustees the next and every succeeding payment of the income of the fund as it becomes due. But if she be put to her election, and if by her election she deprives herself of the right to receive subsequent payments of the income until her husband and children are compensated, it follows that she has by the act of election, or by the default in performing her covenant, deprived herself of the benefit of the income in the way of anticipation, which is the very thing which the settlement declares that she cannot do. This settlement, therefore, in our judgment, contains a declaration of a particular intention inconsistent with the doctrine of election, and therefore excludes it.

This conclusion appears to us consonant with the general understanding of men and women in England at the present day. A provision for a married woman who is restrained from anticipation is regarded as giving the highest security known to the law that the married woman shall, come what may to herself and her husband, have from half-year to half-year some moneys paid into her very hands to increase her comforts or to supply her with maintenance. And this security would be seriously imperilled if by the doctrine of election she could take in lieu of this inalienable provision a sum of money or other benefit which she might forthwith make over to her husband or squander at her choice. Suppose, to imagine events which nothing in the present case *suggests as probable, suppose that Mrs. Walker [*281] were put to her election, that she took the £8000, and that she lost her annual income of the £5000, and immediately squandered or lost the £8000, she might pass the rest of her life in that very poverty and need against which the inalienable provision of the settlement was designed to protect her.

No. 7. — In re Vardon's Trusts, 31 Ch. D. 281, 282.

Hitherto we have discussed this case as if it were unaffected by authority. But that is not entirely so. In *Willoughby* v. *Middleton*, the late Lord HATHERLEY, then a VICE-CHANCELLOR, decided that a married woman should be put to her election between certain benefits derived under a will for her separate use without any restraint on anticipation, and the life interest to her separate use without power of anticipation given to her under a settlement executed when she was an infant; and the decision in this case was stated without any expression of disapproval by Lord SELBORNE in *Codrington* v. *Lindsay*.

On the other hand, the late MASTER OF THE ROLLS, Sir GEORGE JESSEL, in *Smith* v. *Lucas*, criticised the decision of Lord HATHERLEY in *Willoughby* v. *Middleton*, and observed forcibly on the inconveniences which would follow if that decision were to prevail; and this case before the MASTER OF THE ROLLS was referred to without disapproval by Earl SELBORNE in the House of Lords in *Cahill* v. *Cahill*, 8 App. Cas. 420, 427.

Mr. Justice CHITTY, in *In re Wheatley*, 27 Ch. D. 606, has followed the late MASTER OF THE ROLLS, whilst Mr. Justice KAY has in the case now under appeal followed Lord HATHERLEY. In this conflict of opinion in the Courts of the first instance and in the absence of any decision in the House of Lords or in this Court we feel ourselves at liberty, and therefore bound, to decide the question before us upon principle.

Upon principle we are of opinion, for the reasons already given, that the order of Mr. Justice KAY cannot be sustained, and we discharge the same, and declare that the appellant is not bound to elect.

[*282] The proceedings in the present case have arisen out of the payment into Court under the Trustee Relief Act of the £8573, *representing the legacy given to Mrs. Walker by her brother's will. In that matter she presented a petition, and she subsequently took out an originating summons for the decision of the question, and the trustees of the settlement have represented all parties contesting Mrs. Walker's claim. We direct the costs of Mrs. Walker to be paid out of the fund in Court, and the costs of the trustees to be paid out of the £5000 in which she is entitled to a present life interest.

No. 7. — In re Vardon's Trusts. — Notes.

ENGLISH NOTES.

By the judgment of Mr. Justice CHITTY in *Re Queade's Trusts* (2 May 1885), 54 L. J. Ch. 786, 53 L. T. 74, 33 W. R. 816, pronounced while it was understood that the decision of Mr. Justice KAY, in *Re Vardon's Trusts* had not been appealed, Mr. Justice CHITTY considered himself bound to follow the judgment of Vice Chancellor WOOD (afterwards Lord HATHERLEY), in *Willoughby* v. *Middleton* (1862), 2 Joh. & Hemming, 344, 31 L. J. Ch. 283; and, accepting the decision of Mr. Justice KAY in *Re Vardon's Trusts* (28 Ch. D. 124), although apparently against his own opinion on the general principle, held that the married woman was put to her election and bound to make compensation out of her life interest (although restrained from anticipation), to those disappointed by her election to take a subsequent gift without settling it.

A decision on a point somewhat akin to that in the principal case is that of Mr. Justice CHITTY in *Re Lord Chesham, Cavendish* v. *Lord Dacre* (1886), 31 Ch. D. 466, 55 L. J. Ch. 401, 54 L. T. 154, 34 W. R. 321; where a testator bequeathed heirlooms for the benefit of younger sons and gave certain benefits to his eldest son who took the settled property to which the heirlooms were annexed. The eldest son electing to take under the will, it was held that there was nothing which he could give up so as to make compensation.

In *Re Wells Trusts, Hardisty* v. *Wells* (1889), 42 Ch. D. 646, 58 L. J. Ch. 835, 61 L. T. 588, the doctrine laid down by FRY, L. J. in the principal case, that the intention of the author of an instrument that effect shall be given to every part of it "may be repelled by the declaration in the instrument of a particular intention inconsistent with the presumed and general intention," is applied by STIRLING, J. to the special construction of a settlement having regard to a recital.

In *Hamilton* v. *Hamilton* (20 Jan. 1892), 1892, 1 Ch. 396, 61 L. J. Ch. 220, 66 L. T. 112, 40 W. R. 312; an ante-nuptial settlement was made in 1879, the wife being then under age. By the settlement (to which the sanction of the Court of Chancery had not been obtained) the wife acquired certain benefits for her separate use, and also became entitled to certain income as to which she was restrained from anticipation during any coverture. The settlement contained a covenant by the husband and wife to settle her after-acquired property. The wife was divorced and subsequently brought an action to have it declared that she was not bound by the covenant to settle after-acquired property. Before the trial of the action she married again. Mr. Justice NORTH, by his judgment, observed that the settlement executed by the lady while an infant is not void, but voidable only,

and any avoidance must be within a reasonable time after the decree *nisi*. And although he considered that the action had been commenced within a reasonable time, he was of opinion that it would not be reasonable that the time for election should be prolonged further. He declared that the lady was not bound by the covenants so far as relates to reversionary interests; but she was bound (within a reasonable time to be named, and although the reversionary interest in question had not come into possession), to signify her election if she will take against the settlement of 1879. That, if she elected to take against the settlement, the life and other interests to which she was entitled under that settlement ought to be applied in making compensation to the persons disappointed by her election; but this declaration was not to apply to the income, during the existing coverture, of the property as to which she was restrained from anticipation.

It may perhaps be questioned whether the latitude of time allowed by Mr. Justice NORTH, for election in the case just cited was not too large; and whether he was right in assuming that the married woman was incapable during the coverture by her former husband of electing against the settlement. That a married woman is capable of a binding election so as to confirm a settlement appears clear from the judgment of STIRLING, J. in *Greenhill* v. *North British and Mercantile Insurance Co.* (5 July 1893), 1893, 3 Ch. 474, 62 L. J. Ch. 918, 69 L. T. 526, 42 W. R. 91, and the cases there cited (see *Barrow* v. *Barrow* (1858), 4 K. & J. 409; *Smith* v. *Lucas* (1881), 18 Ch. D. 531; *Wilder* v. *Pigott* (1882), 22 Ch. D. 263, 52 L. J. Ch. 141); and the decision of CHITTY, J. in *Re Hodson's Settlement, Williams* v. *Knight* (9 May, 1894), 1894, 2 Ch. 421, 63 L. J. Ch. 609, 71 L. T. 77, 42 W. R. 531.

Upon this last point the effect of the decision of the House of Lords in *Edwards* v. *Carter* (cited in Notes to Nos. 5 & 6 p. 367, *supra*), must be considered. It is cited by CHITTY, J. in his judgment in *Re Hodson's Settlement, Williams* v. *Knight*, *supra*, as an authority for the proposition that a married woman (assuming that she has the capacity to affirm the settlement), must be taken to have affirmed it unless she repudiates it within a reasonable time. Whether the principle of *Edwards* v. *Carter* applies to a married woman at all — whether it applies to a married woman to the effect of obliging her to repudiate a covenant for settling after-acquired property although none has come into possession (as to which *Smith* v. *Lucas*, 18 Ch. D. 531, appears to be an authority to the contrary) — whether the principle applies to a married woman who takes nothing in possession under the settlement except income as to which she is restrained from anticipation — these are questions which may possibly have to be discussed further.

See "Corporation," Part I. Sec. II., 7 R. C. 288–333.

But upon the rule of construction above laid down as the rule of the principal case, no doubt appears to be thrown by the decision of the House of Lords in *Edwards* v. *Carter*. There is no analogy, for the purpose of inferring an intention in the author of the instrument, between the gift of property which under the law relating to married women is to be enjoyed during coverture without the power of alienation, and a gift of property to a man *until* alienation. In the latter case the property may be alienated, and it is gone according to the intention of the gift: in the former it is given so that it cannot be alienated. This distinction is clearly put by Mr. Justice ROMER in his judgment in *Carter* v. *Silber*, 1891, 3 Ch. 553, 60 L. J. Ch. 716, 65 L. T. 51, 39 W. R. 552, which, although it was overruled by the Court of Appeal and the House of Lords (*Edwards* v. *Carter*, pp. 367, 378, *supra*) in respect that they decided that the repudiation was too late, is not impugned by their decisions as to what would be the effect of repudiation.

AMERICAN NOTES.

Mr. Pomeroy cites the principal case (1 Equity Jurisprudence, p. 693), observing: "The *rationale* of the doctrine of election with respect to its operation in cases of persons under disabilities was elaborately examined, and it was held that the doctrine was founded upon the rule that a person cannot take under and against the same instrument, and the equity is, not that the person electing to take against the instrument shall be required to assign, but that he shall not be permitted to take the benefit to him thereunder." The principal case does not appear to have been cited in judicial decisions here, inasmuch as marriage settlements are almost unknown in this country, where for a quarter of a century or more, married women have been competent to hold their own property like single women.

ELECTION OF CANDIDATES FOR AN OFFICE (SEE "CORPORATION," PART I. SECT. II. 7 R. C. 288–333).

EMBLEMENTS.

GRAVES *v.* WELD.

(K. B. 1833.)

RULE.

EMBLEMENTS, which the tenant or his executors is or are entitled to sever and take from the land after the determination of the tenancy, are confined to crops of that species only which ordinarily repay the labour by which they are produced within the year in which that labour is bestowed.

Graves v. Weld.

5 Barn. & Adol. 105–121 (s. c. 2 N. & M. 725).

Emblement. — Tenant and Reversioner.

Tenant for a term determinable upon a life, sowed the land in spring, [105] first with barley, and soon after with clover. The life expired in the following summer. In the autumn the tenant mowed the barley, together with a little of the clover plant which had sprung up. The clover so taken made the barley straw more valuable, by being mixed with it; but the increase of the value did not compensate for the expense of cultivating the clover, and a farmer would not be repaid such expense in the autumn of the year in which it was sown. The reversioner came into possession in the winter, and took two crops of the same clover after more than a year had elapsed from the sowing: *Held*, that the tenant was not entitled to emblements of either of these two crops; first, because emblements can be claimed only in a crop of a species which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed; and, secondly, because, even if the plaintiff were entitled to one crop of the vegetable growing at the time of the cessor of his interest, this had been already taken by him at the time of cutting the barley.

Trover for clover, the clover hay, and clover seed. Plea, not guilty. At the trial before TAUNTON, J., at the Dorsetshire Summer Assizes 1832, a verdict was found for the plaintiff subject to the following case: —

Graves v. Weld, 5 Barn. & Adol. 105–107.

The plaintiff being possessed of a close under a lease for ninety-nine years, determinable on three lives, in the course of the Spring of 1830, sowed it with barley; and in May of the same year, he sowed broad clover seed with the barley. The last of the three lives *expired on the 27th of July 1830, [*106] the reversion then being in the defendant. In the autumn of 1830, the plaintiff took the crop of barley, in the mowing of which a little of the clover plant which had sprung up was cut off and taken together with the barley. In January, 1831, the plaintiff gave up the possession of the close to the defendant. According to the usual course of good husbandry, broad clover is sown about April or May, and the crop is fit to be taken for hay about the beginning of June in the following year. The clover in question was cut by the defendant about the end of May, 1831, which was more than a twelve month after the seed had been sown. After the barley is cut, the clover is sometimes depastured by sheep in the autumn, whereby the crop is made thicker; if not so fed off, the shoots would be killed by the frost in the winter. In this case the clover was not depastured. Broad clover is sometimes sown by itself; but more frequently with barley, flax, oats, or wheat. The part of the clover plants cut off with the barley at the time of mowing it, makes the barley straw better as fodder; but the clover is sown for hay, or seed, and not to improve the barley straw. When the clover grows up high, it is injurious to the barley. It is the common course of husbandry, to take for hay a second crop of the clover in the autumn of the year after it is sown; and a second crop was so taken by the defendant in the autumn of 1831. But when it is intended for seed, no crop is taken for hay in the summer. Sometimes the clover is left for a third year, but it is not then a good crop. The usual course of husbandry is to plough up the land in the autumn of the second year for wheat. There was no covenant in the lease as to the away *going crop, or binding the [*107] tenant to any particular course of husbandry.

The learned Judge took the opinion of the jury on the two following questions. First, whether the plaintiff received any benefit from taking the clover with the barley straw, sufficient to compensate him for the cost of the clover seed, and the extra expense of sowing and rolling. Secondly, whether a prudent and experienced farmer, knowing that his term was to expire at

Michaelmas, would sow clover with his barley in the spring, where there was no covenant that he should do so; and, whether, in the long run, and on the average, he would repay himself in the autumn for the extra cost incurred in the spring. The jury answered both these questions in the negative.

The question for the opinion of the Court was, whether the plaintiff was entitled to the clover cut in May, 1831, as emblements.

The case was argued in this term.

Follett for the plaintiff. The question is, whether the tenant, whose interest has been put an end to by the death of *cestui que vie*, is to have the crop of clover as emblements? The rule is, that, where a tenant holding for an uncertain time sows and manures the land, or generally bestows labour and expense upon it, for the purpose of raising a crop, he is entitled to that crop as emblements; though he is not entitled to any thing of a permanent nature, as trees planted by him, or their produce. The objection to the right of the tenant in this case will probably be, that the clover was sown early in the May, and not cut [*108] till the end of the May of the following year; and *that because some of the old authorities, in describing emblements, use the words "annual profits," the tenant here cannot be entitled, the clover not coming under that description. This use of the word "annual" arises from the fact, that the crop sown, in most cases, is taken in the course of a year. There are, however, several sorts of crops which are not cut in that time, as to which, nevertheless, the tenant is entitled to emblements. The principle is thus laid down by Mr. Justice BLACKSTONE: "If a tenant for his own life sows the lands, and dies before harvest, his executors shall have the emblements or profits of the crop, for the estate was determined by the act of God; and it is a maxim in the law, that *actus Dei nemini facit injuriam*. The representatives, therefore, of the tenant for life shall have the emblements, to compensate for the labour and expense of tilling, manuring, and sowing the lands: and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it." 2 Bla. Com. 122 (Book 2, ch. viii.). "The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit, but it is otherwise

of fruit trees, grass, and the like; which are not planted annually at the expense and labour of the tenant, but are either a permanent, or natural, profit of the earth. For when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit, but merely with a prospect of its being useful to himself in future, and to future successions of tenants." (Ibid. 123). Both the reasons here given, the justice of compensating the tenant, and the importance * of encouraging [* 109] husbandry, apply to crops which are not annual. The doctrine of the passage in Blackstone is taken from Lord Coke's commentary on the sixty-eighth section of Littleton, Co. Litt. 55, a. b. The distinction is between those cases where an expense has been incurred by the tenant, on the expectation that the crop was to repay him, and those where the tenant has not been put to expense on such expectation, as in the instance of trees not planted by himself. Therefore, if the lessee for life of a hop-ground die in August, before the hops are severed, the executor shall have them, though growing on ancient roots: *Latham* v. *Atwood*, Cro. Car. 515. [LITTLEDALE, J. What would you say of liquorice, or madder? — PARKE, J. Or teazles?] The Court of Common Pleas has allowed the right to emblements of teazles; *Kingsbury* v. *Collins and Another*, 4 Bing. 202: at any rate, the right was not contested. But, in fact, no distinction can be taken between annual and other artificial crops. The party sows, and must receive compensation for so doing; otherwise no tenant for an uncertain interest would sow or manure. And the questions put to the jury by the learned Judge who tried the cause were intended to ascertain the nature of the crop, not the time it takes to come to maturity: the real ground of the tenant's claim being the expense and the labour. [PARKE, J. Would you extend that to four or five crops? the effect of manuring may continue for ten years.] Only one crop is claimed. [PATTESON, J. That you have had, the crop of barley.] The finding of the jury is conclusive against that. Suppose the clover had been sown without the barley; as the facts are found, the * plaintiff [* 110] would be situated exactly as he is at present. The clover is not sown to benefit the barley: it may be injurious to it. The clover was sown with a view to repayment by cutting the clover; the barley, with a view to repayment by cutting the barley. [PARKE, J. But you have had a crop of clover.] Clover is sown

that it may be mown in the following year. The plaintiff has had no compensation for sowing the clover. [PARKE, J. Some compensation he has had: you are insisting that he must have an adequate one.] It may perhaps be questionable whether the plaintiff be entitled to a second crop of clover; but that he does not seek; he does not complain of the crop cut in autumn 1831, but of that cut in May. [PATTESON, J. The question is this: if you sow a crop to be taken eighteen months after, are you to have emblements?] The sowing and the rolling were exclusively for the clover. Suppose the *cestui qui vie* had died a week before the maturity of the crop, would there not have been emblements? Then why not in the present case? When is the year to begin? Is it to be the next calendar year? if so, the crop was taken by the defendant before the year was expired. [LITTLEDALE, J. The year may be reckoned from the sowing. — PARKE, J. In the case of hops, the year runs from the time at which the additional expense is incurred which is necessary to make the hops grow.] There is no ground for confining the time to a year at all: it is a mere question of repayment. The distinction between crops which are usually annual and those which are permanent, is intelligible, only on the ground that expense is incurred in one case and not in the other. And the distinction, so understood, would be consistent with the allowance of emblements of [* 111] crops which came to * maturity thirteen months after they were sown; a case which is clearly within the mischief sought to be prevented by the privilege of emblements. Dr. Burn, 4 Ecc. Law, 299, cited in 1 Williams Executors, 454, remarks, that the matter had not come in question; but gives his opinion that, "for clover, saintfoin, and the like, the reason of manurance, labour, and cultivation, is the same as for corn."

Gambier for the defendant. The true principle is, that the law confines its allowance of emblements to those cases in which there is an outlay of cost or labour in one part of the year, the recompence for which cost or labour is to arise, in the shape of a crop, in another part of the same year. If the decision in this case should be in favour of the plaintiff, it would lead to innumerable questions hereafter, all of which will be precluded by a strict adherence to the ancient rule, which is consistent with all the authorities cited on behalf of the plaintiff. With respect to the passage cited from Blackstone, although it is true that the privi-

lege of emblements was established for the purpose of encouraging husbandry, and of compensating the tenant for his labour and expense, yet neither of these purposes furnishes the test by which it is to be determined to what extent that privilege is to be allowed. It is good husbandry to convert unproductive grass land into fertile meadow land, yet the law allows no compensation for so doing, Co. Litt. 69, a. It is good husbandry to plough and manure land; yet if the tenant's estate determine before he puts in the seed, he will be entitled to no compensation, Hale's MSS. note (4) to Co. Litt. 55, a. (ed. H. & B.). *Br. [*112] Abr. Emblements, 7; also Tenant per Copie, &c., 3. 11 H. IV. 90, cited in each place. Then as to the compensation. If a tenant by statute merchant sow the land, and before the maturity of the crop he be satisfied by a casual profit, he shall have the corn, and therefore receives more than compensation for his expense and labour. Vin. Abr. Emblements, (A.) pl. 20; Co. Litt. 55 b. Therefore these two tests must be abandoned; and this destroys any argument which could be drawn from the finding of the jury, for that finding really amounts only to this, that, generally, a tenant who sowed clover in the spring would not receive compensation before the following Michaelmas, and that, in this particular instance, the tenant has not received compensation. It might be added, too, that the finding is imperfect, even as to the question of compensation; it ought to have extended to the July of the succeeding year. Again, clover is ordinarily fed in the autumn, and the feeding has not been taken into the account. But the rule, instead of being dependent upon these tests, has been laid down in positive and arbitrary terms. The compensation must arise, in the shape of a crop, within the year in which the cost is incurred. Lord Coke, after speaking of a corn crop, which is the instance put by Littleton, says, Co. Litt. 55 b., "And so it is, if he set rootes, or sow hempe or flax, or any other annual profit, if, after the same be planted, the lessor oust the lessee; or, if the lessee dieth, yet he or his executors shall have that yeare's crop. But if he plant young fruit trees, or young oaks, ashes, elmes, &c., or sow the ground with acornes, &c., there the lessor may put him out notwithstanding, *because they will yeeld no present annuall profit." So [*113] Chief Baron Comyn, Com. Dig. Biens. (G. 1.), after speaking of corn and roots, as going to the tenant's executor, adds

the following cases: — "If he plant hops from old roots: for he annually manures the land, &c. If he sow hemp, flax, or other thing of an annual profit." So in Rolle's Abridgment, 1 Roll. Abr. 728, Emblements, (A.) 22, "If lessee at will sows the land with grain, roots, flax, hemp, or other annual profit, and the lessor enters before severance, yet he shall have it." The exceptions made by Blackstone, in the passage cited on the other side, 2 Bl. Com. 123 (book ii. ch. 8), *ante*, p. 382, recognise the same criterion. The old law seems to have allowed emblements within the year to that tenant only who had actually sown. The case of *Latham* v. *Atwood*, Cro. Car. 515, went further; for, in that case, the party might, or might not, have put into the ground that which produced the crop. The language of the report is, that hops were like emblements. Cruise remarks upon this case, Cruise's Dig. (I.) 110, (Ed. 3), "This determination was probably on the account of the great expense of cultivating the ancient roots;" from which language it may be collected that the writer considered the decision to have introduced a novelty. [DENMAN, C. J. There was some discussion as to the time at which hops began to be cultivated at all in this country, in a case in the House of Lords: *Knight* v. *Halsey*, 2 Bos. & P. 180.] In *Kingsbury* v. *Collins*, 4 Bing. 202, the question was not argued at the bar; the point as to emblements was merely suggested by [* 114] the * Court towards the end of the argument. No reference was made, in the pleadings or elsewhere, to the nature of the crop of teazles, or of their cultivation, nor to the time of their being planted, or coming to maturity, or being cut. [PARKE, J. And it was assumed that tenant from year to year was entitled to emblements, without any custom of the country to that effect being shown to exist.] In point of fact, teazles are sown in March, thinned and hoed after they come up, thinned and hoed again in the following year, and the crop is taken in the August of that following year. Again, in the case of hops, the fact is that they grow by the manurance and industry of the owner, by the making of hills and setting of poles. So that, in each case, there is not merely the original outlay, but an annual outlay and labour, which cannot be said in the present case. With respect to the passage cited from Burn, it is alluded to in a manuscript note of Mr. Serjeant Hill, on the following passage in Viner's Abridgment, Vin. Abr. 9. 368 (folio), Emblements,

25 : — So, if lessee at will sows the land with hay-seed, and by this increases the grass, and the lessor enters and ejects him, yet the lessee shall not have it." The note is as follows : — " V. Burn's Eccl. Law, 2 vol. 647,[1] that it seems otherwise as to clover, saintfoin, and the like, but that no case occurs wherein these matters have come in question. If arable land is sown with a crop of corn and clover, &c., in March, and the estate of the tenant, being uncertain, determine, not by his own act, after harvest, and before the next year's crop of clover is ripe (which is usually * in May or June), it seems that this [* 115] crop of clover will belong to him in remainder or reversion; for this crop was not a present annual profit, according to the expression in Co. Lit. 55 b. But if the land had been sown only with clover, &c., and the estate had determined as aforesaid, before the clover was ripe, whether the first and second crops of clover in the same year (for there are usually two crops in a year), or whether the first crop only, or neither of them, shall belong to the tenant, or his executors or administrators." Independently of all authority, the importance of a fixed arbitrary rule is apparent, from the disputes and inconveniences which would arise from allowing the right to emblements in the present case. Who is to have the benefit of the autumn feeding? The case finds depasturing in autumn to be necessary; is the remainder-man to do this, or can he, by neglecting it, destroy the previous tenant's right, or is the previous tenant himself to occupy that he may depasture? Whose is the second crop of the second year? The case finds that, where the clover is for seed, no crop is taken for hay. Now, if the lessee be entitled to the first crop only, can he have it for seed, and so deprive the remainder-man of the second-crop altogether? The case extends the difficulty even to the third year; and the analogy will be applied to artificial grasses, some of which cannot be taken till the third year. In the case of fresh plants of hops, the remainder-man may be kept out for three years, if the tenant is to have compensation.

Follett in reply. The plaintiff claims only that crop which is the produce of his industry, and which is * actu- [* 116] ally growing at the determination of his estate. For that is no longer land, but personalty: it may be considered as virtually

[1] Sic in MS. The reference is to the edition of 1763, and corresponds to vol. iv. p. 299 of later editions.

severed, and, if the land were occupied by the tenant in fee, it would go to his executor and not to his heir. And this relieves the case from the analogies which have been suggested on the other side. It might as well be contended that if a tenant put up a fixture, for the purpose of trade, he cannot take it after the expiration of a year, which would be in contradiction to the case of *Poulton* v. *Robert*, 2 East, 88 (6 R. R. 376). Suppose a crop were delayed beyond a year, by a late season, is the tenant to lose this? The case of *Evans* v. *Roberts*, 5 B. & Cr. 829, shows that a growing crop is no part of the real estate, for it was there held by LITTLEDALE, J., not to be an interest in land, under the fourth section of the statute of frauds. [LITTLEDALE, J. I am not prepared to say that I should not have considered that a crop of apples would go to the executor also; so that this proves too much. The ground of the decision was, that the executors were entitled to such a crop as chattels.] The crop might be taken in execution. And all the cases on the statute of frauds turn upon the question of personalty or not personalty, not upon the distance of time at which the crops have been sowed. The expressions cited on the other side apply to the distinction between periodical and permanent produce, not to the distinction between a year and a year and a day. [PARKE, J. Suppose the case of a nurseryman, who plants, intending to remove what he plants.] He would be entitled to do so, if his estate determined as in [*117] the * present case. No objection can arise from a crop of barley having been taken by the plaintiff after the determination of his estate; for, if his estate had lasted over the time at which he took the barley, the growing crop, without any additional act, or expense, would have been the clover simply. [PATTESON, J. Who is to hoe and weed?] The same party who would hoe and weed in the case of corn growing: the distinction between corn and clover is denied by the plaintiff.

Cur. adv. vult.

DENMAN, C. J., on a subsequent day delivered the judgment of the Court.

In this case the plaintiff is undoubtedly entitled to emblements. The question is, whether that which is here called the second crop of clover falls under that description? We think it does not.

In the very able argument before us, both sides agreed as to the

principle upon which the law which gives emblements was originally established. That principle was, that the tenant should be encouraged to cultivate, by being sure of receiving the fruits of his labour; but both sides were also agreed that the rule did not extend to give the tenant all the fruits of his labour, or the right might be extended in that case to things of a more permanent nature, as trees, or to more crops than one; for the cultivator very often looks for a compensation for his capital and labour in the produce of successive years. It was, therefore, admitted by each, that the tenant could be entitled to that species of product only which grows by the industry and manurance of man, and to one crop only of that product. But the plaintiff insisted that the tenant was entitled to the crop *of any vegetable of [*118] that nature, whether produced annually or not, which was growing at the time of the cesser of the tenant's interest; the defendant contended that he was entitled to a crop of that species only which ordinarily repays the labour by which it is produced, within the year in which that labour is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period. And the latter proposition we consider to be the law.

It is not, however, absolutely necessary to decide this question; for, assuming that the plaintiff's rule is the correct one, the crop which is claimed was not the crop growing at the end of the term. The last *cestui que vie* died in July: the barley and the clover were then growing together on the same land, and a crop of both, together, was taken by the plaintiff in the autumn of that year; though the crop of clover of itself was of little value. Thus the plantiff has had one crop: and if it were necessary, either generally, or in the particular case, that the crop taken should remunerate the tenant, we must observe, that though the crop of clover alone did not repay the expense of sowing and preparation, the case does not find that both crops together did not repay the expenses incurred in raising both. The decision, therefore, might proceed on this short ground: but as the more general and important question has been most fully and elaborately argued, we think it right to say we are satisfied that the general rule laid down by the defendant's counsel is the right one.

The principal authorities upon which the law of emblements depends, are Littleton, sect. 68, and Coke's commentary on that passage. The former is as follows: "If the lessee soweth the

land, and the lessor, after it [* 119] is sowne and before the corne is ripe, put him out, yet the lessee shall have the corne, and shall have free entry, egresse and regresse to cut and carrie away the corne, because he knew not at what time the lessor would enter upon him." Lord COKE, Co. Litt. 55 a., says, "the reason of this is, for that the estate of the lessee is uncertaine and, therefore, lest the ground should be unmanured, which should be hurtful to the commonwealth, he shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he set rootes or sow hempe or flax, or any other annual profit, if after the same be planted, the lessor oust the lessee; or if the lessee dieth, yet he or his executors shall have that yeare's crop. But if he plant young fruit trees, or young oaks, ashes, elms, &c., or sow the ground with acornes, &c., there the lessor may put him out notwithstanding, because they will yield no present annuall profit." These authorities are strongly in favour of the rule contended for by the defendant's counsel; they confine the right to things yielding present annual profit: and to that year's crop which is growing when the interest determines. The case of hops, which grow from ancient roots, and which yet may be emblements, though at first sight an exception, really falls within this rule. In *Latham* v. *Atwood*, Cro. Car. 515, they were held to be "like emblements," because they were "such things as grow by the manurance and industry of the owner, by the making of hills, and setting poles:" that labour and expense, without which they would not grow at all, seems to have been deemed equivalent to the sowing and [* 120] *planting of other vegetables. Mr. Cruise in his Digest I. 110, Ed. 3, says that this determination was probably on account of the great expense of cultivating the ancient roots. It may be observed, that the case decides that hops, so far as relates to their annual product only, are emblements; it by no means proves, that the person who planted the young hops would have been entitled to the first crop whenever produced.

On the other hand, no authority was cited to show that things which take more than a year to arrive at maturity, are capable of being emblements, except the case of *Kingsbury* v. *Collins*, 4 Bing. 202, in which teazles were held by the Court of Common Pleas to be so. But this point was not argued, and the Court does not appear to have been made acquainted with the nature of

that crop or its mode of cultivation, or it may be, that in the year when the plant is fit to gather, so much labour and expense is incurred, as to put it on the same footing as hops. We do not therefore consider this case as an authority upon the point in question.

The note of Serjeant Hill in 9 Vin. Abr. 368, in Lincoln's Inn Library, which Mr. Gambier quoted, is precisely in point in the present case, and proves that, in the opinion of that eminent lawyer, the crop of clover in question does not belong to the plaintiffs. It is stronger, because there the estate of the tenant is supposed to determine after harvest, whereas here it determined before.

The weight of authority, therefore, is in favour of the rule insisted upon by the defendant. There are besides some inconveniences, doubts, and disputes, * which were pointed [* 121] out in the argument, which would arise if the other rule were to prevail. Is the tenant to have the feeding in autumn, besides the crop in the following year? If so, he gets something more than one crop. Is he to have the possession of the land for the purpose? Or is the reversioner to have the feeding; and, in that case, is the reversioner to be liable to an action if he omits to feed off the clover, and thereby spoils the succeeding crop? These inconveniences do not arise if the defendant's rule is adopted. It also prevents the reversioner from being kept out of the full enjoyment of his land for a longer time than a year at the most; whereas, upon the other supposition, that period may be extended to two or more years, according to the nature of the crop.

We are therefore of opinion, that the rule regulating emblements is that which the defendant has contended for, and that for this reason also he is entitled to our judgment.

Judgment for the defendant.

ENGLISH NOTES.

Perhaps the most authoritative definition of emblements is that of Lord Coke, Co. Litt. 55 *b*. They comprise not only corn of all kinds but other annual products, such as hemp, flax, melons, cucumbers, turnips, and carrots. Also teazles, *Kingsbury* v. *Collins* (cited at p. 383, *supra*); hops, *Latham* v. *Attwood* (p. 383, *supra*), because they require to be annually manured and cultivated — although they grow annually from the old roots: potatoes, *Evans* v. *Roberts* (1826), 5 B. &

C. 832, *per* Bailey, J. But not fruit growing on trees. The trees and plants forming the stock-in-trade of a nursery gardener are clearly removable by him at the end of his tenancy. *Penton* v. *Robart* (1801), 2 East, 90, *per* Lord Kenyon; *Elwes* v. *Maw* (1805), 3 East, 45 *n.*, *per* Lawrence, J. But these seem to belong to the class of trade fixtures rather than of emblements.

The exact distinction of what are emblements and what are not has become of less importance in England since the Act 14 & 15 Vict. c. 25, which (by s. 1) superseded the common law in the case of a tenant at rack-rent whose tenancy determines by death or cesser of the estate of the landlord entitled for life or other uncertain interest. By this Act there is given to the tenant, in lieu of his right to emblements, an extension of his term to the end of the then current year of his tenancy. See *Haines* v. *Welch* (1868), L. R. 4 C. P. 91, 38 L. J. C. P. 118.

The right to emblements still exists,

I. In favour of a tenant not within the Act of 14 & 15 Vict., and whose estate determines by an event which could not be foreseen, *e. g.* where the estate of the holder of a beneficial lease is determined by the cesser by death or forfeiture of the estate of his landlord.

II. In favour of the executor as against the heir of the owner in fee of land in his own occupation.

III. In favour of the execution-creditor under a writ directing seizure of goods and chattels.

IV. By 11 Geo. II. c. 19, emblements are liable to distress by the landlord.

V. They are (when separately assigned or charged), included in the expression "personal chattels" under the 4th section of the Bills of Sale Act, 1878.

Where the mortgagee of land takes possession, he is entitled, as against the mortgagor, to crops subsequently severed. *Ex parte Official Receiver, In re Gordon* (16 May, 1889), 61 L. T. 299.

AMERICAN NOTES.

The principal case is cited by the latest text writers of this country on Real Estate — Pingrey and Kerr.

The doctrine here generally conforms to that of the Rule. Washburn says (1 Real Property, p. 133): "But it is essential to the claim of emblements, at the common law, that the crop should have been actually planted during the life and occupancy of the tenant. No degree of preparation of the ground will give to one the fruits of seed planted by another after the determination of his tenancy." They are allowed "to compensate for the labour and expense of tilling, manuring, and sowing the land. These crops are such as are the growth of annual planting and culture, and the

right to take them after the determination of the tenancy rests partly upon the idea of compensation, but chiefly upon the policy of encouraging husbandry, by assuring the fruits of his labor to the one who cultivates the soil." Citing *Price* v. *Pickett*, 21 Alabama, 741; *Gee* v. *Young*, 1 Haywood (Nor. Car.), 17; *Thompson's Adm'r* v. *Thompson's Exec'r*, 6 Munford (Virginia), 514; *Hunt* v. *Watkins*, 1 Humphrey (Tennessee), 498; *Wintermute* v. *Light*, 46 Barbour (N. Y. Sup. Ct.), 278; *Reiff* v. *Reiff*, 64 Pennsylvania State, 134; *Evans* v. *Iglehart*, 6 Gill & Johnson (Maryland), 171; *Sanders* v. *Ellington*, 77 North Carolina, 255.

The doctrine is universal that natural fruits are not emblements. *Sparrow* v. *Pond*, 49 Minnesota, 412; 32 Am. St. Rep. 571, a case of blackberries.

It seems that hops form the single exception to the rule, on the ground that although the roots are real estate, yet the produce comes only "by the manurance and industry of the owner, and so are emblements." *Frank* v. *Harrington*, 36 Barbour (N. Y. Sup. Ct.), 415, citing *Latham* v. *Atwood*, Cro. Chas. 515, and the principal case. This is an exceedingly learned and interesting treatment of the subject. The Court inclined to think that strawberries and grapes "should be put in the same category" as hops. This case has not been noticed by any of the above mentioned text-writers, and seems to be the only brother of the old English case above cited.

In a case of letting by one partner to another for rearing nursery trees it was held, in *King* v. *Wilcomb*, 7 Barbour (N. Y. Sup. Ct.), 263, that "the interest of the tenant in the land, for the purpose contemplated by the parties, should be held to continue until that purpose is accomplished." Citing *Miller* v. *Baker*, 1 Metcalf (Mass.), 27; *Penton* v. *Robart*, 2 East, 88; *Wyndham* v. *Way*, 4 Taunt., 316, 13 R. R. 307. But in such a case, as between landlord and tenant the trees are not removable after expiration of the term, *Brook* v. *Galster*, 51 Barbour (N. Y. Sup. Ct.), 196. *Contra*, *Price* v. *Brayton*, 19 Iowa, 309, *obiter*. Wine plants are removable, *Wintermute* v. *Light*, 46 Barbour (N. Y. Sup. Ct.), 278.

In *Fobes* v. *Shattuck*, 22 Barbour (N. Y. Sup. Ct.), 568, wheat straw was held to be part of the removable crop. So in *Craig* v. *Dale*, 1 Watts & Sergeant (Penn.), 509; 37 Am. Dec. 477.

In *Stewart* v. *Doughty*, 9 Johnson (New York), 108, the letting was on shares, with privilege to the lessor to determine the letting on six months written notice, and compensating the tenant "for preparing the ground for the seed and any extra labour." Kent, Ch. J., held that the tenant was entitled to a crop of wheat, planted and growing at the time of such determination. He said: "This preparation of the ground for the reception of seed is not necessarily a substitute for the right to the emblements, for it may apply to clearing and manuring and ploughing the ground, and these acts may have taken place long before seed time. The common law has established a distinction in respect to this very subject of emblements, between the right to emblements and the costs of ploughing and manuring the ground, so that the determination of an estate at will would give to the lessee his emblements, but not any compensation for these improvements. He might be ousted of the possession before the crop was in the ground, and

wholly lose the expense of ploughing and manuring the land, though if he was ousted afterwards, he would be entitled to the emblements. (*Bro. Abr.* tit. *Emblements*, pl. 7 tit. *Tenant per copie de court roll*, pl. 3.) We ought to consider the compensation intended by the article for such a case as this, and not as an equivalent for the crop itself. The doctrine of emblements is founded on the clearest equity and the soundest policy, and ought to receive a liberal encouragement. Compensation for *preparing the ground for seed* is not an indemnity for the loss of the crop, which includes the loss of the seed, the labor of sowing and nursing it, and the hopes, to the laborer and his family, of a fruitful harvest."

EQUITABLE TITLE

Section I. Assignment of chose in action.
Section II. Equitable assignment (commonly so called).
Section III. Priorities.
Section IV. Equitable Execution.

Section I. — *Assignment of chose in action.*

No. 1. — CROUCH *v.* CREDIT FONCIER OF ENGLAND. (1873.)

RULE.

The right of an assignee of a *chose in action* (except in the case of instruments which are negotiable by custom or assignable by statute) is only constituted at law by a power given by the original obligee to sue in his name; and in equity the right of the assignee to sue extends no further than the right of the assignor, and is met by any defence available against the latter.

Crouch v. Credit Foncier of England.

L. R., 8 Q. B. 374–387 (s. c. 42 L. J. Q. B. 183; 29 L. T. 259; 21 W. R. 946).

Assignment of chose in action. — Effect at Law and in Equity.

[374] In May, 1869, the defendants, a limited company registered under the Act of 1862, sold to M. a document under the seal of the company and

No. 1. — Crouch v. Credit Foncier of England, L. R., 8 Q. B. 374, 375.

signed by two directors and the secretary. It was numbered and headed with the name of the company, and called "Debenture," and proceeded, "The company hereby promise, subject to the conditions indorsed on this debenture, to pay to the bearer £100 on the 1st of May, 1872, or upon any earlier day upon which this bond shall be entitled to be paid off according to the conditions, and interest at 8 per cent. on the 1st of November and the 1st of May in each year; and also a further sum of £10 by way of interest or bonus at the same time as the principal sum is paid off. In witness whereof the common seal of the company has been affixed this 9th of May, 1869." By the conditions indorsed a certain number of the bonds were to be drawn for twenty-one days before the days for the payment of the half-yearly interest, and any bond drawn was to be advertised and paid off with the interest and bonus due, the bond being given up and no further interest being payable.

In July, 1869, the bond was stolen from M. In October, 1871, the number of the bond was drawn. At the end of 1871 the plaintiff purchased the debenture from S., who had since absconded. The defendants, having notice of the robbery, refused to pay the debenture to the plaintiff, and he brought an action in his own name, alleging that he was lawful bearer of the debenture.

At the trial it was admitted that similar documents had been treated as negotiable; it was also admitted that the plaintiff derived title from the thief; but the jury found that the plaintiff had given value for the debenture without notice: —

Held, first, that the contract contained in the conditions prevented the debenture from being a promissory note, even if it had been under hand only: secondly, that it was not competent to the defendants to attach the incident of negotiability to such instruments, contrary to the general law; and that the custom to treat them as negotiable, being of recent origin and not the law merchant, made no difference, as such a custom, though general, could not attach an incident to a contract contrary to the general law. And the plaintiff, therefore, could not recover.

Declaration, that the defendants made their debenture in the words and figures following:

"No. **B.** 499.

"The Credit Foncier of England, Limited, incorporated under the Companies Act, 1862.

"£100 Debenture. £100.

"The Credit Foncier of England, Limited, hereby promise (subject * to the conditions indorsed on this debenture) [* 375] to pay to the bearer the sum of £100 on the 1st day of May, 1872, or upon any earlier day upon which this bond shall be entitled to be paid off or redeemed, according to the said printed conditions indorsed hereon, such payment to be made at

Messrs. Smith, Payne, & Smiths, bankers, No. 1, Lombard Street, London.

"And, subject to the said indorsed conditions, the Credit Foncier of England, Limited, hereby further promise to pay to the bearer interest at the rate of 8 per cent. per annum upon the said sum of one hundred pounds hereby secured, by equal half-yearly payments on the 1st day of November and the 1st day of May in each year, according to the coupons hereto annexed, the first of such half-yearly payments to be made on the 1st day of November, 1869, and to be continued half-yearly up to the 1st day of May, 1872, unless this debenture shall be entitled to be paid off or redeemed upon any earlier day than the 1st day of May, 1872, in which case the payment of such interest shall be made up to such earlier day only.

"And, subject to the said indorsed conditions, the Credit Foncier of England, Limited, hereby further promise to pay to the bearer, as and by way of additional interest or bonus upon the said principal sum of £100 hereby secured the further sum of ten pounds, such payment to be made at the same time and place as the said principal sum of one hundred pounds shall become payable, according to the tenor of this bond and the conditions hereon indorsed.

"In witness whereof the common seal of the Credit Foncier of England, Limited, has been affixed this 19th day of May, 1869.

"Henry J. Backer,
"Financial Secretary.

L. S.

Directors: G. N. Alfain,
A. T. Cunningham."

[Conditions printed on the back:]

"Conditions upon which this debenture is issued.

"1. This debenture is one of the Series **B.** of debentures of £100 each, numbered 81 to 1140 inclusive, issued by the Credit Foncier of England, Limited.

[*376] *"2. The debentures of the several series amount together to £200,000, viz., Series **A.**, 80 debentures of £500; **B.**, 1060 of £100; **C.**, 740 of £50; **D.**, 380 of £20; and **E.**, 690 of £10.

"3. The debentures will be paid off or redeemed according to the following table: viz., £40,000 on the 1st of May and the 1st of November, 1870, and on the 1st of May, 1872.

No. 1. — Crouch v. Credit Foncier of England, L. R., 8 Q. B. 376, 377.

" 4. A proportionate number of the debentures of each series will be drawn for redemption at each periodical drawing.

" 5. The directors of the Credit Foncier of England, Limited, however, reserve to themselves the right to pay off the whole of the debentures at any earlier period than those specified above, on giving thirty days notice by advertisement in a London daily newspaper of their intention so to do. Should such right be exercised, both the amount of interest then accrued and a bonus equal to £10 per cent. on the amount of the debenture by way of additional interest will be paid at the same time.

" 6. The particular debentures to be paid off on each occasion will be determined in the following manner: (*a.*) The drawings will take place half-yearly at the office of the Credit Foncier of England, Limited, St. Clement's House, in the city of London, or other the head office of that company for the time being, in the presence of a notary public of the city of London, at least twenty-one days before the respective half-yearly days on which the debentures are to be paid off or redeemed. (*b.*) Public notice of such drawing will be given by the company at least ten days previously, by advertisement in a London daily newspaper. (*c.*) Forthwith, after each drawing, notice will be given by advertisement in a London daily newspaper of the numbers and amounts of the debentures drawn to be paid off on the next half-yearly day for redemption.

" 7. All the debentures not previously drawn will become payable on the 1st day of May, 1872.

" 8. Every debenture is entitled to interest on the principal sum at the rate of 8 per cent. per annum, payable on the 1st day of November and the 1st day of May, the first of such payments to be made on the 1st day of November, 1869, and to be continued until the 1st day of May, 1872, unless in the meantime the debenture * shall become entitled to be paid [* 377] off or redeemed; and in that case interest shall only be paid up to the day on which the debenture is entitled to be so paid off. At the time of payment of any coupon for interest, such coupon is to be delivered up to the company.

" 9. Every debenture, as it becomes payable, will be paid to the bearer, together with a bonus by way of additional interest, equal to 10 per cent. upon the amount of the debenture, at Messrs. Smith, Payne, & Smiths, No. 1 Lombard Street, London; but the

person presenting it will be required to surrender it up at the time of payment, together with all coupons for future interest thereon, as hereafter mentioned.

"10. When any debenture is drawn or advertised to be paid off or redeemed, the coupons annexed to it, purporting to be for interest accruing due after the day on which the debenture is entitled to be paid off or redeemed, become null, and must be delivered up to the company at the same time as the debenture itself."

The declaration then stated that the plaintiff became the lawful bearer of the debenture, and that all conditions, &c., had happened to entitle him to a performance of the promises of the defendants and to the payment of the £100, &c., with the interest, &c. Breach, non-payment.

The material plea was that the plaintiff was not the lawful bearer of the debenture, as alleged. Issue joined.

At the trial before Bramwell, B., at the Summer Assizes, 1872, at Maidstone, a verdict was found for the plaintiff, leave being reserved to move to enter the verdict for the defendants.

The facts proved, and the course of the trial, are fully given in the judgment of the Court.

A rule was obtained pursuant to the leave reserved to enter a verdict for the defendants, on the grounds, first, that the instrument declared upon was not negotiable or one where the holder could acquire a better title than his transferors; secondly, that the instrument, having been drawn for payment, was overdue, and imputed notice to every subsequent taker.

May 6. Garth, Q. C., and F. Turner, showed cause.

Philbrick, in support of the rule.

[* 378] *The arguments, on the points on which the judgment proceeded, sufficiently appear from the judgment of the Court.[1]

[1] The debenture had an impressed stamp, marked simply "Two shillings sixpence;" and in answer to an objection that this was not a promissory note stamp, counsel for the plaintiff observed that the stamp was of sufficient value, and, the stamp not being specially appropriated, the objection was obviated by s. 10 of 55 Geo. III. c. 184. As to the document being under seal, counsel for the plaintiff called attention to it being also signed by the directors; and they contended that, the company being registered under the Companies Act, 1862 (25 & 26 Vict. c. 89), the Amendment Act of 1867 (30 & 31 Vict. c. 131), s. 37, applied, and by subs. 2 the signature of the directors made the document a promissory note, binding on the company.

No. 1. — Crouch v. Credit Foncier of England, L. R., 8 Q. B. 378, 379.

In addition to the cases noticed in the judgment, the following were referred to in the course of the argument: *Horton* v. *Westminster Improvement Commissioners*, 7 Ex. 780, 21 L. J. Ex. 297; *Lang* v. *Smyth*, 7 Bing. 284; *Colehan* v. *Cooke*, Willes, 393, 396; *Halford* v. *Cameron's Ry. Co.*, 16 Q. B. 442, 20 L. J. Q. B. 160; *Burbridge* v. *Manners*, 3 Camp. 193, 194, (13 R. R. 786); *Carlon* v. *Kenealy*, 12 M. & W. 139, 13 L. J. Ex. 64.

Cur. adv. vult.

July 5. The judgment of the Court (BLACKBURN, QUAIN, and ARCHIBALD, JJ.) was delivered by

BLACKBURN, J. This was an action brought by the plaintiff in his own name as holder of an instrument called a debenture, against the Credit Foncier, a company incorporated under the Companies Act, 1862. It was defended in the name of the defendants by one Macken, to whom the defendants had originally issued the debenture, and who had indemnified the defendants.

The instrument was under the seal of the company, countersigned by two directors and the secretary. The form of the instrument, as far as it is material to the points we have to decide, is as follows.

It is headed with the name of the company, "The Credit Foncier of England, Limited, incorporated under the Companies Act, 1862." It is called a debenture, and is numbered B. 499. It then proceeds:

"The Credit Foncier of England hereby promise, subject to the *conditions indorsed on this debenture, to pay [*379] to the bearer the sum of one hundred pounds on the 1st day of May, 1872, or upon any earlier day upon which this bond shall be entitled to be paid off or redeemed, according to the said printed conditions indorsed hereon, such payment to be made at Messrs. Smith, Payne, & Smiths, bankers, No. 1, Lombard Street." (Then follow some stipulations as to interest and bonus, which we need not notice.) "In witness whereof the common seal of the Credit Foncier of England, Limited, has been affixed this nineteenth day of May, 1869.

"Henry J. Backer, "Financial Secretary. L. S. "Directors: G. N. Alfain. "A. T. Cunningham."

The conditions printed on the back, as far as material to notice, are as follows: [The learned Judge read shortly the substance of the conditions from the original debenture.]

On the trial before my Brother BRAMWELL it appeared that in May, 1869, the defendants sold ten debentures for £100 each, all in the same form, to Macken. They were numbered respectively B. 489, 490, 491, 492, 493, 494, 497, 498, 499, and 500. The instrument sued upon, as already mentioned, was that numbered B. 499.

Macken never parted with these debentures. In July, 1869, his house was broken into, and the ten debentures were stolen. Macken gave immediate notice to the defendants; and they, on his indemnity, agreed to stop the payment of the stolen debentures, and gave him other debentures, with corresponding numbers, in lieu of those stolen.

In October, 1870, the bond numbered B. 499 was drawn as one of those to be paid off on the 1st of November, 1870, according to the conditions printed on the back of the debenture, and the amount was paid to the holder of the substituted debenture of that number.

In the end of 1871 the plaintiff purchased the debenture sued upon from a person called Stanley, who has since absconded.

The company refused to pay this debenture to the plaintiff. This action was brought, and Macken, in pursuance of his indemnity, defended the action in the name of the company.

*The question left to the jury was, whether the plain- [*380] tiff gave value for this debenture without notice; the jury found in favour of the plaintiff; and no motion has been made to question that verdict.

The question of law reserved for this Court was, whether the plaintiff could, under such circumstances, maintain this action, it being admitted that the debenture had been stolen, and that the plaintiff derived title from the thief.

No evidence was given at the trial as to whether similar documents are in practice treated as negotiable, nor was any express admission made as to this point; but from my Brother BRAMWELL'S report we think that we must take it to have been tacitly admitted at the trial that they are so treated, and we must in this case assume that this admission is correct. As instruments of this kind have only come into use within the last few years, a

custom or usage to treat them as negotiable can only have begun recently; but we must, in deciding this case, proceed on the assumption that they have acquired whatever degree of negotiability can be created by any such recent custom of trade. As we proceed entirely on this admission, it is not to be taken in any future case that any custom was in this case established.

The general rule is not disputed that a chose in action cannot be transferred at law at all, but that in equity it may be assigned, though the action at law must be brought by the assignee in the name of the original contractee, in this case Macken. Equity will compel the contractee, if he has assigned the contract, to allow his name to be used for this purpose on an indemnity against costs. Had Macken assigned this contract to the plaintiff, either directly or through the medium of intervening assignees, the question, whether the plaintiff was able to sue in his own name, or was obliged to sue in the name of Macken, would have been purely technical. But the general rule, both at law and in equity, is that no person can acquire title, either to a chose in action or any other property, from one who has himself no title to it; and therefore the plaintiff could not, in equity, have compelled Macken to permit his name to be used, unless, to borrow the language of TINDALL, C. J., in *Brandao* v. *Barnett*, 1 M. & G. at p. 935, such an instrument as this "falls within *that [*381] description of property to which a good title may be acquired by a party who takes it *bonâ fide* for value, notwithstanding any defect of title in the party from whom it is so taken."

In the present case the plaintiff has taken upon himself the burden of establishing both that the property in the debenture passed to him by delivery, and that the right to sue in his own name was transferred to him.

The two propositions are very much connected, but not identical. The holder of an overdue bill or note may confer the right on the transferee to sue in his own name, but he conveys no better title than he had himself. So the assignee of a Scotch bond, which is assignable by the law of Scotland, may sue in his own name in the courts of this country: see *Innes* v. *Dunlop*, 8 T. R. 595; but he has not a better title than those from whom he took the bond, unless, perhaps, if the contract is by the law of Scotland not merely assignable but also negotiable. As to this, in *Dixon* v. *Bovill*, 3 Macq. at p. 16, Lord CRANWORTH, then Lord Chancellor,

in delivering the judgment of the House of Lords in a Scotch case as to iron scrip notes, says, "I have no hesitation in saying, that independently of the law merchant and of positive statute, within neither of which classes do these scrip notes range themselves, the law does not, either in Scotland or in England, enable any man by a written engagement to give a floating right of action at the suit of any one into whose hands the writing may come, and who may thus acquire a right of action better than the right of him under whom he derives title."

But the two questions go very much together; and, indeed, in the notes to *Miller* v. *Race*, 1 Smith L. C. at p. 359, 2nd ed.; at p. 479, 6th ed., where all the authorities are collected, the very learned author says: "It may therefore be laid down as a safe rule that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a negotiable instrument, and the property in it passes to a *bonâ fide* transferee for value, though the transfer may not have taken place in market overt. But that if either of the above requisites be wanting, i. e., if it be either not accustomably [*382] *transferable, or, though it be accustomably transferable, yet, if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a negotiable instrument, nor will delivery of it pass the property of it to a vendee, however *bonâ fide*, if the transferor himself have not a good title to it, and the transfer be made out of market overt."

Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word. The person who, by a genuine indorsement, or, where it is payable to bearer, by a delivery, becomes holder, may sue in his own name on the contract, and if he is a *bonâ fide* holder for value, he has a good title notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it. The first question, therefore, is whether this instrument is a promissory note. It is under seal, and therefore is *primâ facie* a covenant, not a promise; and it is quite clear that a covenant to pay money is not negotiable by the custom of merchants.

When a corporation is established for trading purposes, it is from its nature capable of drawing a bill of exchange and making the promise implied by law from making a bill, and is liable

to be sued in assumpsit on the bill, though a body corporate: see *Murray* v. *East India Co.*, 5 B. & Ald. 204, (24 R. R. 325). This is not by virtue of any statute, but from the common law. But all such bills of exchange in practice always have been made under hand, by an agent authorized to draw or accept as the case may be. The East India Company by their secretary, the Bank of England, as any one who looks at a Bank of England note may see, make their notes by an agent; and there is no case in the books where a bill of exchange made under seal has been sued upon.

The negotiability of promissory notes depends, in part at least, upon the Statute 3 & 4 Anne, c. 9; and it seems to have been the opinion of Lord Justice WOOD, in *Re General Estates Co.*, L. R., 3 Ch. at p. 762, and of MALINS, V. C., in *Re Imperial Land Co. of Marseilles*, L. R., 11 Eq. at p. 490, that, inasmuch as that Act enacts that promissory notes in writing * " made [* 383] and signed by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, who is usually intrusted by him, her, or them, to sign such promissory notes for him, her, or them, whereby such person or persons, body politic or corporate, his, her, or their servant or agent, doth promise to pay any sum of money, shall be indorsable, as bills of exchange are, by the custom of merchants," it follows that a corporation fixing its seal to a written promise to pay must be considered as signing the promise, not as covenanting under seal to fulfil it; and so, that the statute by implication enacts that what would at common law be their covenant to pay is their promise to pay. But, although intimating their opinion, neither of the learned persons referred to gave any decision on the point, as it was not necessary for the purpose of the cases before them. In *Slark* v. *Highgate Archway Company*, 5 Taunt. 792, a similar question was raised, but not decided. There, however, the Act authorized the making of notes under the seal of the corporation. Neither is it necessary for us to decide the point as, for reasons which will presently be given, the instrument in question, even if under hand, could not be a promissory note; but we wish to point out that in *Glyn* v. *Baker*, 13 East, 509, 512, 514 (12 R. R. 414), the form of the East India bond was that the East India Company acknowledged to have received of W. G. Sibley £100, which the company prom-

ised to repay to Sibley, his executors, or assigns by indorsement. It was, therefore, in form a promissory note for value received, payable to order, and, had it been signed as such by an agent of the East India Company, would have been negotiable. But it was a bond under the seal of the East India Company, and Le Blanc, J., says: "It is clear that no action could have been brought on this bond but by Sibley the obligee, or in his name; or if he died, in the name of his executors."

The alarm occasioned by this decision was so great that within a month afterwards an Act (15 Geo. III., c. 64) was passed to make East India Bonds negotiable like promissory notes. It seems not to have occurred to any one that it could be said that this was already done by virtue of the statute of Anne, the promise in writing being signed by the East India Company's seal.

This seems a strong authority for saying that instru-
[* 384] ments under *the seal of a body corporate are not exceptions from the general rule laid down in Byles on Bills, p. 67, n. 10th ed., that "at common law bills of exchange and promissory notes, being simple contracts, cannot be under seal, at least so as to retain their negotiable qualities." And it certainly is very desirable that it should not be left doubtful on the face of an instrument whether it is a covenant or a promise.

But it is not necessary to decide in the present case whether an instrument under the seal of a corporation can be a promissory note; for the contract of the Credit Foncier is not merely to pay the money, but also to cause a portion of the bonds to be drawn in the stipulated manner; and any one entitled to sue on the contract contained in this instrument would be entitled to sue for damages, if the company did not fairly give him his chance of having his bond drawn according to the stipulated conditions. And it is obvious that such a contract as that cannot be a promissory note.

It is not pretended that there is any statute applicable to such a class of instruments as the present. We have therefore to see whether it falls within any other principle. Foreign and colonial governments frequently create a public debt, the title to portions of which is by them made to depend on the possession of bonds expressed to be transferable to the bearer or holder. There can hardly properly be said to be any right of action on such instruments at all, though the holder has a claim on a foreign govern-

ment. In *Attorney General* v. *Bouwens*, 4 M. & W. 171, 180, it was found in the special verdict, as to Russian, Danish, and Dutch bonds, that those securities have always been dealt with as transferable within this kingdom by delivery only, that it is not necessary to do any act out of England to render such a transfer valid, and that the bearers of the bonds have always been treated and dealt with by the agents of the three sovereigns as entitled to the money payable under the bonds. The Court in that case held the bonds transferable in England, so as to render the executors of the holder liable to probate duty in respect of them. And the Court of King's Bench in *Gorgier* v. *Mieville*, 3 B. & C. 45, decided that a Prussian bond of a similar description was negotiable. We have no intention to throw the least doubt on this decision; but we do not think it applicable to *an English instrument made in England; and we [*385] express no opinion as to what might be the law as to obligations made by subjects abroad, which, by the law of the country where they were made, are negotiable in that country. We confine our judgment to the case before us, which is that of an English instrument made by an English company in England.

We think that the form of the instrument shows that the defendants did contract with Macken, to whom they originally issued this instrument, to pay the money to the bearer of this instrument, and (wholly irrespective of any custom) they were competent to make any stipulations they pleased with Macken that would affect their own rights and his only. If Macken had sued them, a plea, that they had paid the money to the bearer without any notice that he was not entitled to it, would be good, if, on the true construction of the instrument it is stipulated that the receipt of the bearer giving up the instrument should be a sufficient discharge for the company; for they were quite competent to stipulate to that effect. And if Macken were suing in his own name for the benefit of an assignee, as in *Higgs* v. *Assam Tea Co.*, L. R., 4 Ex. 387, 38 L. J. Ex. 233; or if the assignee were proceeding in equity in his own name, as in *In re Blakely Ordnance Co.*, L. R., 3 Ch. 154, 37 L. J. Ch. 418; *In re Natal Investment Co.*, L. R., 3 Ch. 355, 37 L. J. Ch. 362; *In re General Estates Co., Ex parte City Bank*, L. R., 3 Ch. 758; and *In re Imperial Land Co. of Marseilles*, L. R., 11 Eq. 478, 40 L. J. Ch. 93; and the defendants set up some equitable defence good against

the original contractee, and therefore generally good against the assignee also, it would be a good answer to say that the defendants had, with a view to induce persons to become assignees of such instruments, represented that there were no such equities, and that the now holder was induced to take this instrument on the faith of that representation. That would amount to an estoppel at law: *In re Bahia & San Francisco Ry. Co.*, L. R., 3 Q. B. 584; and see *Hart* v. *Frontino, &c. Mining Co.*, L. R., 5 Ex. 111. And in *In re Blakely Ordnance Co.*, it was held that it was a good answer in equity. In *In re Natal Investment Co.*, L. R., 3 Ch. at p. 358, Lord CAIRNS, C., as we understand him, thought that the mere fact of making an instrument payable to order did not amount to such a representation, but he did not dispute
[* 386] that, if made out, it would * produce the effect contended for, or say that such a provision was beyond the competency of the parties. We have not now to consider whether the form of this debenture is such as to amount to such a representation or not. If it does, the Credit Foncier had full power to alter or abandon their own rights; but the plaintiff is obliged to contend, in this case, that they had also power to alter and abandon the rights of those who might become holders of the instrument, and to declare that such persons should, contrary to the general rule of law, hold their property on a precarious title liable to be divested if a thief or finder could find a *bonâ fide* purchaser for the debenture. No authority has been cited to show that it is within the competency of private persons by their contract to attach such an incident to any property.

He is also obliged to contend that they could give a right of action in his own name to any holder, though the general law would give no such right of action to the holders. There is no decision or authority that it is competent to a party to create by his own act a transferable right of action on a contract. It is enough to refer to *Dixon* v. *Bovill*, 3 Macq. 1, and *Thompson* v. *Dominy*, 14 M. & W. 403, as authorities that he cannot, irrespective of custom, so create it.

We have only further to consider whether the custom or practice of trade to treat such instruments as negotiable makes any difference. We must take it as admitted (whether truly or not we know not) that such a custom has prevailed of late years; but as the instruments themselves are only of recent introduction, it

can be no part of the law merchant. Incidents, which the parties are competent by express stipulation to introduce into their contracts, may be annexed by custom, however recent, provided that it be general, on the ground that they are tacitly incorporated in the contract. If the wording of an instrument is such as to exclude this tacit incorporation, no usage can annex the incident. But where the incident is of such a nature that the parties are not themselves competent to introduce it by express stipulation, no such incident can be annexed by the tacit stipulation arising from usage. It may be so annexed by the ancient law merchant, which forms part of the law, and of which the Courts take notice. Nor, if the ancient law merchant annexes the incident, can any modern usage take it away. Thus, in *Edie* v. *East India Co.*, 2 Burr. 1216, there * was a verdict of the jury [* 387] founded on strong evidence that, according to usage in London, an indorsement to an indorsee by name without any further words was restrictive; but the Court of King's Bench decided that the evidence should not have been admitted, the law merchant being known to the Court to be that it was not restrictive. And in *Partridge* v. *Bank of England*, 9 Q. B. 396, 15 L. J. Q. B. 395, there was the exact converse. There the dividend warrants of the Bank of England were in form of cheques payable to a particular person, Partridge, without any words to make them transferable, which therefore were by the general law merchant not transferable. The Court of Exchequer Chamber gave judgment *non obstante veredicto* on a plea on which it had been found that by custom for sixty years such dividend warrants were negotiable.

We have already intimated our opinion that it is beyond the competency of the parties to a contract by express words to confer on the assignee of that contract a right to sue in his own name. And we also think it beyond the competency of the parties by express stipulation to deprive the assignee of either the contract or the property represented by it, of his right to take back his property from any one to whom a thief may have transferred it, even though that transferee took it *bonâ fide* and for value. As these stipulations, if express, would have been ineffectual, the tacit stipulations implied from custom must be equally ineffectual.

We think, therefore, that the rule to enter a verdict for the defendants ought to be made absolute.

My Brother Bramwell, in reserving the question, provided that

there should be no appeal without leave of this Court. We give that leave on two conditions: first, that the plaintiff within a month gives security to the satisfaction of the master for the costs in appeal as well as the costs below; and, secondly, that the plaintiff consents that the Court of Error shall have liberty to disregard the form of the pleas and decide on the real question.

Rule absolute.

ENGLISH NOTES.

The principal case shows that "assignment," in the sense of transferring the title to an obligation, is not recognized by the common law of England. For the convenience of business, indeed, certain obligations have been recognised as transferable by custom — or negotiable. And by means of a power of attorney (which, if given for valuable consideration, is irrevocable) the right of action may be in effect transferred subject to all defences competent to the original obligor. But, apart from certain statutes, the title of the assignee of a *chose in action* is an equitable title.

Except as to the negotiable obligations above mentioned, the effect is the same as in the systems of law which recognise assignment as a mode of conveyance, subject to the rule *assignatus utitur jure auctoris.*

The principal case has been cited chiefly for the exposition of the principle of the common law as to assignment of a *chose in action* contained in the judgment. As to what instruments, other than the well-known ones of Bills of Exchange and Promissory Notes, have been held negotiable, reference is made to the cases and notes under the title "Bond" (Negotiable), 5 R. C. 197, *et seq.* It is only here to be noted, that the circumstance of the instruments in question being of recent introduction, which is relied on in the judgment of the principal case as showing that they could not be negotiable, has, in later cases decided in the House of Lords, been held to be by no means conclusive against their being negotiable. *Goodwin* v. *Robarts* (H. L. 1876), 5 R. C. 199; *London Joint Stock Banking Co.* v. *Simmons* (H. L. 1892), 1892, A. C. 201, 61 L. J. Ch. 723, 66 L. T. 625, 41 W. R. 108; cited 5 R. C. 222; *Venables* v. *Baring Brothers* (1892), 1892, 3 Ch. 527, 61 L. J. Ch. 609, 67 L. T. 110, 40 W. R. 699; *Bentinck* v. *London Joint Stock Bank* (8 Feb. 1893), 1893, 2 Ch. 120, 62 L. J. Ch. 358, 68 L. T. 315, 42 W. R. 140.

The proposition that the effect of an assignment of a *chose in action* is to give a merely equitable title has not become void of significance by the Judicature Act, 1873, which effected an important change in procedure. For, although section 25 of that Act below cited nominally gives a legal title, the title is subject to the equities which constitute

the essential characteristic of an equitable title. By section 25 (6) of this Act (36 & 37 Vict. c. 66) — "Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal *chose in action*, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or *chose in action*, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or *chose in action* from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor."

The effect of this section was considered in *May* v. *Lane* (C. A. 18 Dec. 1894), 64 L. J. Q. B. 236, 43 W. R. 193, where a builder, to whom a verbal promise had been made by the defendant, who was the owner of a building estate, to advance him certain sums of money, purported to assign to the plaintiffs the sum of £50 "out of the monies due." The Court held that there was nothing which could be the subject of an assignment under the section. For, assuming that the promise to advance £50 could have been made a ground of action for damages for breach of agreement, it could not create a "debt or other legal *chose in action*" within the meaning of the section. Lord Justice Rigby gave as a reason for the decision that, if the section made assignable such rights as a right to recover damages for a breach of contract or a legal right to recover damages arising out of an assault, the section would materially affect the law of champerty and maintenance. Upon the effect of the section, see further the next case (*Brice* v. *Bannister*).

AMERICAN NOTES.

The dual doctrine of the rule is recognized generally in this country except where modified by statute.

1. At common law the assignee must sue in the name of his assignor. *Skinner* v. *Somes*, 14 Massachusetts, 107; *Jessel* v. *Ins. Co.*, 3 Hill (N. Y.), 88. "We know of no principle upon which the assignee of a policy of insurance can be allowed to sue upon it in his own name," citing *Innes* v. *Dunlop*, 8 T. R. 595: *Currier* v. *Hodgdon*, 3 New Hampshire, 82.

A court of equity would not entertain a suit brought by such assignee in his own name, but would leave him to his legal remedy to sue at law in the name of his assignor, unless special circumstances rendered it necessary to prevent a failure of justice. *Ontario Bank* v. *Mumford*, 2 Barbour Chancery (N. Y.), 596; (see notes to the case in 5 Lawyers' Co-operative edition, p. 593); citing *Moseley* v. *Boush*, 4 Randolph (Virginia), 392; *Adair* v. *Win-*

chester, 7 Gill & Johnson (Maryland), 114; *Smiley* v. *Bell*, Martin & Yerger (Tennessee), 378.

But in the Code States, and in some others by force of special statute, the assignee may sue in his own name. *Hooker* v. *Eagle Bank*, 30 New York, 83; *Long* v. *Heinrich*, 46 Missouri, 603; *Cook* v. *Bell*, 18 Michigan, 387; *White* v. *Tucker*, 9 Iowa, 100; *Stewart* v. *Balderston*, 10 Kansas, 131; *Fletcher* v. *Piatt*, 7 Blackford (Indiana), 522; *Russell* v. *Petree*, 10 B. Monroe (Kentucky), 184; *Allen* v. *Miller*, 11 Ohio State, 374; *Carpenter* v. *Johnson*, 1 Nevada, 331; *Smith* v. *Chicago R. Co.*, 23 Wisconsin, 267; *McDonald* v. *Kneeland*, 5 Minnesota, 352.

2. The assignee takes subject to all defences valid as between the original parties existing at the time of bringing suit. *Bebee* v. *Bank of New York*, 1 Johnson (N. Y.), 529; 3 Am. Dec. 353; *Bush* v. *Lathrop*, 22 New York, 535; *Fault* v. *Tinsman*, 36 Pennsylvania State, 108; *Kamena* v. *Huelbig*, 8 C. E. Green (New Jersey Equity), 78; *Martin* v. *Richardson*, 68 North Carolina, 255; *Boardman* v. *Hayne*, 29 Iowa, 339; *Jeffries* v. *Evans*, 6 B. Monroe (Kentucky), 119; *Barney* v. *Grover*, 28 Vermont, 391; *Andrews* v. *McCoy*, 8 Alabama, 920; *Kleeman* v. *Frisbie*, 63 Illinois, 482; *Marshall* v. *Cooper*, 43 Maryland, 61; *Merrill* v. *Merrill*, 3 Greenleaf (Maine), 463; 14 Am. Dec. 247; *Jones* v. *Hardesty*, 10 Gill & Johnson (Maryland), 404; 32 Am. Dec. 180; *Foot* v. *Ketchum*, 15 Vermont, 258; 40 Am. Dec. 678; *Warner* v. *Whittaker*, 6 Michigan, 133; 72 Am. Dec. 65; *Robeson* v. *Roberts*, 20 Indiana, 155; 83 Am. Dec. 309; *Burton* v. *Willin*, 6 Houston (Delaware), 522; 22 Am. St. Rep. 363; *Nester* v. *Cont. Brewing Co.*, 161 Pennsylvania State, 473; 41 Am. St. Rep. 894 (contract void as in restraint of trade).

Every succeeding assignee takes subject to defences between the first assignor and assignee. *Com. Nat. Bank* v. *Burch*, 141 Illinois, 519; 33 Am. St. Rep. 331.

As to payment of a debt by a stranger, see *Crumlish's Adm'r* v. *Cent. Imp. Co.*, 38 West Virginia, 390; 23 Lawyers' Reports Annotated, 120.

The question was examined with great learning by Ch. J. Denio in *Bush* v. *Lathrop*, *supra*, a leading case (three of the seven judges however dissenting). The Chief Justice planted himself upon Lord Thurlow's declaration, in *Davies* v. *Austin*, 1 Ves. 247: "A purchaser of a *chose in action* must always abide by the case of the person from whom he buys," adding: "The rule as thus stated is the only logical one. In the transmission of property of any kind, from one person to another, the former owner can, in reason, only transfer what he himself has to part with, and the other can only take what is thus transferred to him." He admits that there are decisions the other way, and he reviews them all, — mostly New York cases.

Section II. — *Equitable Assignment (commonly so called).*

No. 2. — BRICE *v.* BANNISTER.

(C. A. 1878.)

RULE.

Where A., having a contract with B. in respect of which money is due or to become due from B. to A., makes an agreement for valuable consideration with C. that C. is to receive a sum out of that money, and gives an order to B. to pay such sum to C. out of the money due or to become due from B. to A., this is an equitable assignment creating a property in C., and binding upon B.

Brice v. Bannister.

3 Q. B. D. 569-581 (s. c. 47 L. J. Q. B. 722; 38 L. T. 739; 26 W. R. 670).

Assignment of Debt. — Payment to Original Creditor after Notice [569]

G. agreed to build a vessel for the defendant, the price of which was to be paid by instalments. Before the vessel was finished, G., being in debt to the plaintiff, by an instrument in writing directed the defendant to pay to the plaintiff £100 out of moneys due or to become due from the defendant to G. At the time of giving this direction all the instalments which were due had been paid by the defendant to G. Notice in writing of the above-mentioned instrument was given to the defendant, but he refused to be bound by it, and afterwards paid to G. the balance of the price of the vessel, amounting to more than £100: —

Held (by Bramwell and Cotton, L. JJ., Brett, L. J., dissenting), that the instrument in writing constituted a valid assignment of £100, part of the moneys due or to become due from the defendant to G., and that the plaintiff was entitled to recover that amount from the defendant, notwithstanding the subsequent payments by him to G.

Claim stated that John Gough, by an order in writing under his hand, directed to the defendant, bearing date on or about the 27th of October, 1876, absolutely assigned to the plaintiff the sum of £100, money due or to become due of John Gough in the hands of the defendant, of which order due notice was given to the defendant, and the defendant thereupon accepted the same. At the time of the making of the order in writing and at the time

No. 2. — Brice v. Bannister, 3 Q. B. D. 570.

[*570] *of notice thereof to the defendant he was indebted to John Gough in divers sums of money more than sufficient to pay the sum of £100 assigned by John Gough to the plaintiff. The plaintiff had on more than one occasion demanded from the defendant payment of the sum of £100, but the defendant had not paid it or any part of it.

The nature of the defence appears from the facts hereinafter stated.

At the trial at the Somersetshire Summer Assizes, 1877, before Lord Coleridge, C. J., without a jury, the following facts were proved. The plaintiff is a solicitor at Bridgewater, and the defendant is a shipowner residing at Barrow-in-Furness. The defendant had entered into a contract with John Gough, dated the 17th of May, 1876, by which Gough agreed to build for the defendant a vessel on certain terms. The material part of the contract is as follows: "The vessel to be completed by the 30th of December, 1876, for the sum of £1375. Payments to be made as follows: —

When keel and stern post up and floors across	£250
When in frame	250
When planked	400

and the remainder when completed and handed over with Lloyd's, Board of Trade, and builder's certificates."

The contract was in the course of being performed by John Gough between the date of the contract, 17th of May, 1876, and the completion of the vessel, 11th of February, 1877. The first instalment under the contract became due on the 22nd of June, 1876, the second instalment became due on the 11th of October, 1876, and the third instalment became due on the 23rd of November, 1876, and the remainder was due on the completion of the vessel, 11th of February, 1877.

Gough was unable to finish the vessel without assistance from the defendant, and therefore during the progress of the building the latter advanced to him sums of money, which were necessary to enable him to pay the wages of his workmen employed in building the vessel and to pay for the materials used in constructing her. The total amount of these advances upon the 27th of October, 1876, was £1015. That sum was in excess of the amount then due pursuant to the contract.

No. 2. — Brice v. Bannister, 3 Q. B. D. 571.

* On the 27th of October, 1876, Gough, being indebted [* 571] to the plaintiff to an amount exceeding £2000, gave the plaintiff an order addressed to the defendant in the following terms: —

"I do hereby order, authorize, and request you to pay to Mr. William Brice, Solicitor, Bridgwater, the sum of £100 out of moneys due or to become due from you to me, and his receipt for same shall be a good discharge."

On the same day, the 27th of October, 1876, the plaintiff gave the defendant written notice of the order in the following terms: —

"I hereby give you notice that by a memorandum in writing dated the 27th of October, 1876, John Gough, of this place, authorized and requested you to pay me the sum of £100 out of money due or to become due from you to him, and my receipt for the same shall be a good discharge."

The defendant acknowledged the receipt of the notice, but declined to be bound by it as an authority to pay £100 to the plaintiff.

Subsequently to the receipt of the notice, the defendant paid to Gough on account of the building of the vessel, pursuant to the contract, sums far exceeding £100; and unless the defendant had made such payments to Gough, he would not have been able to complete the vessel.

On these facts it was contended by the defendant's counsel that the judgment ought to be entered for the defendant, on the following grounds: —

1. That at the time of giving the order there was nothing due to Gough, and therefore there was nothing which could be assigned by him to the plaintiff by virtue of the Judicature Act, 1873, s. 25, sub-s. 6.[1]

[1] By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 6, "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt, or other legal *chose in action*, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or *chose in action*, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or *chose in action* from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or *chose in action* shall have had notice that such assignment is disputed by the assignor or any one claim-

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[*572] *2. That there was no binding acceptance of the order by the defendant.

3. That had not the defendant made advances to Gough or to his creditors, other than the plaintiff, Gough would never have been in a position to become a creditor of the defendant.

Lord COLERIDGE, C. J., after consulting LINDLEY, J., delivered the following judgment: —

Lord COLERIDGE, C. J. In this case I am of opinion that the plaintiff is entitled to succeed.

This is an action brought to recover the sum of £100 due on an order given by a person named Gough on the 27th of October, 1876, authorizing and requesting the defendant to pay to the plaintiff Brice £100 out of money due, or to become due, from the defendant to Gough, and the plaintiff's receipt was to be a good discharge.

The circumstances under which this order was made are these. [The learned Judge stated the facts.] Now it appears by the statement which Mr. Cole has made on behalf of the defendant, and which is not disputed on the part of the plaintiff, that certain payments were made, not at the dates fixed by the contract, but at periods to a considerable extent in advance of the payments under the contract. Mr. Cole has furnished a list of them, but the only circumstance that is material for me to consider is, that at the date of the 27th of October, 1876, as much as £1015 — it is better to include the payment made on the 27th of October — had been paid under the contract. That was, no doubt, considerably in excess of the sum which at that time was due. That left the difference between £1015 and £1375 to be paid under the [*573] contract. *It is admitted on the part of the plaintiff, that those payments had been made before the date of the order: it is admitted on the part of the defendant, that payments subsequently to the date of the order were made to a much greater extent — it is immaterial to what extent — but to a much greater extent than £100.

The further facts that are material are, that the notice was given of this order at the date of the order: that the defendant

ing under him, or of any other opposing or conflicting claims to such debt or *chose in action*, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice, under and in conformity with the provisions of the Acts for the relief of trustees."

acknowledged the receipt of the order, but did not accept the order in the sense of any attornment to it, or agreeing to be bound by it. He therefore acknowledged he knew of the order, but at the same time declined in terms to be bound by its authority. These are the only material facts necessary for my decision.

It is said on behalf of the plaintiff that he has proved his case. He has shown there was a contract, there were various sums to become due, after the date of the order, under the contract; that those sums did become due and were not paid to him, although an order was given for the payment of the amount of £100, the portion of the debt which had been assigned to the plaintiff. On behalf of the defendant it was objected, first, at the date of the order there was no money due, and it seems to be admitted that Gough was overpaid, and nothing was at the time under the terms of the contract owing to him. The words of the order are "out of money due or to become due." It is argued that, in order to satisfy the terms of the statute to which he has referred, the debt must be an existing debt, and an assignment of a debt to become due will not be within the terms of the section. Now that a debt to become due is a chose in action, is clear; and that an assignment of a debt to become due would have been enforced in equity, upon the authorities is clear. I am happy to find that two great authorities cited to me have so decided; but I should have thought it fell within the very nature and definition of the term "chose in action." Lord HARDWICKE [1] and Sir L. SHADWELL [1] have so decided; that is sufficient for the present purpose. It seems to me that this is distinctly a chose in action, and the fact that the *actual sum which was assigned [*574] under the order had not become due, is not material in reference to the power of the plaintiff to enforce it.

Next, it is said that there was no acceptance of the order. In one sense that is true. There was no acceptance. That, again, does not appear to me to be material, because if the debt was a chose in action, and if there was an assignment of it, the Judicature Act, 1873, s. 25, sub-s. 6, is directly in point, and there need be no acceptance and no agreement on the part of the debtor, express notice having been given. Therefore it seems to me that the first objection has no foundation, and the second falls with it.

[1] It is presumed that Lord COLERIDGE, C. J., referred to *Row* v. *Dawson*, 1 Ves. Sen. 331; 2 W. & T. (L. C. in Eq.) 726, 5th ed., and *Lett* v. *Morris*, 4 Sim. 607.

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Then the third objection is, that in order to give occasion for the payment of the sums, a portion of which was assigned, advances had been made by the debtor in the interval, and the assignor never would have been in a position to become a creditor but for those advances, and it is argued that shows an equity in favour of the defendant, because he is the meritorious cause of the payment. It appears to me that that argument does not bear investigation, and this becomes apparent upon referring to the date of the order and the date of the receipt of the notice. It is admitted that the £1015 only had been paid, and subsequently to the receipt of the notice the defendant chose to advance to Gough sums of money without regard to the order. He did that in his own wrong, for he knew that to the extent of the order the contract, on which by hypothesis the advance was made, was gone from Gough, and that the contract to that extent was no longer a security in favour of the latter; therefore to the extent of £100 the defendant was lending money on no security, and it appears to me that no question of priority arises. This last point has no substance in it, and I must decide it against the defendant.

A material point remains to be considered, which was probably intended to be raised before me, but was not put very prominently forward, but which it is fit I should notice. [The learned Judge read the Supreme Court of Judicature Act, 1873, s. 25, sub-s. 6.] The legislature uses the words "any absolute assignment," and it may be said that an absolute assignment does not include what in strictness is rather an agreement to assign a debt when it [*575] arises, *than the present assignment of a debt that has arisen. When, however, the general object of this section is looked at, and when one remembers that the reason of it was to give a right to an action at law in cases which would have been the subject-matter of a bill in equity, and when it is recollected that an agreement in equity to assign a future debt would have been enforced, it appears to me that it is no straining of the words of this section to construe the request to pay as an absolute assignment of a debt or chose in action, the words of the enactment being not merely "a debt," but also "chose in action," and I think that it was intended to include a case of this kind. I do not think I am straining the words of this section in holding that this order is within their meaning.

It is necessary to have recourse to the enactment, because at

law no action could have been maintained without the assent of the assignor, and in equity, I apprehend, though I speak here with great diffidence, that without joining the assignor no bill could have been enforced for want of parties. Therefore I could not decide this case without the aid of the enactment. The general jurisdiction of the High Court and the abolition of the general lines of demarcation between law and equity and the authority of a VICE-CHANCELLOR would not have enabled me to decide this case in favour of the plaintiff. But for the section I must have looked on this action as a bill in equity, to which the only parties were the present plaintiff and the present defendant, and which therefore could not have been maintained for want of proper parties. I therefore rely on the terms on this sub-section, and not on the general authority of the High Court.

For these reasons I direct that the judgment be entered for the plaintiff for £100.

The defendant appealed.

Jan. 28, 29. Cole, Q. C., and Bullen, for the defendant. The document signed by Gough, was not an absolute assignment of a "debt or other legal chose in action" within the meaning of the Supreme Court of Judicature Act, 1873, s. 25, sub-s. 6. It resembled a cheque, which is a mere order to pay, and confers in * equity no title upon an assignee as against the [* 576] drawee: *Schroeder* v. *Central Bank of London*, 34 L. T. (N. S.) 735, 24 W. R. 710, following *Hopkinson* v. *Foster*, L. R., 19 Eq. 74. An express promise made to a creditor by a third party that he will pay to the former money thereafter to be received for the debtor, is not an assignment in equity: *Rodick* v. *Gandell*, 1 De G. M. & G. 763. The last clause giving the debtor power to interplead or pay money into court under the Trustee Relief Acts, shows that the legislature intended to confine the operation of sub-s. 6 to debts already due.

A. Charles, Q. C., and Herbert Reed, for the plaintiff. The document by its very terms was a good assignment in equity of £100, to be paid out of any money due either at its date or thereafter from the defendant to Gough. The doctrine that a debt was assignable in equity upon notice, was established by many decisions before the Judicature Acts, of which one of the latest is *M'Gowan* v. *Smith*, 26 L. J. Ch. 8. The defendant's counsel have referred to *Rodick* v. *Gandell*, but that case is very distin-

guishable in its facts. The promise relied upon was not made by a person who owed money to the debtor.

[Cotton, L. J. *Rodick* v. *Gandell* was a very different case from the present.

Bramwell, L. J. It is not an authority against the contention for the plaintiff.]

The plaintiff relies upon *Yeates* v. *Groves*, 1 Ves. 280, and *Lett* v. *Morris*, 4 Sim. 607, in which orders to pay were supported in equity. This case does not raise any question as to the property in the ship built by Gough, and therefore *Clarke* v. *Spence*, 4 A. & E. 448, does not assist the view presented upon behalf of the defendant.

Bullen replied. *Cur. adv. vult.*

May 18. The following judgments were delivered: —

Cotton, L. J. The letter of the 27th of October is a good equitable assignment by Gough to the plaintiff of money to
[* 577] the * extent of £100, which might become due under his contract with the defendant. To this extent he thereby anticipated the moneys payable from the defendant to him, and Gough became incompetent to deal with these moneys to plaintiff Brice's prejudice, and the defendant, after notice of the letter, could not come to any agreement with Gough dealing with or anticipating these moneys to the prejudice of the plaintiff. At the time when notice of the letter of the 27th of October was given to the defendant, the balance of the contract price which remained unpaid exceeded £100, and the ship has been completed under the contract. The question is, whether in substance what has been done by Bannister and Gough was not a dealing with the moneys payable under the contract; I think it was. The contention of the defendant was that though, after notice of the assignment to the plaintiff he had paid moneys exceeding £100 to Gough, he did so not in payment of the price or under the contract, but that the advances were necessary in order to secure the completion of the ship. But this is not a case where the builder having failed in his contract the person for whom he was building put an end to the contract and completed the work. In such a case, the builder if he in fact completed the work, would be employed as agent or servant doing the work for the owner of the vessel. Here the builder completed the work as contractor build-

ing under a contract with the defendant, and this is the distinction between this case and *Tooth* v. *Hallett*, L. R., 4 Ch. App. 242, where the work was completed after the bankruptcy of the builder by his trustee out of his own moneys, and the person for whom the work was done had power to take possession and employ any one to complete the building, and in effect he did so, and the Court allowed the expenditure against the equitable assignee. It is probable that Gough would not, unless he had obtained the advances made by the defendant either from him or from some other person, have been able to complete the vessel; but a charge for the money lent after the 27th of October by any other person for the purpose of paying wages or buying material necessary for the completion of the ship, and in that sense necessary to enable the money to become due to Gough, could not be preferred to the plaintiff's claim. Moneys paid for the same purpose to Gough by * the defendant cannot, in my opinion, stand in [* 578] a better position. It was urged that the assignee of a chose in action takes subject to all equities. But these must be equities existing or arising out of circumstances existing before notice is given of the assignment; the advances made by the defendant were in no way sanctioned by the contract, and in no sense an equity between Gough and the defendant existing or arising from circumstances existing at the date of the notice to the defendant of the assignment to the plaintiff. The plaintiff was assignee for value of the moneys payable under the contract, without any deduction for cost of materials or other costs of construction. The defendant, for his own purposes, determined not to complete the ship himself, but to let Gough do so under the contract. To enable him to do so, he, after notice of the assignment to the plaintiff, paid money to Gough so as to exhaust the contract price. By so doing, he could not, in my opinion, defeat or prejudice the plaintiff's right, and the judgment appealed from must in my opinion be affirmed.

Brett, L. J. I am sorry to say that, with great hesitation, I differ from the judgment which has been read. I consider the principle involved in this case to be of the highest importance. The defendant and Gough were parties to a contract for building a ship, the price of which was to be paid by instalments at different stages of the building, and the ship was to become the property of the purchaser according to the different times of the payments.

Before the ship was finished the builder, through want of funds, became unable to proceed with the work. I do not mean to say that there is any finding that the defendant as purchaser was compelled to take possession of the ship if he did not advance money; but practically if he did not advance money the ship must have been thrown upon his hands, and he must have completed the building of the ship, a most onerous charge upon him. It is an ordinary mode of meeting a difficulty of this kind, an ordinary mode of transacting business, either that the purchaser shall take the ship into his own hands, or that he and the builder shall agree to modify the contract, so that he, instead of paying the purchase-money after a stage of work is completed, should advance the money beforehand; or, as it may be put in another [* 579] *way, the purchaser, when the builder is in difficulties, before the time of payment fixed by the contract has arrived, advances money upon the terms that he is to repay himself out of the money which he would have to pay when a particular stage is completed. It is true that the builder, in consideration of money previously advanced by the plaintiff, made an equitable assignment to him of the money which would become due to him at a following stage, and he afterwards did procure an advance before the appointed time from the defendant, in order to enable him to complete the ship. It is true that the defendant had notice of this so-called equitable assignment; but it was a matter between the builder of the ship and a third person, over which the defendant, the purchaser of the ship, had no control; and the question is whether we are to allow an equitable doctrine to hamper and impede an ordinary business transaction. I cannot bring myself to agree that, either by virtue of the Judicature Act or otherwise, business transactions are to be hampered by any doctrine which will prevent a man from doing what he otherwise might do, merely because something has happened between other parties. I would therefore confine this remedy to a case where a debt has actually accrued due from one person to another, or at least I certainly would confine it simply to the case where nothing remains to be done by the person who is the assignor. In that case nothing remains to be done by him but to receive money from the person who is to pay him, and that money he makes over to the equitable assignee. But I cannot bring my mind to think that this doctrine should be extended, so as to prevent the parties

to an unfulfilled contract from either cancelling or modifying, or dealing with regard to it in the ordinary course of business. I quite agree that they ought not to be allowed to act *malâ fide* for the purpose of defeating an equitable assignee; but if what they do is done *bonâ fide* and in the ordinary course of business, I cannot think their dealings ought to be impeded or imperilled by this doctrine, and it seems to me the purchaser of a ship and the builder might have cancelled the contract even after this assignment. Why may they not modify it? If they cannot modify it, it seems to me to denote a state of slavery in business that ought not to be suffered; but I apprehend the * parties to [* 580] the contract can modify it. If they can modify it, why may they not act so that no money shall be due from the defendant in this case to the plaintiff? It seems to me there never was any money due to the assignor of the plaintiff. Before that money became due, it was absorbed either by an advance made *bonâ fide* by the present defendant to the builder, or by a modification of the contract. The builder never could have sued this defendant for money due to him as for a debt; and therefore it seems to me no equitable assignment ought to be allowed to charge the defendant and make him practically pay twice over.

In what cases has this equitable doctrine been applied? Suppose a man writes upon paper, "I promise to pay A. B. the sum of £100 on demand:" the document, not being payable to bearer or to order, is not a promissory note, assignable or negotiable by statute or the law merchant. Has any Court of Equity ever held, that if a person received such a paper it could be sued upon after being handed over to a third person? But this equitable doctrine would make a promissory note not payable to bearer an order transferable to a third party, without any writing upon it, and I apprehend that is directly contrary to all practice, custom, and law, and shows that this doctrine is not to be allowed to control or hamper ordinary business transactions.

I am, therefore, of opinion in this case the doctrine ought not to be allowed to hamper and impede the ordinary transactions which occurred between the defendant and the builder. The defendant had a right, with the consent of the builder, to modify this contract, and he modified it so far and to such a degree that no money was ever due from the defendant to the builder, and therefore the equitable assignment by the builder to the plaintiff

had no legal or binding effect whatever. Therefore I am of opinion that the defendant in this case is entitled to succeed.

Bramwell, L. J. I have reluctantly come to the conclusion that this judgment should be affirmed. I say reluctantly, because I feel the great force of my Brother Brett's observations; it does seem to me a strange thing and hard on a man, that he should enter into a contract with another and then find that because that other has entered into some contract with a third, he, the [* 581] first * man, is unable to do that which it is reasonable and just he should do for his own good. But the law seems to be so; and any one who enters into a contract with A. must do so with the understanding that B. may be the person with whom he will have to reckon. Whether this can be avoided, I know not; may be, if in the contract with A. it was expressly stipulated that an assignment to B. should give no rights to him, such a stipulation would be binding. I hope it would be. But as there is no such clause in the contract here, the plaintiff has undoubtedly certain rights — to what? If it were only to money payable according to the terms of the contract, the plaintiff would fail, for no money ever became due according to the terms of the contract. It was paid in advance before the work was finished; so that an amendment of the statement of claim is necessary; and in strictness the plaintiff's case is this: "You, the defendant, had no right to pay in advance; you were bound to wait till the work was finished; you would then owe Gough money, and would then be bound to pay me." This seems to be the law, and certainly if Gough and the defendant had agreed to anticipate the time of payment to defeat the plaintiff, such a scheme ought not to succeed. On the other hand, if Gough had broken his engagement, or threatened to break his engagement to finish the vessel, or to finish it in a reasonable time, and the defendant to remedy and avert such breach, reasonably and *bonâ fide*, not to defeat the plaintiff but to protect himself, advanced money to Gough before it was due, so that it never became due according to the contract, I should have hesitated long before holding that the defendant was liable in this action. But in reading the correspondence I cannot see that this was the case. That the defendant acted *bonâ fide* I doubt not, but I think his advancing of the money as he did was quite voluntary and in no sense compulsory. I concur, therefore, in affirming the judgment. *Judgment affirmed.*

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ENGLISH NOTES.

The principal case was followed by the Queen's Bench Division in the similar case of *Buck* v. *Robson* (1878), 3 Q. B. D. 686, 39 L. T. 325, 26 W. R. 804; and again by the Master of the Rolls (Sir George Jessel) in *Fisher* v. *Calvert* (1879), 27 W. R. 301. And all these authorities were followed by the Court of Appeal in Ireland in *Adams* v. *Morgan* (1883), 14 L. R. Ir. 140.

In the case of *Ex Parte Hall, In re Whitting* (C. A. 1879), 10 Ch. D. 615, 48 L. J. Bk. 79, 40 L. T. 179, 27 W. R. 384, the Master of the Rolls (Sir George Jessel) sitting in the Court of Appeal with the Lords Justices James and Bramwell, expressed his concurrence with the decision in the principal case. There was here a verbal agreement by a debtor with his banker that a loan should be repaid out of the rent of a farm to become due at the following Michaelmas. If this had appeared in writing, the Court would have held it a good equitable assignment. But as the rent was an interest in land, they held that it could not, by reason of the 4th section of the Statute of Frauds, be proved by parol evidence. And as the only writing was a letter to the tenant, making no mention of the consideration, and only authorising and requesting the tenant when his Michaelmas rent became due to pay £200 to the creditor — they held that nothing appeared but a mere revocable authority, which was revoked by bankruptcy.

The same principle is applied in *British Waggon Co.* v. *Lea* (1880), 5 Q. B. D. 149, 154, 49 L. J. Q. B. 321, 42 L. T. 437, 28 W. R. 349; and in *Walker* v. *Bradford Old Bank* (1884), 12 Q. B. D. 511, 53 L. J. Q. B. 280, 32 W. R. 645. In the latter case it was said in the judgment of the Court (Williams and Smith, JJ.): — "The cases of *Brice* v. *Bannister* and *Buck* v. *Robson* decide that if an accruing debt arising out of contract be assigned, though not due at the date of assignment, such assignment satisfies the provisions of subsection 6 of section 25 of the Act of 1873." *Drew* v. *Josolyne* (C. A. 1887), 18 Q. B. D. 590, 56 L. J. Q. B. 490, 57 L. T. 5, 35 W. R. 570, where a builder assigned certain "retention moneys" (*i. e.* sums earned for work done but retained under a proviso in the building contract), was a simple application of the rule in the principal case. The assignee was held entitled as against the trustee in bankruptcy.

AMERICAN NOTES.

An order payable out of a particular fund operates as an equitable assignment of the fund, and binds the drawee, though not accepted by him, and even against his dissent. *Brill* v. *Tuttle*, 81 New York, 454; 37 Am. Rep. 515; *Hall* v. *Ins. Co.*, 111 Massachusetts, 53; 15 Am. Rep. 1; *East Lewisburg L. & M. Co.* v. *Marsh*, 91 Pennsylvania State, 96; *McLellan* v. *Walker*,

26 Maine, 114; *Newby* v. *Hill*, 2 Metcalfe (Kentucky), 530; *Conway* v. *Cutting*, 51 New Hampshire, 407; *McWilliams* v. *Webb*, 32 Iowa, 577; *Walker* v. *Mauro*, 18 Missouri, 564; *Spain* v. *Hamilton's Adm'r*, 1 Wallace (U. S. Sup. Ct.), 604, 624; *Blin* v. *Pierce*, 20 Vt. 25; *Munger* v. *Shannon*, 61 New York, 251; *Christmas* v. *Russell*, 14 Wallace (U. S. Sup. Ct.), 84; *Central Nat. Bank* v. *Sprathen*, Colorado (to appear); *McDaniel* v. *Maxwell*, 21 Oregon, 202; *Lapping* v. *Duffy*, 47 Indiana, 51.

To have this effect, it must be drawn on a particular fund and not generally. *Harris* v. *Clark*, 3 New York, 93; *Mandeville* v. *Welch*, 5 Wheaton (U. S. Supr. Ct.), 283; *Sands* v. *Matthews*, 27 Alabama, 399; *Ford* v. *Angelrodt*, 37 Missouri, 57; *Jones* v. *Pacific, &c. Co.*, 13 Nevada, 359; 29 Am. Rep. 308; *Harris County* v. *Campbell*, 68 Texas, 22; 2 Am. St. Rep. 467.

But even if drawn on a particular fund it does not bind the drawee, unless it is for the whole of the fund, or he assents to it, or an assent is implied from custom or the particular dealings of the parties. *Mandeville* v. *Welch*, *supra*, 286. "A creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract." See *Shankland* v. *Corporation of Washington*, 5 Peters (U. S. Sup. Ct.), 390; *Knowlton* v. *Cooley*, 102 Massachusetts, 234.

This is the rule at law, but in equity it is otherwise. *Grain* v. *Aldrich*, 38 California, 514; *Field* v. *Mayor, &c.*, 6 New York, 179; 57 Am. Dec. 435; *Gibson* v. *Cooke*, 20 Pickering (Mass.), 15; 32 Am. Dec. 194; *James* v. *City of Newton*, 142 Massachusetts, 368; 56 Am. Rep. 692; *Peugh* v. *Porter*, 112 United States, 737; *Exchange Bank* v. *McLoon*, 73 Maine, 498; 40 Am. Rep. 388; *Harris County* v. *Campbell*, 68 Texas, 22; 2 Am. St. Rep. 467 and notes, 472; *Caldwell* v. *Hartupee*, 70 Pennsylvania State, 74; *Whittemore* v. *Judd Linseed, &c. Co.*, 124 New York, 565; 21 Am. St. Rep. 708; *Schilling* v. *Mullen*, 55 Minnesota, 122; 43 Am. St. Rep. 475; *McDaniel* v. *Maxwell*, 21 Oregon, 202; 28 Am. St. Rep. 740.

Notice to the debtor of the assignment is essential to bind him. *Campbell* v. *Day*, 16 Vermont, 558; *Noble* v. *Thompson Oil Co.*, 79 Pennsylvania State, 354; *Heermans* v. *Ellsworth*, 64 New York, 159; *Dodd* v. *Brott*, 1 Minnesota, 270; *Spain* v. *Hamilton's Adm'r*, *supra*.

After such notice the debtor may do no act to defeat the assignee's title. *Brashear* v. *West*, 7 Peters (U. S. Sup. Ct.), 608; *Laughlin* v. *Fairbanks*, 8 Missouri, 367; *Cummings* v. *Fullam*, 13 Vermont, 434; *Stewart* v. *Kirkland*, 19 Alabama, 162.

A check drawn on a bank does not constitute an equitable assignment of the deposit, and no action lies against the bank on it in favor of the payee, unless it is accepted. *Ætna Nat. Bank* v. *Fourth Nat. Bank*, 46 New York, 82; 7 Am. Rep. 311; *Carr* v. *Nat. Sec. Bank*, 107 Massachusetts, 45; 9 Am. Rep. 6; *Case* v. *Henderson*, 23 Louisiana Annual, 49; 8 Am. Rep. 590; *Attorney-General* v. *Continental L. Ins. Co.*, 71 New York, 325; 27 Am. Rep. 55; *Colorado Nat. Bank* v. *Boettcher*, 5 Colorado, 185; 40 Am. Rep. 142; *National Bank of Rockville* v. *Second Nat. Bank of Lafayette*, 69 Indiana, 479; 35 Am. Rep. 236; *Grammel* v. *Carmer*, 55 Michigan, 201; 54 Am. Rep. 363; *Northumberland Bank* v. *McMichael*, 106 Pennsylvania State, 460; 51 Am. Rep. 529; *Creveling* v. *Bloomsbury Nat. Bank*, 16 New Jersey Law, 255; 30 Am.

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Rep. 417; *Moses* v. *Franklin Bank*, 34 Maryland, 574; *Dickinson* v. *Coates*, 79 Missouri, 251; 49 Am. Rep. 228; *Harrison* v. *Wright*, 100 Indiana, 516; *Lynch* v. *First Nat. Bank*, 107 New York, 179; 1 Am. St. Rep. 803; *Hawes* v. *Blackwell*, 107 North Carolina, 196; 22 Am. St. Rep. 870; *Bank of Marysville* v. *Windisch-Muhlhauser B. Co.*, 50 Ohio State, 151; 40 Am. St. Rep. 660; *Akin* v. *Jones*, 93 Tennessee, 353; 42 Am. St. Rep. 921; 25 Lawyers' Reports Annotated, 523; *Pickle* v. *People's Nat. Bank*, 88 Tennessee, 380; 7 Lawyers' Rep. Annotated, 93; and this is so even if the check is for the whole deposit: *Union Mills First Nat. Bank* v. *Clark*, 134 New York, 368; 17 Lawyers' Rep. Annotated, 580; *Bank of the Republic* v. *Millard*, 10 Wallace (U. S. Sup. Ct.), 152.

Contra: *Union Nat. Bank* v. *Oceana County Bank*, 80 Illinois, 212; 22 Am. Rep. 185; *Fonner* v. *Smith*, 31 Nebraska, 107; 28 Am. St. Rep. 510; *Roberts* v. *Corbin & Co.*, 26 Iowa, 315; 96 Am. Dec. 146; *Fogarties* v. *State Bank*, 12 Richardson Law (So. Car.) 518; 78 Am. Dec. 468; *Lester & Co.* v. *Givin*, 8 Bush (Kentucky), 358.

The prevailing doctrine is thus stated in *Bank of the Republic* v. *Millard*, *supra*: "It is conceded that the depositor can bring assumpsit for the breach of the contract to honor his checks, and if the holder has a similar right, then the anomaly is presented of a right of action upon one promise, for the same thing, existing in two distinct persons, at the same time. On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there is a privity of contract between the banker and holder when the check was given, the bank would be obliged to pay the check, although the drawer, before the check was presented, had countermanded it, and although other checks, drawn after it was issued, had exhausted the funds of the depositor. If such a result should follow the giving of checks, it is easy to see that bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers. If then the bank did not contract with the holder of the check to pay it at the time it was given, how can it be said that it holds any duty to the holder until the check is presented and accepted? The right of the depositor, as was said by an eminent judge (GARDINER, J., *Chapman* v. *White*, 6 New York, 417), is a *chose in action*, and his check does not transfer the debt, or give a lien upon it to a third person without the consent of the depositary. This is a well established principle of law, and is sustained by the English and American decisions." Citing *Foley* v. *Hill*, 2 Cl. & Finn. 28; *Wharton* v. *Walker*, 4 B. & C. 163; *Warwick* v. *Rogers*, 4 M. & G. 371.

In the minority decisions, the argument of want of privity is met by the doctrine of subrogation, and that a promise by one for the benefit of a third may be enforced by the latter although the consideration did not move from him. The argument of the inconvenience of several actions by two upon the same promise is met by the doctrine of implied promise of the bank and the general and well known custom to honor checks as an important part of the banking business.

No. 3. — HOLROYD *v.* MARSHALL.

(H. L. 1862.)

No 4. — TAILBY *v.* OFFICIAL RECEIVER.

(H. L. 1888.)

RULE.

An agreement to assign by way of security goods of the assignor which shall subsequently come within a certain description creates in the assignee an equitable interest in the goods as and when they are brought within the description; and if the assignee takes possession of the goods, he acquires a legal title.

And where the intention of the agreement (being for valuable consideration) is that in a certain event (not being in the nature of a proviso for redemption) the property shall pass absolutely, the legal title will pass, upon the condition being fulfilled, as to goods coming within the description.

Holroyd v. Marshall.

33 L. J. Ch. 193–196; 10 H. L. Cas. 191–229 (s. c. 9 Jur. N. S. 213; 7 L. T. 172; 11 W. R. 171).

[193] *Bill of Sale. — Assignment of future Chattels. — Possession. — Judgment Creditor.*

A., by deed, assigned to B. all the machinery in and about a certain mill, upon trust for securing a sum of money; and it was thereby provided, that all the machinery which, during the continuance of the security, should be fixed or placed in the mill, in addition to or substitution for the former machinery, should be subject to the trusts of the assignment, and A. undertook to do all that was necessary to vest the substituted and added machinery in B. The assignment was duly registered as a bill of sale, and after the date of it, A. placed other machinery in the mill, in addition to that which was there at the date of the assignment, and gave notice to B. of each substitution and addition. A. continued in possession according to the terms of the assignment. Vice-Chancellor Stuart held, that the machinery being in A.'s possession, as agent of B., B. was entitled, as against a judgment creditor of A. who had sued out execution against A., to the additional machinery; but this decision was reversed

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by Lord Chancellor CAMPBELL, on the ground of A.'s possession not being sufficient to support B.'s claim, and on the ground that to give B. the complete title to the substituted and added machinery, it was necessary that there should be a *novus actus interveniens.*

This House, on appeal, reversed the LORD CHANCELLOR'S judgment, and restored that of Vice-Chancellor STUART.

The question in the appeal was between the plaintiffs (appellants) claiming under an indenture of mortgage described in the judgment of the Lord Chancellor (WESTBURY) as below stated, and the respondent (defendant), who was the sheriff supporting the right of the execution creditors under the circumstances described in the same judgment.

The cause was heard by Vice-Chancellor STUART, who, [194] on the 27th of July, 1860, pronounced a decree, declaring that all the property in the mill, originally there, added, and substituted, vested in the plaintiffs (2 Giff. 382, 29 L. J. Ch. 655). Lord Chancellor CAMPBELL reversed this order, (2 De G. F. & J. 596, 30 L. J. Ch. 385). This was an appeal against that reversal. The only question was as to the added and substituted property.

Mr. Malins and Mr. G. V. Yool, for the appellants, contended that the equitable mortgagees here were entitled to a preference over the execution creditor, not only as to the original, but as to the added and substituted property, their title being perfect according to the rules of equity, on which alone this case ought to be decided. No *novus actus* was necessary. It was admitted it would be different at law — *Acraman* v. *Bates*, 29 L. J. Q. B. 78; but equity ought to govern here. The judgment creditor could only take what belonged to the judgment debtor at the time of the execution. Here, nothing belonged to him. Though an assignment of the profits of an intended voyage would pass nothing at law — *Robinson* v. *Macdonnell*, 5 M. & S. 228, it will do so in equity — *In re Ship Warre*, 5 Price, 269. *Mogg* v. *Baker*, 3 M. & W. 195, 7 L. J. (N. S.) Ex. 94, is not an authority, for it proceeded on a mistaken notion of what was the rule in equity. Lord COTTENHAM had decided the reverse of what was, in that case, represented as his opinion. In this case Lord CAMPBELL proceeded on the notion that a *novus actus interveniens* was necessary: it might be so at law (*Lunn* v. *Thornton*, 1 C. B. 379, 14 L. J. C. P. 161; *Congreve* v. *Evetts*, 10 Ex. 298, 23 L. J. Ex. 273; *Chidell* v. *Galsworthy*, 6 C. B. N. S. 471; *Allatt* v. *Carr*, 27 L.

J. Ex. 385); but it was not in equity (*Wilcocks* v. *Wilcocks*, 2 Vern. 558; *Deacon* v. *Smith*, 3 Atk. 323; *Bucknal* v. *Roiston*, 1 Prec. in Ch. 285; *Curtis* v. *Auber*, 1 Jac. & W. 526; *Douglas* v. *Russell*, 4 Sim. 524, 1 Myl. & K. 488.)

Langton v. *Horton*, 1 Hare, 549, 11 L. J. (N. S.) Ch. 299, was mistaken in the Court below, for the VICE-CHANCELLOR there did not mean to put his decision on the ground of possession having actually been taken. They also referred to *Hobson* v. *Trevor*, 2 P. Wms. 191; *Beckley* v. *Newland*, 2 P. Wms. 182; *Wright* v. *Wright*, 1 Ves. sen. 409; *Metcalfe* v. *the Archbishop of York*, 6 Sim. 224, 4 L. J. (N. S.) Ch. 154; *Newlands* v. *Paynter*, 4 Myl. & Cr. 408; *Lyde* v. *Mynn*, 4 Sim. 505; *Harwood* v. *Tooke*, 2 Sim. 192.

Mr. Amphlett and Mr. Hobhouse, for the respondents. No man can mortgage his future property so as to prevent its liability to be taken in execution by a creditor, unless when it comes into existence some act is done by the mortgagee to show that he has taken possession of it. If he could, frauds would be endless. The real difference between the two Courts here was one of fact. The VICE-CHANCELLOR thought that the assignee of the mill had obtained possession, and so the *actus interveniens* had occurred. The LORD CHANCELLOR found that the mortgagee had not been in possession when the added property was introduced, and so that the *novus actus* was wanting. There had not been any difference of opinion as to the rule that ought to govern the case.

[* 195] * A mortgagor is not the agent of the mortgagee, and no trust can attach on future property, and the maxim of Bacon on which the LORD CHANCELLOR acted becomes applicable in a case like the present. When the assignee has done something to perfect his title his remedy in equity is complete, but not till then. The deed anticipated the doing of some *novus actus*, for it contains a covenant that Taylor will "do all necessary acts for securing such added or substituted machinery, so that the same may become vested accordingly." The omission to do such an act left the title of the assignee imperfect so far as the substituted and the added machinery were concerned. They commented on the cases already cited, contending that those relied on for the appellants were not applicable under the peculiar circumstances which existed here. On the other side, there were *Morse* v. *Faulkner*, 3 Swanst. 429, n., and *Carleton* v. *Leighton*, 3 Mer.

667; and in *Curtis* v. *Auber* and in *Douglas* v. *Russell* there actually was that *novus actus* which was required to make the mortgagee's title perfect. And in *Metcalfe* v. *the Archbishop of York* the person in whose favour the equitable charge was made was actually in possession. Something of the same kind was the fact in *Langton* v. *Horton*, and the words of Vice-Chancellor WIGRAM justified the construction that was put on them in the Court below.

Mr. Malins replied.

The case stood over for judgment. Lord CAMPBELL died and the Great Seal was delivered to Lord WESTBURY. The case was then re-argued.

Mr. Malins, for the appellants, renewed his former arguments, and cited in addition *Morris* v. *Cannan*, 31 L. J. Ch. 425.

Mr. Amphlett, for the respondents, insisted that *Langton* v. *Horton* clearly showed that some new act was necessary, and that no other case had shaken that decision.

Mr. Malins, in reply.

The LORD CHANCELLOR (Lord WESTBURY) said that it might be necessary to state in a few words the facts of this case, to render intelligible the opinion which he should submit to their Lordships for adoption. In the month of September, 1858, the appellants were the owners of certain machinery and implements upon a mill and buildings of which one Taylor had taken a lease. Taylor contracted with the appellants for the purchase of the machinery and implements at the sum of £5000, but being unable to pay the money the appellants, by an indenture of mortgage dated the 20th of September, 1858, assigned the machinery and implements (of which a list and description were contained in a schedule annexed to the mortgage) unto one Brunt upon trust for Taylor, until the appellants should have demanded in writing payment of the money due to them, and from and after such demand upon trust, if Taylor should pay the said sum of £5000 with interest, to assign the property to Taylor; but if default should be made in payment, upon trust to sell the property, receive the proceeds, and apply the same after payment of expenses, in discharge of the money due to the appellants, and pay the surplus to Taylor. The deed contained a covenant by Taylor to insure the property and also a covenant that all machinery and implements and things which during the continu-

ance of the security should be fixed or placed in or about the mill and buildings, in addition to or substitution for the premises or any part thereof, should be subject to the trusts, powers, provisoes and declarations thereinbefore declared and expressed concerning the premises; and that Taylor would, at the request of the appellants, do all necessary acts for assuring such added or substituted machinery, implements and things, so that the same might become vested accordingly. This deed was duly registered under the statute of the 17 & 18 Vict. c. 36. At various times prior to the 2nd of April, 1860, portions of the machinery comprised in the schedule to the mortgage-deed were sold, and other machinery added and substituted by Taylor. An account in writing of the effects so added and substituted was delivered by Taylor to the appellants before the 2nd of April, 1860. On the 2nd of April, 1860, the appellants served Taylor with a demand in writing for payment of the £5000 and interest thereon. On the 14th of April and subsequently, the machinery and effects of Taylor on the mill were seized by the sheriff under writs of execution issued on judgments recovered against Taylor subsequently to the mortgage.

After stating the facts as above, the Lord Chancellor continued: —

[10 H. L. C. 209] My Lords, the question is whether, as to the machinery added and substituted since the date of the mortgage, the title of the mortgagees or that of the judgment creditor ought to prevail. It was admitted that the judgment creditor has no title as to the machinery originally comprised in the bill of sale, but it was contended that the mortgagees had no specific estate or interest in the future machinery. It is also admitted that if the mortgagees had an equitable estate in the added machinery the same could not be taken in execution by the judgment creditor.

The question might be easily decided by the application of a few elementary principles long settled in Courts of Equity. In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, by which it is agreed to make a present transfer of property, passed at once the beneficial interest, provided the contract is one of which a Court of Equity would decree specific performance. In the language of Lord Hardwicke, the vendor

became a trustee for the vendee; subject, of course to the contract being one to be specifically performed. And this is true, not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter were such as a Court of Equity would direct to be specifically performed.

A contract for the sale of goods, as, for example, of five hundred chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell the five hundred chests of the particular kind of tea which is * now in my warehouse in [* 210] Gloucester, is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person.

The effect in equity of a mere contract as amounting to an alienation, may be illustrated by the law relating to the revocation of wills. If the owner of an estate devised it by will and afterwards contracts to sell it to a purchaser, but dies before the contract is performed, the will is revoked as to the beneficial or equitable interest in the estate, for the contract converted the testator into a trustee for the purchaser; and, in like manner, if the purchaser dies intestate before performance of the contract, the equitable estate descends to his heir-at-law, who may require the personal representative to pay the purchase-money. But all this depends on the contract being such as a Court of Equity would decree to be specifically performed.

There can be no doubt, therefore, that if the mortgage-deed in the present case had contained nothing but the contract which is involved in the aforesaid covenant of Taylor, the mortgagor, such contract would have amounted to a valid assignment in equity of the whole of the machinery and chattels in question, supposing such machinery and effects to have been in existence and upon the mill at the time of the execution of the deed.

But it is alleged that this is not the effect of the contract, because it relates to machinery not existing at the time, but to be acquired and fixed and placed in the mill at a future time. It is quite true that a deed which professes to convey property which is not in existence at the time is, as a conveyance, void at law, simply because there * is nothing to convey. So in [* 211]

equity, a contract which engages to transfer property which is not in existence, cannot operate as an immediate alienation, merely because there is nothing to transfer.

But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described, the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained.

Apply these familiar principles to the present case; it follows that immediately on the new machinery and effects being fixed or placed in the mill they became subject to the operation of the contract and passed in equity to the mortgagees, to whom Taylor was bound to make a legal conveyance, and for whom he, in the mean time, was a trustee of the property in question.

There is another criterion to prove that the mortgagee acquired an estate or interest in the added machinery as
[* 212] * soon as it was brought into the mill. If afterwards the mortgagor had attempted to remove any part of such machinery, except for the purpose of substitution, the mortgagee would have been entitled to an injunction to restrain such removal, and that because of his estate in the specific property. The result is that the title of the appellants is to be preferred to that of the judgment creditor.

Some use was made at the bar and in the Court below of the language attributed to Mr. Baron PARKE, in the case of *Mogg* v. *Baker*, 3 M. & W. 198. That learned Judge appears to have given, not his own opinion, but what he understood would have been the decision of a Court of Equity upon the case. He is

represented as speaking upon the authority of one of the Judges of the Court of Chancery. Any communication so made was of course extra-judicial, and there is much danger in making communications of such a nature the ground of judicial decision; but I entirely concur in what appears to have been the principle intended to be stated; for Mr. Baron PARKE, speaking of the agreement in the case, says, "It would cover no specific furniture and would confer no right in equity." I have already explained that a contract relating to goods but not to any specific goods, would not be the subject of a decree for specific performance, and that a contract that could not be specifically performed would not avail to transfer any estate or interest.

If, therefore, the contract in *Mogg* v. *Baker* related to no specific furniture, it is true that it would not at the time of its execution confer any right in equity; but it is *equally [*213] true that it would attach on furniture answering the contract when acquired, provided the contract remained in force at the time of such acquisition.

Whether a correct construction was put upon the agreement in *Mogg* v. *Baker* is a different question, and which it is needless to consider, as I am only desirous of showing that the proposition stated by the learned Judge is quite consistent with the principles on which this case ought to be decided.

I therefore advise your Lordships to reverse the order of Lord Chancellor CAMPBELL and direct the petition of re-hearing presented to him to be dismissed with costs.

Lord WENSLEYDALE. — My Lords, more than a year ago, when this case was argued at your Lordships' Bar, with very great ability on both sides, on behalf of the appellants by Mr. Malins and Mr. Yool, and on behalf of the respondents by Mr. Amphlett and Mr. Hobhouse, the late LORD CHANCELLOR, with that extraordinary industry which he possessed, immediately after the argument committed his opinion to paper, and I was favoured with a perusal of that opinion which I read with great attention. My noble and learned friend opposite (Lord CHELMSFORD) also committed his opinion to paper, and he favoured me with its perusal. Upon considering those opinions and the argument I had heard at the Bar, my opinion then concurred with that of the late LORD CHANCELLOR. But now that the matter has been argued a second time, and I have heard the opinion of the LORD CHANCELLOR upon

it, and find that the opinion of my noble and learned friend opposite is the same as it was before, I cannot say that I feel myself so confident in the arguments that have presented themselves to my mind as to press your Lordships to adopt them.

[*214] *I have heard the very able and very clear opinion which the Lord Chancellor has pronounced, and I cannot help saying that I think that the views which I adopted upon the subject after the first argument were not correct. I feel therefore, that I must acquiesce in the judgment proposed.

Lord Chelmsford: —

My Lords, this case, which has become of great importance, has been twice fully and ably argued, there having been a difference of opinion amongst your Lordships upon the first argument, which made it desirable that a second should take place. Upon the original argument I thought that the decree of my late noble and learned friend, Lord Campbell, could not be maintained; but I came to this conclusion with all deference due to his great legal experience, and with the more doubt as to the soundness of my views, upon finding not only that he adhered to his opinion on hearing the question argued in this House, but that he was supported in it by my noble and learned friend Lord Wensleydale, for whose judgment (it is unnecessary to say) I entertain the most sincere respect. Aware that I was opposed to such eminent authorities, I listened to the second argument with the most earnest and anxious attention; but nothing which I heard in the course of it tended to shake the opinion which I had originally formed. I should, therefore, have been compelled to state this opinion under such discouraging circumstances, if I had not happily been fortified by the concurrence of the noble and learned Lord upon the woolsack, before whom the last argument took place. His great learning and long experience in Courts of Equity justify me now in expressing myself with some confidence in a

[*215] case in which his views *coincide with mine, and which is to be decided upon equitable grounds and principles.

In considering the question, I propose to advert to the various points which were touched upon in the course of both the arguments, although upon the last occasion many were omitted which were raised upon the first. The question in the case is, whether the appellants, who have an equitable title as mortgagees of certain machinery fixed and placed in a mill, of which the mort-

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gagor, James Taylor, was tenant, are entitled to the property which was seized by the sheriff, under two writs of execution issued against the mortgagor, in priority to those executions, or either of them?

The title of the appellants depends upon a deed dated the 20th September, 1858. [His Lordship here stated the bill of sale and the other facts of the case.] The machinery sold by the sheriff was more than sufficient to satisfy the first execution, and the appellants claiming a preference over both executions, contend that the possession taken by them on the 30th April entitled them, at all events, to priority over the second execution of the 11th May. The great question, however, is, whether they are entitled to a preference over the first execution by the mere effect of their deed? or whether it was necessary that some act should have been done after the new machinery was fixed or placed in the mill, in order to complete the title of the appellants?

It was admitted that the right of the judgment creditor, who has no specific lien, but only a general security over his debtor's property, must be subject to all the equities which attach upon whatever property is taken under his execution. But it was said (and truly said) that those equities must be complete, and not inchoate or imperfect, * or, in other words, that they [* 216] must be actual equitable estates, and not mere executory rights.

What, then, was the nature of the title which the mortgagees obtained under their mortgage deed? If the question had to be decided at law, there would be no difficulty. At law an assignment of a thing which has no existence, actual or potential, at the time of the execution of the deed, is altogether void, *Robinson v. Macdonnell*, 5 M. & S. 228. But where future property is assigned and after it comes into existence possession is either delivered by the assignor, or is allowed by him to be taken by the assignee, in either case there would be the *novus actus interveniens* of the maxim of Lord BACON, upon which Lord CAMPBELL rested his decree, and the property would pass.

It seemed to be supposed upon the first argument that an assignment of this kind would not be void in law if the deed contained a license or power to seize the after acquired property. But this circumstance would make no difference in the case. The mere assignment is itself a sufficient *declaratio præcedens* in the words of the maxim; and although Chief Justice TINDALL, in the case

of *Lunn* v. *Thornton*, said, "It is not a question whether a deed might not have been so framed as to give the defendant a power of seizing the future personal goods;" he must have meant that under such a power the assignee might have taken possession, and so have done the act which was necessary to perfect his title at law. This will clearly appear from the case of *Congreve* v. *Evetts*, 10 Ex. 298, 23 L. J. Ex. 273, in which there was an assignment of growing crops and effects as a security for [*217] money lent, with a power for the *assignee to seize and take possession of the crops and effects bargained and sold, and of all such crops and effects as might be substituted for them; and Baron PARKE said, "If the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution. It gave no legal title, nor even equitable title, to any specific goods; but when executed not fully or entirely, but only to the extent of taking possession of the growing crops, it is the same in our judgment as if the debtor himself had put the plaintiff in actual possession of those crops." And in *Hope* v. *Hayley*, 5 El. & Bl. 830, 845, (a case much relied upon by the VICE-CHANCELLOR) where there was an agreement to transfer goods, to be afterwards acquired and substituted, with a power to take possession of all original and substituted goods, Lord CAMPBELL, Chief Justice, said, "The intention of the contracting parties was, that the present and future property should pass by the deed. That could not be carried into effect by a mere transfer; but the deed contained a license to the grantee to enter upon the property, and that license, when acted upon, took effect independently of the transfer."

I have thought it right to dwell a little upon these cases, both on account of some expressions which were used in argument respecting them, and also because in determining the present question it is useful to ascertain the precise limits of the doctrine as to the assignment of future property at law. The decree appealed against proceeds upon the ground, not indeed that an assignment of future property, without possession taken of it, would be void in equity (as the cases to which I have referred show that it would be at law), but that the equitable [*218] *right is incomplete and imperfect unless there is subsequent possession, or some act equivalent to it to perfect the title.

In considering the case, it will be unnecessary to examine the authorities cited in argument, to show that if there is an agreement to transfer or to charge future acquired property, the property passes, or becomes liable to the charge in equity, where the question has arisen between the parties to the agreement themselves. In order to determine whether the equity which is created under agreements of this kind is a personal equity to be enforced by suit, or to be made available by some act to be done between the parties, or is in the nature of a trust attaching upon and binding the property at the instant of its coming into existence, we must look to cases where the rights of the third persons intervene.

The respondents, in support of the decree, relied strongly on what was laid down by Baron PARKE in *Mogg* v. *Baker*, 3 M. & W. 195, 198, 7 L. J. Ex. 94, 96, as the rule in equity which he stated he had derived from a very high authority, "that if the agreement was to mortgage certain specific furniture, of which the corpus was ascertained, that would constitute an equitable title in the defendant, so as to prevent it passing to the assignees of the insolvent, and then the assignment would make that equitable title a legal one, but if it was only an agreement to mortgage furniture to be subsequently acquired, or" (the word "or" is omitted in the report) "to give a bill of sale at a future day of the furniture and other goods of the insolvent, then it would cover no specific furniture, and would confer no right in equity." The meaning of these latter words must be that there would be no complete equitable transfer of the *property because [*219] there can be no doubt that the agreement stated would create a right in equity upon which the party entitled might file a bill for specific performance.

This point is so clear that it is almost unnecessary to refer to the observations of Lord ELDON, in the case of the *Ship Warre*, 8 Price, 269, n., in support of it. It must also be observed, that the proposition in *Mogg* v. *Baker* hardly reaches the present question, because it is not stated as a case of an actual transfer of future property, but as an agreement to mortgage, or to give a bill of sale at a future day. The only equity which could belong to a party under such an agreement would be to have a mortgage or a bill of sale of the future property executed to him. It does not meet a case like the present, where it is expressly provided that

all additional or substituted machinery shall be subject to the same trusts as are declared of the existing machinery.

Under a covenant of this description to hold that that trust attaches upon the new machinery as soon as it is placed in the mill, is to give an effect to the deed in perfect conformity with the intention of the parties, and as, by the terms of the deed, Taylor was to remain in possession, the act of placing the machinery in the mill would appear to be an act binding his conscience to the agreed trust on behalf of the appellants, and nothing more would appear to be requisite, unless by the established doctrine of a Court of Equity some farther act was indispensable to complete their equitable title.

The judgment of Lord CAMPBELL resting, as he states, upon Lord BACON'S maxim, determines that some subsequent act is necessary to enable "the equitable interest to prevail against a legal interest subsequently *bonâ fide* acquired." It is agreed that this [*220] maxim relates only to *the acquisition of a legal title to future property. It can be extended to equitable rights and interests (if at all) merely by analogy; but in thus proposing to enlarge the sphere of the rule, it appears to me that sufficient attention has not been paid to the different effect and operation of agreements relating to future property at law and in equity. At law property, non-existing, but to be acquired at a future time, is not assignable; in equity it is so. At law (as we have seen), although a power is given in the deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in equity it is not disputed that the moment the property comes into existence the agreement operates upon it.

No case has been mentioned in which it has been held that upon an agreement of this kind the beneficial interest does not pass in equity to a mortgagee or purchaser immediately upon the acquisition of the property, except that of *Langton* v. *Horton*, 1 Hare, 549, which was relied upon by the respondents as a conclusive authority in their favour. I need not say that I examine every judgment of that able and careful Judge Vice-Chancellor WIGRAM with the deference due to such a highly respected authority. *Langton* v. *Horton* was the case of a ship, her tackle and appurtenances, and all oil, head matter, and other cargo which might be caught and brought home. The VICE-CHANCELLOR

decided, in the first place, that as against the assignor there was a valid assignment in equity of the future cargo. But the question arising between the mortgagees and a judgment creditor, who had afterwards sued out a writ of *fi. fa.*, his honour, assuming that the equitable title which was good against the assignor * would not, under the circumstances of the case, be avail- [* 221] able against the judgment creditor, proceeded to consider whether enough had been done to perfect the title of the mortgagees, and ultimately decided in their favour upon the acts done by them to obtain possession of the cargo.

It was said upon the first argument of this case by the counsel for the appellants that the judgment of the VICE-CHANCELLOR was, upon this occasion, fettered by his deference to the opinion apparently entertained and expressed by Lord COTTENHAM in the case of *Whitworth* v. *Gaugain*, 1 Phill. 728. It will be necessary, therefore, to direct attention for a short time to that case, and especially as it has an immediate bearing upon the present occasion. The case as originally presented before Lord COTTENHAM, was an appeal from an order of the VICE-CHANCELLOR of England appointing a receiver. The bill of the equitable mortgagees was founded entirely upon alleged fraud and collusion between the mortgagor and the tenants by elegit. The defendants had denied fraud and collusion, and also notice of the mortgagees' title at the time of obtaining possession under the elegits. The plaintiffs, in argument, attempted to set up a case not made by their bill, viz., that independently of the question of fraud, they had by law a preferable title to the defendants. The LORD CHANCELLOR discharged the order for a receiver, solely on the ground that the plaintiffs had failed in making out the case on which they asked for the interference of the Court. Upon discharging the order, Lord COTTENHAM is reported to have said that in the argument a totally different turn was given, or attempted to be given, to the plaintiffs' case; viz., that independently of the question of fraud, they had by law a * preferable title to the [* 222] defendants. " If (he added) the bill had been framed with that view, and the claim of the plaintiffs founded on that supposed equity, I should have required a great deal more to satisfy me of the validity of that equity before I could have interposed by interlocutory order, because I find these defendants in possession of a legal title, although not to all intents and purposes an

estate, yet a right and interest in the land which under the authority of an Act of Parliament they had a right to hold, the elegit being the creature of the Act of Parliament, and, therefore, they have a parliamentary title to hold the land as against all persons unless an equitable case can be made out to induce this Court to interfere." Although Vice-Chancellor WIGRAM, in *Langton* v. *Horton*, in adverting to this language, said that he thought Lord COTTENHAM intended only what his words literally expressed, that he would not interfere against the judgment creditor by an interlocutory order unless he was well satisfied of the validity of the equity to which he was called upon to give summary effect, yet it is impossible to doubt (to use the expressions of his honour) "that the strong learning of Lord COTTENHAM'S mind," was in favour of the legal right of the judgment creditor over the equitable title of the mortgagees.

This opinion, though merely expressed incidentally, would be entitled to the greatest weight upon the present question, if the law had not been since settled in opposition to it. For in consequence of the ground upon which Lord COTTENHAM discharged the order for a receiver, the plaintiffs amended their bill, and inserted a prayer for alternative relief, independent of fraud and
[* 223] collusion: and the cause having been brought on for * hearing before Vice-Chancellor WIGRAM, his honour decided that the mortgagees were entitled in equity to enforce their charge in priority to the judgment creditors of the mortgagor, although they had no notice of the equitable mortgage, and had obtained actual possession of the land by writ of elegit and attornment of the tenants.

This decision was afterwards affirmed by Lord LYNDHURST, who in the course of his judgment mentioned the case of *Abbott* v. *Stratton*, 3 J. & Lat. 603, where Sir EDWARD SUGDEN, then Lord Chancellor of Ireland, had determined that an equitable mortgagee was entitled to priority over a subsequent creditor by judgment, who was in possession by a receiver, and who had no notice of the mortgage; and referring to *Whitworth* v. *Gaugain* expressed his agreement with the conclusion to which Vice-Chancellor WIGRAM (3 Hare, 416) had come in that case, and stated that "he had repeatedly acted on the rule, that an agreement binding property for valuable consideration, though equitable only, will take precedence of a subsequent judgment, whatever may be the consideration for it, and whether it be obtained *in invitum* or by confession."

Whatever doubts, therefore, may have been formerly entertained upon the subject, the right of priority of an equitable mortgagee over a judgment creditor, though without notice, may now be considered to be firmly established; and, according to the opinion of Lord ST. LEONARDS, "any agreement binding property for valuable consideration" will confer a similar right.

It does not appear from this review of the case of *Whitworth* v. *Gaugain*, that it could have had any influence over the question in *Langton* v. *Horton*, as to the imperfection of the mortgagee's title, unless something *had been done to perfect [*224] it. The point does not appear to have been at all noticed by Lord COTTENHAM, his observations having been confined to the competition between the equitable title of the mortgagee and the legal title of the judgment creditors. *Langton* v. *Horton*, must, therefore, be accepted as an authority that there may be cases in which an equitable mortgagee's title may be incomplete against a subsequent judgment creditor. In that case the delivery of possession of the cargo on board the vessel was, as the VICE-CHANCELLOR said, "impossible, as the vessel was at sea. The parties could do nothing more in this country with reference to it than execute an instrument purporting to assign such interest as Birnie (the mortgagor) had, send a notice of the assignment to the master of the ship, and await the arrival of the ship and cargo. This was the course taken; and on the arrival of the ship at the port of London the plaintiffs immediately demanded possession." The cargo was, in point of fact, in possession of the captain as the agent for the owner, the mortgagor. It would have been rather a strange effect to give to the assignment of the future cargo, to hold that when it came into existence a trust attached upon it for the benefit of the mortgagee, that thereupon the captain became his agent, and that the mortgagee thereby acquired a perfect equitable right to the property, which was valid against all subsequent legal claimants. *Langton* v. *Horton* may have been rightly decided as to the necessity for the completion of the mortgagee's title under the circumstances which there existed, and yet it will be no authority for saying that in every case of an equitable mortgage of future property something beyond the execution of the deed and the coming into existence of the property will be necessary.

It certainly appears to be putting too great a stress *upon this case, to urge it as an authority that an equita- [*225]

ble title would have been defective if certain circumstances had not existed, when the existence of these circumstances was established in proof and made the ground of the decision.

But if it should still be thought that the deed, together with the act of bringing the machinery on the premises, were not sufficient to complete the mortgagee's title, it may be asked what more could have been done for this purpose. The trustee could not take possession of the new machinery, for that would have been contrary to the provisions of the deed under which Taylor was to remain in possession until default in payment of the mortgage money after a demand in writing, or until interest should have become in arrear for three months; and in either of these events a power of sale of the machinery might be exercised. And if the intervenient act to perfect the title in trust be one proceeding from the mortgagor, what stronger one could be done by him than the fixing and placing the new machinery in the mill, by which it became, to his knowledge, immediately subject to the operation of the deed?

I asked Mr. Amphlett, upon the second argument, what *novus actus* he contended to be necessary, and he replied "A new deed." But this would be inconsistent with the terms of the original deed, which embraces the substituted machinery, and which certainly was operative upon the future property as between the parties themselves. And it seems to be neither a convenient nor a reasonable view of the rights acquired under the deed, to hold that for any separate article brought upon the mill a new deed was necessary, not to transfer it to the mortgagee, but to protect it against the legal claims of third persons.

[* 226] *But if something was still requisite to be done, and that by the mortgagor, I cannot help thinking that the account delivered by Taylor to the mortgagees of the old machinery sold, and of the new machinery which was added and substituted, was a sufficient *novus actus interveniens*, amounting to a declaration that Taylor held the new machinery upon the trusts of the deed.

Lord Wensleydale: —

My noble and learned friend will forgive me, but that was not mentioned in the bill.

Lord Chelmsford: —

My noble and learned friend is quite correct in that; it must

be taken that that was not mentioned in the bill, and that was the answer given when I urged, in the course of the argument, that that account must be taken to be a sufficient *actus*. But still I am stating what my views are of the whole of the case. I think that the account delivered by Taylor to the mortgagees of the whole machinery which was added and substituted, was a sufficient *novus actus interveniens*, amounting to a declaration that Taylor held the new machinery upon the trusts of the deed, the only act which could be done by him in conformity with it; and it is difficult to understand for what other reason such an account should have been rendered. As between themselves, it is quite clear that a new deed of the added and substituted machinery was unnecessary, no possession could be delivered of it, because it would have been inconsistent with the agreement of the parties; and anything, therefore, beyond this recognition of the mortgagees' right appears to be excluded by the nature of the transaction.

I will add a very few words on the subject of the * notice [*227] of the claim of the mortgagees to the judgment creditor. I think that the equitable title would prevail even if the judgment creditor had no notice of it, according to the authorities which have been already observed upon. It is true that Lord COTTENHAM, in the case of *Metcalfe* v. *The Archbishop of York*, 1 Myl. & Cr. 555, 574, said that if the plaintiff, in that case, was entitled to the charge upon the vicarage under the covenant and charge in the deed of 1811, "then, as the defendants had notice of that deed before they obtained their judgment, such charge must be preferred to that judgment." This appears to imply that his opinion was, that if the judgment creditor had not had notice, he would have been entitled to priority. Much stress, however, ought not to be laid upon an incidental observation of this kind, where notice had actually been given, and where, therefore, the case was deprived of any such argument in favour of the judgment creditor. If Lord COTTENHAM really meant to say that notice by the judgment creditor of the prior equitable title was necessary in order to render it available against him, his opinion is opposed to the decisions which have established that a judgment creditor, with or without notice, must take the property, subject to every liability under which the debtor held it.

The present case, however, meets any possible difficulty upon the subject of notice, because it appears that the deed was regis-

tered as a bill of sale, under the provisions of the 17th & 18th Vict. c. 36. It was argued that this Act was intended to apply to bills of sale of actual existing property only, and it probably may be the case that sales of future property were not within the contemplation of the Legislature; but there is no ground for [*228] excluding them from the provisions of the Act; and upon the question of notice, the register would furnish the same information of the dealing with future as with existing property, which is all that is required to answer the objection.

I think that the late Lord Chancellor was right in holding that if actual possession of the machinery in question before the sheriff's officer entered was necessary, there was no proof of such possession having been taken on behalf of the mortgagee. But upon a careful consideration of the whole case, I am compelled to differ with him upon the ground on which he ultimately reversed Vice-Chancellor Stuart's decree. I think, therefore, that his decree should be reversed, and that of the Vice-Chancellor affirmed.

Mr. Malins asked the direction of the House as to costs. The Vice-Chancellor gave the costs of the sheriff below. Your Lordships have given the respondents the costs of the petition of appeal to the Court below. I understand your Lordships to confirm the decree of the Vice-Chancellor. That would include the costs of the sheriff as well as the costs of the respondents.

The Lord Chancellor: —

There can be no costs of this appeal. The petition of re-hearing to the Court below is dismissed with costs; therefore all persons affected by that petition of re-hearing will get their costs below.

The following order was afterwards entered on the Journals: —

"That the decree or decretal order of the Court of Chan- [*229] cery of the 22nd of December, 1860, be reversed; *and that the petition for re-hearing, presented by the said respondent, Emil Preller, to the Lord High Chancellor be dismissed, with costs; and that the cause be remitted back to the Court of Chancery, to do therein as shall be just, and consistent with this judgment."

Lords' Journals, 4th August, 1862.

Tailby v. Official Receiver.

13 App. Cas. 523-553 (s. c. 58 L. J. Q. B. 75; 60 L. T. 162; 37 W. R. 513).

Bill of Sale. — After-acquired Property, Assignment of. — Chose in [523] *Action. — Assignee, Title of. — Future Book Debts. — Specific Performance.*

A bill of sale assigned (*inter alia*) all the book debts due and owing or which might during the continuance of the security become due and owing to the mortgagor: —

Held, reversing the decision of the Court of Appeal, that the assignment of future book debts, though not limited to book debts in any particular business, was sufficiently defined and passed the equitable interest in book debts incurred after the assignment, whether in the business carried on by the mortgagor at the time of the assignment or in any other business.

Appeal from a decision of the Court of Appeal (18 Q. B. D. 25).

By a bill of sale made the 13th of May, 1879, H. G. Izon, described as a packing case manufacturer of 87 Parade, Birmingham, assigned to Tyrrell for valuable consideration (*inter alia*) "all and singular the stock-in-trade, fixtures, shop and office furniture, tools, machinery, implements, and effects now being or which during continuance of this security may be in upon or about the premises of the said mortgagor situate at 87 Parade aforesaid or any other place or places at which during the continuance of this security he may carry on business. . . . And also all the book debts due and owing or which may during the continuance of this security become due and owing to the said mortgagor, which fixtures, stock-in-trade, machinery, furniture, chattels, goods, effects, and debts are for the most part and as near as may be mentioned in the respective schedules hereunder written."

* In November, 1884, Tyrrell having died, his executors [* 524] assigned to Tailby, the present appellant, certain book debts (specified in a schedule) owing to Izon, and among them a debt of about £11 which had become due to him from Wilson Brothers & Co., since the bill of sale, and due notice of this assignment was thereupon given to Wilson Brothers & Co.

In December Izon became bankrupt. In January, 1885, and after the adjudication in bankruptcy, Wilson Brothers & Co. paid to Tailby the debt above-mentioned. The official receiver in Izon's bankruptcy afterwards sued Tailby in the County Court of Warwickshire for the amount of the debt as money had and received.

The County Court Judge gave judgment for the plaintiff on the ground that the assignment of future book debts generally, without any delimitation as to time, place, or amount, was too vague to be supported.

The Queen's Bench Division (HAWKINS and MATHEW, JJ.) reversed this decision and entered judgment for the defendant (17 Q. B. D. 88). That judgment was reversed by the Court of Appeal (Lord ESHER, M. R., LINDLEY and LOPES, L. JJ.), who restored the judgment for the plaintiff (18 Q. B. D. 25).

Against this judgment Tailby appealed.

April 17, 19, 20. Finlay, Q. C., and J. V. Austin for the appellant: —

There is no such general doctrine with regard to vagueness as was held in the Court of Appeal. Reading the description as including all future debts in any business carried on anywhere, this assignment is valid. Where the consideration has passed, a Court of Equity will restrain the grantor from making away with or dealing with the property in a way inconsistent with the charge, provided the description is so clear and definite that the Court can identify the property when it comes into existence. There is no rule of law or equity which prevents the covenant from attaching when the property comes into existence. The Court of Appeal said specific performance could not be granted; but this is erroneous; see per Lord CRANWORTH in *Hoare* v. *Dresser*, 7 H. L. C. 290, 317, 28 L. J. Ch. 611, 614, as to where equity [*525] *will interfere. At common law no doubt a man could not grant what he had not: Perkins' Profitable Book (translated, 1642), where the doctrine is stated in all its crudity. But the principles on which equity will enforce the assignment as a contract, are clearly laid down in the judgment of the Court of Appeal in *In re Clarke*, *Coombe* v. *Carter*, 36 Ch. D. 348, 352, where COTTON, BOWEN, and FRY, L. JJ., having before them the decision of the Court of Appeal in the present case, declined to follow it. Indeed the two cases are irreconcilable. The decision in *Holroyd* v. *Marshall*, 10 H. L. C. 191, 209, 210, 211, is strongly in favour of the appellant, but some of Lord WESTBURY'S *dicta* (which were not necessary for the decision) have been misunderstood and led to error, *e. g.* in *Belding* v. *Read*, 3 H. & C. 955, 34 L. J. Ex. 212, and *In re D'Epineuil*, 20 Ch. D. 758, 51 L. J. Ch. 491, which ought to be overruled. In *Greenbirt* v.

Smee, 35 L. T. (N. S.) 168, 170, BRAMWELL, B. is reported to have said during the argument, "If *Holroyd* v. *Marshall* is to be taken to be an authority, I am afraid that *Belding* v. *Read* is not one." Lord WESTBURY has been supposed to have laid it down that there could not be an assignable title to goods which were undetermined. His observations must be read *secundum subjectam materiem*, and clearly do not apply to property to come into existence at a future time. Two things have been confused: vagueness of description, and too great wideness. If the description is so vague that the property cannot be identified, the contract of course cannot be enforced, as in *Pearce* v. *Watts*, L. R., 20 Eq. 493, 44 L. J. Ch. 492; see also *Chattock* v. *Muller*, 8 Ch. D. 177. Also if it is so wide as to be against public policy, *e. g.* where a debtor assigns all his property, the Courts have held the contract void. But neither of these objections applies here. Property to be acquired in future is assigned every day in marriage settlements, and without objection. The cases on this subject are referred to in *Coombe* v. *Carter*, 36 Ch. D. 348, 56 L. J. Ch. 981. There are other authorities which support the appellant's contention: *Bennett* v. *Cooper*, 9 Beav. 252, 258, per Lord LANGDALE; *Harrington* v. *Kloprogge*, 2 Brod. & B. 678, n. (23 R. R. 539 *n*), where an assignment of the profits of all offices or pensions of which the defendant might become *possessed was held valid [*526] by Lord MANSFIELD: *Leatham* v. *Amor*, 47 L. J. Q. B. 581, and *Lazarus* v. *Andrade*, 5 C. P. D. 318, both following *Holroyd* v. *Marshall*, 10 H. L. C. 191; *Ex parte Games*, 12 Ch. D. 314; *Collyer* v. *Isaacs*, 19 Ch. D. 342, 351, per JESSEL, M. R.; and *Clements* v. *Matthews*, 11 Q. B. D. 808, 52 L. J. Q. B. 772, where an assignment of future crops was held valid. In *Bloomer* v. *Union Coal and Iron Company*, L. R., 16 Eq. 383, an assignment of future book debts was held valid by BACON, V. C.

[Lord MACNAGHTEN referred to *Mornington* v. *Keane*, 2 D. & J. 292; and *Fothergill* v. *Rowland*, L. R., 17 Eq. 123, 139, 43 L. J. Ch. 252, per JESSEL, M. R.]

Sir Richard Webster, A. G. and M. Muir Mackenzie for the respondent: —

Under the bankruptcy things in action pass to the trustee in bankruptcy: Bankruptcy Act 1883 (46 & 47 Vict. c. 52) s. 50 sub-s. 5. The respondent is therefore *primâ facie* entitled to this book debt. Of future book debts there can be no assignment,

nothing more than a covenant to assign. If the bankruptcy had happened before the debt came into existence it would not be denied that the trustee was entitled: *Collyer* v. *Isaacs*, per JESSEL, M. R.: "A man cannot in equity, any more than at law, assign what has no existence." How far has equity gone in enforcing such a covenant to assign? The argument on the other side amounts practically to saying that there is no limit to the power to assign future acquired property; but the authorities, beginning with *Holroyd* v. *Marshall*, clearly establish that there is some limit to the effect equity will give to such assignments. The description of the subject-matter in *Holroyd* v. *Marshall* was sufficiently precise — machinery that might be placed in a certain mill. The present case is very different: it includes all book debts in any business carried on anywhere, and even debts which were not entered in books, but which might or ought to have been.

No decision has gone so far as this. *Clements* v. *Matthews* [* 527] is not against the respondent; * the subject-matter was real estate: growing crops being part of the inheritance and in a different position from that of mere chattels, as pointed out by COTTON, L. J. Equity cannot decree specific performance of that which is not certain and specific and cannot become so. Tried by that test the description is too vague for the Court to give specific performance. This is the true test as laid down by Lord WESTBURY in *Holroyd* v. *Marshall*, 10 H. L. C. 191, 209, 210, 211 (p. 426 *ante*) and adopted in *Belding* v. *Read*, 3 H. & C. 955, 965, 34 L. J. Ex. 212, per BRAMWELL, B., and *In re D'Epineuil*. In considering whether the description is specific enough, a Court of Equity looks at it as at the date of the assignment and not when the property comes into existence.

Finlay, Q. C. in reply: —

A description is too vague only if the Court cannot see what the parties intended to deal with. There is no difference in the description required of things in action then in existence and of those not then in existence. A description may be precise and yet in one sense vague: *e. g.* "my ten shares in the L. Railway." The Court would not prevent the grantor dealing with any particular shares out of 100 held by him. A description of "all my shares in the L. Railway," though more wide, would be less vague, and equity could restrain the grantor from dealing with any of them; and that is precisely the present case. But secondly, the appel-

lant does not need the assistance of a Court of Equity. There has been a *novus actus interveniens:* the appellant has got possession of the thing in action and seeks only to retain it, not to take it from some one else. This gets rid of the difficulty suggested about specific performance — if there be a difficulty.

The House took time for consideration.

July 30. Lord HERSCHELL: —

My Lords, the short point to be determined in this case is whether an assignment by way of security of certain book debts not existing at the time of the assignment was valid, so as to *give the assignee a good title to them when they [*528] came into existence. By an indenture of the 13th of May, 1879, Henry George Izon assigned to John Tyrrell "all the book debts due and owing, or which might, during the continuance of the security, become due and owing to the said mortgagor." The debt now in question was incurred subsequently to the date of this indenture. It was not disputed by the respondent that it was a book debt which during the continuance of the security became due and owing to the mortgagor. On the 14th of November, 1884, the mortgagee's executors (under whom the appellant claims) gave notice to the debtors to pay the debt to them. The appellant having received the money, the respondent, who was the official receiver under the bankruptcy of Izon, sued in the Birmingham County Court to recover the money so received as part of Izon's estate. The County Court Judge gave judgment for the respondent and the Court of Appeal have held that he was right in so doing. They based their judgment on the ground that, as the assignment included all book debts which might thereafter become due to the assignor in any trade which he might thereafter carry on in any place, it was so vague that the Court ought to hold that nothing passed under it. The MASTER OF THE ROLLS said: "That there is a doctrine that the description may be too vague is, to my mind, beyond question. Every one of the cases that has been decided has assumed that there is such a doctrine, and in each case the Court has tried to find whether the description in the particular case was or was not too vague; but each and every of them recognises the doctrine." Now, if by "vague" be meant indefinite or uncertain, which is probably the ordinary meaning of the word, I do not think it is correct to say that the assignment in question is in that sense vague. It ap-

pears to me to be perfectly definite. It was just as capable of proof that a book debt became due to H. G. Izon in some business carried on by him as that such a debt became due in the particular business mentioned in the deed. And I do not understand the learned judges in the Court below to doubt that if the assignment had been limited to book debts becoming due in that busi-
[* 529] ness it would have been good and effectual even as * regards future debts. Nay, it is quite conceivable that it might be more difficult to identify a debt as owing in respect of a specified business than as one due in a trader's business generally. Suppose a business to expand or to have new branches added to it, there might often be a difficulty in saying whether a debt was acquired in the specified business or not.

There is no doubt that an assignment may be so indefinite and uncertain in its terms that the Courts will not give effect to it because of the impossibility of ascertaining to what it is applicable. But that is certainly not the case with such an assignment as that which we are now considering.

If by "vague" be meant wide and covering a large area, that may certainly be said of the grant which has given rise to this controversy. And the MASTER OF THE ROLLS is, I think, correct in saying that the Courts have in two cases, viz., *Belding* v. *Read*, 3 H. & C. 955, 34 L. J. Ex. 212, and *Re D'Epineuil*, 20 Ch. D. 758, 51 L. J. Ch. 491, acted upon the doctrine that an assignment of future-acquired property will be held invalid if in that sense it is too vague. The learned County Court Judge was bound by those decisions, but it is open to your Lordships to review them, and to consider whether they rest upon any sound basis. And, my Lords, I conceive that you have no alternative but to consider the question apart from authority, and to review the authorities, for to my mind it is impossible to reconcile the decision under appeal with that of the Court of Appeal in *Combe* v. *Carter*, 36 Ch. D. 348, 56 L. J. Ch. 981, without resorting to distinctions which cannot be justified on principle. In that case the mortgage security covered "all moneys of or to which the mortgagor was, or might during the security become, entitled under any settlement, will, or other document, either in his own right or as the devisee, legatee, or next of kin of his father or any other person or persons." The mortgagor became entitled under a will to a share of the residuary estate. The Court of Appeal held

that this share was covered by the mortgage. The decision in the case now before your Lordships was much pressed upon them in argument. The Court, however, consisting of COTTON, BOWEN, and FRY, L. JJ., refused to regard it as governing the case they had to decide. I * can hardly say that they dis- [* 530] tinguished it except by saying that the terms of the two instruments and the subject-matter to which they related were not identical, and that as the former case laid down no principle it was inapplicable to that before them. I confess I am unable to see any sound distinction between an instrument assigning future book debts which may become due to the assignor in any business carried on by him and one assigning future bequests and devises to which he may under any will become entitled. The subjects of both assignments are equally wide, equally incapable of ascertainment at the time of the assignment, but equally capable of identification when the subject has come into existence and it is sought to enforce the security. I think the case of *Coombe* v. *Carter* was correctly decided and that the views expressed by the learned judges are equally applicable here. That case established no new principle; it proceeded on well-settled lines. In the case of *Bennett* v. *Cooper*, 9 Beav. 252, where the security included all legacies which had already or might thereafter be given or bequeathed to the assignor or his wife by any person whomsoever, Lord LANGDALE held that legacies subsequently bequeathed to the mortgagor were bound. And few covenants are more common or have been more often given effect to than the covenant contained in marriage settlements to settle the wife's future-acquired property. It has never been doubted that these attach as soon as such property comes into existence.

The only authorities that can be cited as contrary to the view I am submitting to your Lordships, are those already referred to of *Belding* v. *Read* and *Re D'Epineuil*. In the latter case FRY, L. J. avowedly followed *Belding* v. *Read*. Another point was, however, there adverted to. The charge under consideration in that case included all the present and future personalty of the person giving it. The learned judge suggested that such a charge might be invalid as depriving the mortgagor of the power of maintaining himself. In *Coombe* v. *Carter* the Court of Appeal left open the question whether such a disposition (which would of course be without effect at law so far as regarded future-* acquired [* 531]

property) would be enforced in equity. I think your Lordships may also be content to put aside this point, which certainly does not arise in the case before you.

I cannot think that the decision in *Belding* v. *Read*, 3 H. & C. 955, 34 L. J. Ex. 212, was correct so far as it turned on the same point as has now to be decided. The assignment to the extent to which it related to after-acquired chattels was undoubtedly void at law, and the question was whether it was effectual in equity to pass the property in question. It appears to me that the view taken by the learned Judges proceeded on a misapprehension of some observations of Lord WESTBURY in *Holroyd* v. *Marshall*, 10 H. L. C. 191. That learned Lord used the following language: "If a vendor or mortgagor agrees to sell or mortgage property real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This of course assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee according to the terms of the contract." Now whatever the learned Lord meant by limiting the doctrine to the class of cases in which a Court of Equity would decree specific performance, he certainly did not intend to exclude cases in which after-acquired property fell within general descriptive words contained in the deed, for he enforced the security in that very case against such property. Nor, again, can I find any trace of the view that a Court of Equity would not enforce a contract relating to future-acquired property if it was vague, in the sense of embracing much within its terms, for, as I have pointed out, Courts of Equity have frequently enforced such contracts. I think the language used referred only to that class of cases to which he had alluded in an earlier part of his opinion, where it could not be
[* 532] predicated of any * specific goods that they fell within the general descriptive words of the grant.

In my opinion the judgment appealed from should be reversed,

and the judgment of the Queen's Bench Division restored, and the respondent should pay the costs in the Court below and the costs of this appeal, and I move your Lordships accordingly.

Lord WATSON: —

My Lords, the circumstances which have given rise to this litigation may be very shortly stated.

Henry George Izon, who at that time carried on the business of a packing-case manufacturer in Birmingham, by mortgage dated the 13th of May, 1879, assigned, for valuable consideration received, to the late John Tyrell, his stock-in-trade, and "all the book debts due and owing or which may during the continuance of this security become due and owing to the said mortgagor." In the months of October and November, 1884, Izon supplied a firm of Wilson Brothers & Co., upon credit, with goods to the value of £10 7*s.* 11*d.* The appellant, who had acquired Tyrell's interest in the debt, gave notice of the assignment to that firm, and required them to make payment of it to himself, which they accordingly did. Some time after the date of the notice Izon was adjudged bankrupt, and the respondent, who is trustee of his estate, now sues the appellant for repayment of the amount received by him from Wilson Brothers & Co.

It does not clearly appear whether the debt in question was incurred to the mortgagor in the business in which he was engaged in May, 1879, or in some other trade. In the argument addressed to your Lordships it was rightly assumed that the assignment comprehends every future book debt becoming due to Izon, in any profession or trade which may be followed by him in any place and at any time during the continuance of the security constituted by the mortgage. The respondent admitted that the liability of Wilson Brothers & Co., whenever it emerged, was, and until satisfied by payment continued to be, a proper book debt, due and owing to the mortgagor. He maintained his right to it, in competition with the appellant, upon the single ground that the assignment of future book debts, in the mortgage
* of 1879, is ineffectual to carry any equitable interest to [*533] the assignee.

The judge of the County Court of Warwickshire, before whom the suit was brought, gave judgment for the respondent. He held, in deference to the authority of *Belding* v. *Read*, 3 H. & C. 955, 34 L. J. Ex. 212, and *In re Count D'Epineuil*, 20 Ch. D. 758,

51 L. J. Ch. 491, that an assignment of future book debts generally without any delimitation of time, place, or amount, is too vague to be supported. His decision was reversed by HAWKINS, J. and MATHEW, J., who were of opinion that the case fell within the principle to which this House gave effect in *Holroyd* v. *Marshall*, 10 H. L. C. 191; but it was restored by the Court of Appeal, consisting of the MASTER OF THE ROLLS and LINDLEY and LOPES, L. JJ.

Had there not been such a conflict of judicial opinion, I should have thought that the question thus raised for decision admitted of one answer only. The rule of equity which applies to the assignment of future *choses in action* is, as I understand it, a very simple one. *Choses in action* do not come within the scope of the Bills of Sale Acts, and though not yet existing, may nevertheless be the subject of present assignment. As soon as they come into existence, assignees who have given valuable consideration will, if the new *chose in action* is in the disposal of their assignor, take precisely the same right and interest as if it had actually belonged to him, or had been within his disposition and control at the time when the assignment was made. There is but one condition which must be fulfilled in order to make the assignee's right attach to a future *chose in action*, which is, that, on its coming into existence, it shall answer the description in the assignment, or, in other words, that it shall be capable of being identified as the thing, or as one of the very things assigned. When there is no uncertainty as to its identification, the beneficial interest will immediately vest in the assignee. Mere difficulty in ascertaining all the things which are included in a general assignment, whether *in esse* or *in posse*, will not affect the assignee's right to those things which are capable of ascertainment or are identified. Lord ELDON said in *Lewis* v. *Madocks*, 8 Ves. 157 (7 R. R. 16): "If the Courts find a solid sub-
[*534] ject of personal *property they would attach it rather than render the contract nugatory."

In the case of book debts, as in the case of *choses in action* generally, intimation of the assignee's right must be made to the debtor or obligee in order to make it complete. That is the only possession which he can attain, so long as the debt is unpaid, and is sufficient to take it out of the order and disposition of the assignor. In this case the appellant's right, if otherwise valid,

was, in any question with the respondent, duly perfected by his notice to Wilson Brothers & Co. before Izon became a bankrupt.

The learned Judges of the Appeal Court were unanimously of opinion that the description of book debts in the assignment of Tyrell is "too vague," and it is upon that ground only that they have held the assignment to be invalid. The term which they have selected, in order to express what they conceived to be the radical defect of the assignment, is susceptible of at least two different meanings. It may either signify that the description is too wide and comprehensive, without implying that there will be any uncertainty as to the debts which it will include, if and when these come into existence, or it may signify that the language of the description is so obscure that it will be impossible, in the time to come, to determine with any degree of certainty to what particular debts it was intended to apply. In the latter sense the description of future book debts in the mortgage of 1879 does not incur the imputation of vagueness. No one has suggested that the expression "book debt" is indefinite; and it is, in my opinion, very clear that every debt becoming due and owing to the mortgagor, which belongs to the class of book debts (a fact quite capable of ascertainment), is at once identified with the subject-matter of the assignment.

The ground of decision in the Appeal Court was obviously this: that the description of future debts is "too vague," in the sense of being too wide and comprehensive, inasmuch as it embraces debts to become due to the mortgagee in any and every business which he may think fit to carry on. If it had been limited to debts arising in the course of the business of packing-case manufacturer, in which Izon was engaged at the date of the mortgage, the MASTER OF THE ROLLS was, as then advised, prepared * to [* 535] hold that the description would not have been too vague.

Upon that point the other members of the Court express no definite opinion, LINDLEY, L. J., merely remarking, "I do not say that an assignment of future book debts must necessarily be too vague." All of their Lordships were evidently under the impression that they were deciding the case according to a well-established equitable doctrine, which LOPES, L. J., traces to *Belding* v *Read*, 3 H. & C. 955, 34 L. J. Ex. 212.

It is unnecessary for the purposes of this case to consider how far a general assignment of all after-acquired property can receive

effect, because the assignment in question relates to one species of property only. I have been unable to discover any principle upon which the decision of the Court of Appeal can be supported, unless it is to be found in *Belding* v. *Read*. That case arose in a Court of Common Law, and, with all deference to the very learned judges who decided it, I am bound to say that, in my opinion, they misapprehended the doctrine laid down by Lord WESTBURY in *Holroyd* v. *Marshall*, 10 H. L. C. 191, which was not new doctrine, but, as the noble Lord explicitly stated, was the mere enunciation of elementary principles long settled in Courts of Equity. It is possible that the learned Judges were misled by the reference which the noble Lord makes to specific performance, an illustration not selected with his usual felicity. Not a single decision by an Equity Court was cited to us, prior in date to *Belding* v. *Read*, which gives the least support to the opinions expressed in that case, and I venture to doubt whether any such decision exists. It is true that Judges on the equity side of the Court have, in one or two instances, deferred to the views expressed in *Belding* v. *Read*, which they assumed to be an authoritative exposition of the law applied by this House in *Holroyd* v. *Marshall*; but these views conflict with the previous cases in equity, to which Lord WESTBURY referred as establishing a well-known and elementary principle. In *Bennett* v. *Cooper*, 9 Beav. 252, Lord LANGDALE, M. R., gave effect to an equitable mortgage by a debtor of "all sums of money then or thereafter to become due to him, and all legacies or bequests which had [*536] *already or might thereafter be given or bequeathed to him or his wife, by any person whomsoever." I cannot understand upon what principle an assignment of all legacies which may be bequeathed by any person to the assignor is to stand good, and effect is to be denied to a general assignment of all future book debts. As COTTON, L. J. said, in *In re Clarke*, (36 Ch. D. 353): "Vagueness comes to nothing if the property is definite at the time when the Court is asked to enforce the contract." A future book debt is quite as capable of being identified as a legacy; and in this case the identity of the debt, with the subjects assigned, is not matter of dispute. When the consideration has been given, and the debt has been clearly identified as one of those in respect of which it was given, a Court of Equity will enforce the covenant of the parties, and will not permit the

assignor, or those in his right, to defeat the assignment upon the plea that it is too comprehensive.

I am accordingly of opinion that the order appealed from ought to be reversed, and the judgment of the Divisional Court restored.

Lord FITZGERALD: —

My Lords, I feel great difficulty as to the reasons which I am about to give. Before your Lordships proceed to decide finally the abstract question which it is said that this appeal raises, it seems to me to be necessary to review and get before the House accurately the facts of the case.

[His Lordship having minutely considered the whole evidence in the cause, from which he deduced the conclusion that the whole liability of the mortgagor under the mortgages of 1879 and 1880 had been respectively discharged, and that the two deeds had become satisfied securities before any assignment to Tailby of the book debts, and consequently could afford no answer to the claim of the receiver, then proceeded as follows: —]

It might, however, be unfit to act here on suggestions of fact, though arising on the documentary evidence alone, which do not appear to have been made in any of the courts below and which certainly were not brought under the notice of the acute * and able Judge of the Court of first instance. The case [* 537] was put forward as a test case, and supposed to raise for decision the one large question on which the noble and learned Lords have just stated their conclusion.

There is, however, a view of the transactions which must be disposed of. Let us assume that the instrument of 1879 was an existing security, unsatisfied and in full force at the time of the assignment of the book debts to Tailby, and that all the steps taken by the mortgagee had been regular and effectual. The deed of 1879 had not, as to the future debts, any greater operation than as an agreement for value to assign those future debts when they came into existence. I do not now pause to consider whether equity would from time to time, as debts became due, decree specific performance of that agreement. It was at least a contract which as between the immediate parties to it had certain efficacy, and was not wholly inoperative. If, for instance, as to future-acquired chattels coming within its provisions the mortgagee had managed peaceably to gain actual possession of them, he could retain that possession as against the mortgagor; and so if, claim-

ing to be entitled under his deed, to receive a future accruing debt, he had demanded and received payment of it from the debtor, the mortgagor could not recover from the mortgagee the sum he had so received. Let us see how this case stands in this respect. The deed of 1879 contains an assignment of future debts and also that comprehensive appointment by the mortgagor of the mortgagee as his attorney, to execute for him and in his name assignments of these future rights, when and as they should arise either to himself or to any other person, and also a power to receive those debts when and as they became payable and give full and effectual discharges for them, a power in fact to do for himself and in virtue of that authority all that a Court of Equity could do for him if there had been no difficulties in the way of obtaining relief from that tribunal. There is nothing in law to prohibit the mortgagor from conferring such an authority on the mortgagee, or to prevent parties from helping themselves if they can lawfully do so.

The whole of the steps taken in November were lawful and unobjectionable, and the parties were competent to take
[*538] them. *The deed of 1879 professed to pledge these future debts to the mortgagee and conferred on him large and exceptional powers to enforce that pledge. His representatives availed themselves of their powers and position to enforce their rights, and did all that they could lawfully do as equivalent to taking possession and determining reputed ownership: see *In re Hennessy*, 2 Dr. & War. 555. The mortgagor certainly did not oppose, and the proper inference is that he acquiesced. If Tailby had received the amount of Wilson's debt before the adjudication in January, 1885, his title to retain it against the receiver would not be open to any question. Does the adjudication before actual payment and the intervention of the receiver make any difference? The latter does not appear to have intervened until the following month of May; the payment was actually made by Wilson in January previous. The assignee, trustee, and receiver in bankruptcy derive their title to the estate through the bankrupt and subject to the rights and equities which would affect it in the hands of the bankrupt, save where by statute for the protection of creditors overreaching rights are conferred upon them. There is no allegation that the adjudication here had any retrospective operation, nor is it alleged that the transactions with Tailby were

tainted with any fraud, nor can I discover any satisfactory ground on which the receiver can override the proceedings of November which were binding on the bankrupt, and recover the money actually paid over in January.

It seems to me, therefore, though I express the view with hesitation, that the action of the receiver in the County Court fails, that he is not entitled to recover the money received by Tailby from Wilson, and that the defendant Tailby is entitled to judgment. If, my Lords, I am correct in this view, no further question arises — the decision of the Court of Appeal and of the County Court Judge should be reversed, and the judgment of the Divisional Court should be restored.

My Lords, in the course of the argument at the bar some of these considerations were thrown out for discussion, but it was said in reply that this was "a test case" to elicit your Lordships' decision on an abstract question of great public importance.

*The MASTER OF THE ROLLS is represented to have put [*539] the question thus: "It seems to me that according to the ordinary rules of construction, the deed of 1879 applies to the book debts which may become due to Izon in any trade which he may hereafter carry on anywhere, that is, any trade which it may please him during the continuance of the security, or which it may be for his benefit to carry on in any part of England, any part of Wales, any part of Scotland, or in any part of France, Germany, Ireland, or Amercia. That is the true reading, and is that, or is it not, within the doctrine that the description of these book debts is so vague that the Court will hold that nothing passed under it?" It is not quite certain that this is critically correct, and the question would seem rather to be whether the description of the future debts professed to be assigned by the deed of 1879 was so vague and so uncertain that the mortgagee could not so far actively enforce it in any Court of Justice. I decline to decide test questions, merely because the case is called "a test case." What is a test case? Probably it is meant to represent a case in which some question of law necessarily arises, governing some other like cases, and to which your Lordships are required to apply the crucial test of the judgment of the House.

My Lords, when such a case comes before the House, your Lordships must and do decide it, but it is not the province of the House to decide abstract questions which are not actually neces-

sary, as the foundation of the judgment of the House. The question has not, up to the present moment, been finally decided. It is one of no inconsiderable difficulty and involves considerations of public policy. What construction is to be put on "future book debts?" Does it mean the trade debts entered in the trader's books, or does it mean the net residue of those debts after satisfying the claims of those creditors by means of whose property those debts came into existence? Would an account have to be taken, as in the case of the trading of a bankrupt after bankruptcy, and without certificate, and debts becoming due to him in that second trading, and claimed by the assignee as after-acquired property? see *Troughton* v. *Gitley*, Amb. 630. The reports [*540] of *Ambler were not unfrequently questioned, but the decree, taken from the registrar's book, is given in the note to *Tucker* v. *Hernaman*, 4 D. M. & G. 396, and the decision in *Troughton* v. *Gitley*, Amb. 630, was adopted by TURNER, L. J.

Suppose, too, in the case of future debts, that the mortgagor had obtained bills and notes or other securities from his debtors, how are the rights and liabilities of the parties to be adjusted? Or suppose a trader to become bankrupt, his assets consisting largely of recent book debts, representing his stock in trade, out of which they were created; are those book debts to go to the holder of a bill of sale, probably some years old, not registered, and of which the real creditors had no notice?

I allude only to these possible contingencies as illustrating some of the difficulties that beset the question, and indicating the inexpediency of carrying the law a step further than it has hitherto gone in practice.

My Lords, in a case recently before the House, your Lordships considered that the policy of the Bills of Sale Act of 1882 was to prohibit, in cases coming within its provisions, bills of sale of property not in existence, but which might be acquired thereafter, *Thomas* v. *Kelly*, 13 App. Cas. 506. Your Lordships are now asked to give effect to an instrument which, though a bill of sale of future debts of the most unlimited and undefined character, does not as to book debts come within the Bills of Sale Code.

My Lords, I have listened to the weighty reasons given by my noble and learned friends, and I have read the judgment to be delivered by my noble and learned friend who is to follow me. That judgment is one of great learning and ability and remark-

able for its boldness. I have weighed all the reasons so powerfully given, and hope your Lordships will excuse me if, for the present, I hesitate, and, for the reasons I have given, decline to express either assent to or dissent from the conclusions of my noble and learned friends.

The course which I have deemed it expedient to adopt renders it unnecessary for me to consider the authorities.

* Lord MACNAGHTEN: — [* 541]

My Lords, I venture to think that this case is free from difficulty when the facts are understood.

Izon was a packing-case manufacturer. In 1879 he compounded with his creditors. At Izon's request, Tyrrell signed promissory notes for the last instalment of the composition, taking from Izon a bill of sale as a counter-security.

The bill of sale is dated the 13th of May, 1879. It assigns to Tyrrell by way of mortgage, among other property, all the stock-in-trade and effects which during the continuance of the security might be on the mortgagor's then premises, or at any other place at which during the continuance of the security he might carry on business, and also (to quote the words of the deed) "all the book debts due and owing, or which may during the continuance of this security become due and owing to the said mortgagor." Then there is a power of attorney in the most ample terms; a proviso that if the mortgagor on demand fails to pay the amount due, the mortgagee may take possession and sell the property in mortgage; and a proviso that until default the mortgagor may use and enjoy all the mortgaged premises; and lastly, there is a covenant for further assurance. Another bill of sale was given in 1880, but I need not refer to it; it was admitted at the bar that it had no bearing on the question before your Lordships.

I pause for a moment to point out the nature and effect of the security created by the bill of sale of 1879. It belongs to a class of securities of which perhaps the most familiar example is to be found in the debentures of trading companies. It is a floating security reaching over all the trade assets of the mortgagor for the time being, and intended to fasten upon and bind the assets in existence at the time when the mortgagee intervenes. In other words, the mortgagor makes himself trustee of his business for the purpose of the security. But the trust is to remain dormant until the mortgagee calls it into operation.

No. 4. — Tailby v. Official Receiver, 13 App. Cas. 541, 542.

The business in the immediate contemplation of the parties was, of course, the business in existence at the date when the bill of sale was given. But the assignment is not limited to that; it extends to any business which the mortgagor may carry [*542] *on during the continuance of the security. That was an obvious, and, if not forbidden by law, a proper precaution. A tradesman who has been unfortunate in his business is perhaps as likely to try a change as one who has been uniformly successful. The draftsman I think would have shewn more simplicity than skill if he had left it in the power of the mortgagor to imperil or defeat the security by altering his business, or by transferring his capital to some other enterprise.

In reliance on the arrangement I have described, Tyrrell paid a large sum to Izon's creditors. But he seems to have been content with his security; and Izon continued to trade without any interference on his part, and apparently without any alteration in the character of the business. In 1885 the executors of Tyrrell, who was then dead, thought fit to call in the money due to his estate. They demanded payment. They took possession of the mortgaged premises, so far as it was practicable to do so, and they sold the book debts.

Among the book debts which were sold was one which had recently become due from Messrs. Wilson Brothers & Co. The purchaser at once gave notice to them. The next thing that happened was that Izon became bankrupt. After that Messrs. Wilson Brothers & Co. paid the purchaser.

The Court of Appeal has held unanimously that the official receiver is entitled to recover the money from the purchaser. Your Lordships have now to determine whether that decision is right.

The question is not complicated by any circumstances other than those I have mentioned. The transaction between Izon and Tyrrell is not impeached as fraudulent under the Act of Elizabeth, or on any other ground. Nor is it necessary to consider the provisions of the Bills of Sale Acts. *Choses in action* are expressly declared not to be personal chattels within the meaning of those Acts.

The grounds on which my noble and learned friend opposite has founded his opinion were not dicusssed at the bar, nor is there, I think, sufficient evidence before your Lordships to enable your Lordships to act on them.

The claim of the purchaser was rested on well-known principles. *It has long been settled that future pro- [*543] perty, possibilities, and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial, provided the intention of the parties is clear. To effectuate the intention, an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor, and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified.

The position of the purchaser was assailed on one point, and one point only. It was not disputed that Tyrrell gave valuable consideration for the bill of sale, or that Tyrrell's executors were within their rights in selling whatever was comprised in the security. It was not denied that the debt purchased was a book debt which became due and owing to Izon during the continuance of the security, nor was any question raised as to the sufficiency of the notice which the purchaser gave to Messrs. Wilson Brothers & Co. The contention of the learned counsel for the respondent was this: They asserted as a proposition of law that an assignment of future book debts not limited to any specified business is too vague to have any effect. Starting from that proposition they asked your Lordships to come to the conclusion that the assignment of book debts in the present case was void from the beginning, as including in its terms book debts which could not be made the subject of valid assignment. I do not stop to consider whether that is a necessary or legitimate conclusion. It is a startling result certainly, and I shall have a word to say about it by-and-by. At present I am merely inquiring whether the original proposition is sound. In the leading judgment in the Court of Appeal it is said that the doctrine which covers the proposition is well established, because "in every one of the cases in point that were cited its existence has been assumed." The principle of the doctrine, however, is not stated; the doctrine itself is not defined; the cases which are supposed to be in point are not reviewed or even named. But the high authority of the learned Judges who have adopted this view makes it necessary to examine the matter closely. The learned counsel for the respondent gave your Lordships every *assistance that ingenu- [*544]

ity and industry could supply; and the result of their labours may fairly be summed up as follows: The origin of the doctrine, modern though it be, is lost in obscurity. Before *Holroyd* v. *Marshall*, 10 H. L. C. 191, no support for it can be found. Possibly it may be evolved from *Holroyd* v. *Marshall*. Lopes, L. J., seems to think so. It assumed a definite form in *Belding* v. *Read*, 3 H. & C. 955, 34 L. J. Ex. 212. It was recognised by Fry J., in *In re Count D'Epineuil*, 20 Ch. D. 758, 51 L. J. Ch. 491, and it received the stamp of authority from what was said or implied by two of the learned Judges who decided *Clements* v. *Matthews*, 11 Q. B. D. 808, 52 L. J. Q. B. 772. No other authority or semblance of authority was produced. My Lords, I have read *Holroyd* v. *Marshall* many times, and I can discover no trace of the doctrine there. *Belding* v. *Read*, as Bowen, L. J., points out, was founded upon a misapprehension of Lord Westbury's judgment in *Holroyd* v. *Marshall*. In *In re Count D'Epineuil* the learned Judge, as he stated in *In re Clarke*, 36 Ch. D. 348, 56 L. J. Ch. 981, thought himself bound by *Belding* v. *Read*, and simply followed the decision in that case. As for the order made in *In re Count D'Epineuil*, it seems to me to have been only too favourable to the claimant. I much doubt whether a memorandum like that on which the claimant relied could create a specific lien of any sort or kind. Finally, Cotton, L. J., has himself disclaimed the hidden meaning attributed to his judgment in *Clements* v. *Matthews*.

So much for authority. What foundation is there for the doctrine apart from authority? The learned counsel for the respondent did not pretend to be wiser than the Court of Appeal. They, too, neither defined the doctrine the aid of which they invoked, nor stated any principle on which it could be supposed to rest. They contented themselves with endeavouring to maintain the proposition that an assignment by a trader of future book debts not confined to a specified business is too vague to be effectual. Why should this be so? If future book debts be assigned, the subject-matter of assignment is capable of being identified
[* 545] as and when the book debts come into existence, * whether the description be restricted to a particular business or not. Indeed the restriction may render the task of identification all the more difficult. An energetic tradesman naturally develops and extends his business. One business runs into another,

and the line of demarcation is often indistinct and undefined. The linen-draper of to-day in the course of a few years may come to be the proprietor of an establishment providing everything that man wants, or woman either, from the cradle to the grave. In such a case I can easily conceive that difficult questions might arise if the book debts assigned were limited to a particular business.

It was admitted by the learned counsel for the respondent, that a trader may assign his future book debts in a specified business. Why should the line be drawn there? Between men of full age and competent understanding ought there to be any limit to the freedom of contract but that imposed by positive law or dictated by considerations of morality or public policy? The limit proposed is purely arbitrary, and I think meaningless and unreasonable. The rule laid down by the Court of Appeal would not help to identify or ascertain the subject-matter of the contract in any case. It might have the opposite effect. It would be no benefit to the assignor's general creditors. It might prevent a man from raising money on the credit of his expectations in his existing business — on that which is admitted to be capable of assignment — in consequence of the obvious risk that some alteration in the character of the business might impair or defeat the security.

Under these circumstances I think your Lordships will come to the conclusion that the proposition on which the respondent relies as the foundation of his case cannot be supported on principle, and that the authorities on which it was supposed to rest may be traced to a decision of the Court of Exchequer which itself is founded on an erroneous view of the principles recognised in this House in *Holroyd* v. *Marshall*.

My Lords, I should wish to say a few words about *Holroyd* v. *Marshall*, because I am inclined to think that *Belding* v. *Read* is not the only case in which Lord WESTBURY'S observations
*have been misunderstood. To understand Lord WEST- [*546]
BURY'S judgment aright, I think it is necessary to bear in mind the state of the law at the time, and the point to which his Lordship was addressing himself. *Holroyd* v. *Marshall*, 10 H. L. C. 191, laid down no new law, nor did it extend the principles of equity in the slightest degree. Long before *Holroyd* v. *Marshall* was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the

property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim which Lord THURLOW said he took to be universal, "that whenever persons agree concerning any particular subject, that, in a Court of Equity, as against the party himself, and any claiming under him, voluntarily or with notice, raises a trust:" *Legard* v. *Hodges*, 1 Ves. Jr. 478 (2 R. R. 146). It had also been determined by the highest tribunals in the country, short of this House — by Lord LYNDHURST as LORD CHANCELLOR in England, and by Sir EDWARD SUGDEN as LORD CHANCELLOR in Ireland — that an agreement binding property for valuable consideration had precedence over the claim of a judgment creditor. Some confusion, however, had recently been introduced by a decision of a most eminent judge, who was naturally less familiar with the doctrines of equity than with the principles of common law. In that state of things, in *Holroyd* v. *Marshall*, in a contest between an equitable assignee and an execution creditor, STUART, V. C., decided in favour of the equitable assignee. His decision was reversed by Lord CAMPBELL, L. C. in a judgment which seemed to strike at the root of all equitable titles. Lord CAMPBELL did not hold that the equitable assignee obtained no interest in the property the subject of the contract when it came into existence. He held that the equitable assignee did obtain an interest in equity. But at the same time he held that the interest was of such a fugitive character, so shadowy, and so precarious, that it could not stand against the legal title of the execution creditor, without the help of some new act to give it substance and strength.

[*547] *It was to this view, I think, that Lord WESTBURY addressed himself; and by way of shewing how real and substantial were equitable interests springing from agreements based on valuable consideration, he referred to the doctrines of specific performance, illustrating his argument by examples. One of the examples, perhaps, requires some qualification. That, however, does not affect the argument. The argument is clear and convincing; but it must not be wrested from its purpose. It is difficult to suppose that Lord WESTBURY intended to lay down as a rule to guide or perplex the Court, that considerations applicable to cases of specific performance, properly so-called, where the contract is executory, are to be applied to every case of equitable

assignment dealing with future property. Lord SELBORNE has, I think, done good service in pointing out that confusion is sometimes caused by transferring such considerations to questions which arise as to the propriety of the Court requiring something or other to be done in specie (*Wolverhampton and Walsall Railway Company* v. *London and North Western Railway Company*, L. R., 16 Eq. 433). His Lordship observes that there is some fallacy and ambiguity in the way in which in cases of that kind those words "specific performance," are very frequently used. Greater confusion still, I think, would be caused by transferring considerations applicable to suits for specific performance — involving, as they do, some of the nicest distinctions and most difficult questions that come before the Court — to cases of equitable assignment or specific lien where nothing remains to be done in order to define the rights of the parties, but the Court is merely asked to protect rights completely defined as between the parties to the contract, or to give effect to such rights either by granting an injunction or by appointing a receiver, or by adjudicating on questions between rival claimants.

The truth is that cases of equitable assignment or specific lien, where the consideration has passed, depend on the real meaning of the agreement between the parties. The difficulty, generally speaking, is to ascertain the true scope and effect of the agreement. When that is ascertained you have only to apply the principle that equity considers that done which ought to be done, *if that principle is applicable under the circum- [*548] stances of the case. The doctrines relating to specific performance do not, I think, afford a test or a measure of the rights created. There are cases where the rights of the parties may be worked out by means of specific performance, though no specific lien is effected by the agreement itself. More frequently a specific lien is effected though no case of specific performance is contemplated. Take the case of *Mornington* v. *Keane*, 2 D. & J. 292. There Lord MORNINGTON covenanted that he would, on or before a specified day, either by a charge on freehold estates in England or Wales or by an investment in the Funds, or by the best means which might be then in his power, secure the payment of an annuity to a trustee for his wife. The LORD CHANCELLOR did not doubt that the covenant would entitle the covenantee to have it performed in specie, but still it was held by the Court

that the covenant of itself created no lien on the covenantor's property. Take the present case. The rights of the parties are completely defined by the bill of sale. Though there is the usual covenant for further assurance, it is plain that no further deed was contemplated. Yet no one can doubt that if Izon had attempted to receive outstanding book debts after the mortgagee had intervened, the Court would at once have lent its assistance by the appointment of a receiver. The case of *Metcalfe* v. *Archbishop of York*, 1 My. & Cr. 574, is, I think, a good illustration of the argument I am presenting to your Lordships. In 1811 an incumbent charged his benefice with an annuity, and covenanted that if he should be preferred to any other benefice he would charge it with the annuity, and that in the meantime it should stand charged therewith, and there was a covenant for further assurance. At the date of the deed the charge was not illegal, for the statute of Elizabeth had been repealed in 1803. In 1814 the incumbent was preferred to another living. In 1817 charges on ecclesiastical benefices were again prohibited by the Act 57 Geo. III., c. 99. No legal charge upon the new living had been executed before that Act passed. A question afterwards arose between the person entitled to the annuity and judgment creditors in possession under a sequestration. It was argued by Mr. Jacob for the [* 549] judgment creditors * that, as specific performance would be in contravention of the statute, the equitable title must fail. It was contended that the covenant was all one, and that it amounted only to a covenant for a legal charge which was prohibited by law before any attempt was made to enforce it. But the Lord Chancellor was of opinion that that was not the true construction of the deed, and that there was an equitable charge independently of the covenant to execute a legal charge. It was then said for the defendants that all equitable charges rest upon specific performance and the right to have a legal charge. Lord Cottenham, however, replied, "This is by no means so," and he affirmed the Vice-Chancellor's judgment giving effect to the equitable charge. There the contract for a legal charge would have raised a case of specific performance. But specific performance of that contract was out of the question. The contract for an equitable charge raised no question of specific performance. A contract for value for an equitable charge is as good an equitable charge as can be. It could not be made any better, though the

aid of the Court might be required to protect or to give effect to it. Mr. Jacob's argument (to cite the words of the report, p. 549) was this: "The whole doctrine of equitable charges rests on the right to specific performance, for a person having an equitable charge has no estate or interest." Lord COTTENHAM summarily rejected the proposition. Lord WESTBURY demolished the foundation on which it was put. And, oddly enough, the proposition is now supposed to be established by Lord WESTBURY'S authority.

It may be said that this is a question of words. To a great extent it is so; most questions are. But I venture to think that the discussion is not out of place, because I observe that LINDLEY, L. J., from whom I differ on a point of equity with much reluctance, was led to disregard the rights of the purchaser in the present case in consequence of the difficulties presented to his mind by the application of the doctrines of specific performance.

In the course of the argument your Lordships were referred to a recent case, *In re Clarke*, *Coombe* v. *Carter*, 35 Ch. D. 109, 36 Ch. D. 348. In principle I am unable to distinguish that case from the present, though others * have been [* 550] more fortunate. *In re Clarke*, 35 Ch. D. 109, 36 Ch. D. 348, was the case of a mortgage. So is this. The contest there, as it is here, was with the mortgagor's general creditors. The assignment which gave rise to the question in that case was an assignment of any moneys to which the mortgagor might be entitled under any will. A charge on book debts in a business not yet established, and perhaps not even thought of, is at best a doubtful security. Most people would think it speculative. Some might call it visionary. But the same terms might be applied without any great impropriety to a charge on a possible legacy from an unknown friend or secret admirer. As to vagueness, whatever that expression may mean, I cannot see that the one can be more vague than the other. In *In re Clarke* the charge was enforced against a legacy which happened to come to the mortgagor some years after the mortgage was made. The judgment of KAY, J., was read to your Lordships. And a very able and exhaustive judgment it is. No one is more familiar with the doctrines of equity than that learned judge. But I gather from his remarks that if he had not been pressed with the decision now under appeal he would have treated the case as a matter of course not open to argument.

No. 4. — Tailby v. Official Receiver, 13 App. Cas. 550, 551.

My Lords, I need hardly say that I think the decision in *In re Clarke* unquestionably correct, and I should add nothing more about it but that I find that some of the learned judges have drawn a distinction which I confess I am unable to appreciate. It was said that both in *Clements* v. *Matthews*, 11 Q. B. D. 808, and *In re Clarke*, the contract was divisible, but that in the present case the contract is indivisible. My Lords, I am not sure that I quite understand what is meant by saying that the contract is divisible in cases of this description. The contract is not, I think, divisible in the usual acceptation of the word. The consideration is not intended to be apportioned, nor can that for which the consideration is given be said to be divisible except in the sense that it consists of a collection of things capable of separation or division without destruction. To say that an assignment by a trader of all future book debts in his present business and also of all future book debts in any other business [*551] * which he may hereafter undertake, is divisible, but that an assignment of all his future book debts is not divisible, seems to me to be attributing substance and reality to the merest verbal distinction. In the present case LOPES, L. J., says "here the words are not capable of being read distributively." The rest of the Court take the same view. And *in Re Clarke*, COTTON and FRY, L. JJ., both seem to think the point material. Can it really make any difference that the several things for which the mortgagee has bargained, and on the faith of which he has advanced his money, are lumped together in one single expression, if, in fact, they have a separate existence, or are capable of being dealt with separately? Brevity has its dangers or its advantages, if equity will absolve a man from his bargain merely because he has packed into a sentence or compressed into a word a description of particulars which might have been set forth at large and expanded under several heads or sub-divisions. This is a question, remember, between the original parties to the bargain. The contract cannot be avoided for the benefit of the mortgagor's creditors unless it is held not binding as between the mortgagor and the mortgagee. Even in an executory contract I apprehend it is not competent for the vendor to say, "I cannot give you all I promised, and so you shall have nothing." The purchaser is entitled to take what the vendor can give him, and as a general rule he is also entitled to a corresponding abatement in the price. But

when the consideration has actually passed, it is difficult to suppose anything less consonant with equity than a rule which should lay down that a man who has had the benefit of the contract may escape from its burthen merely because he has promised what he can perform and something more too, and promised it all in one breath, and in the most compendious language. Surely the other party to the contract ought to have a voice in the matter. He may, perhaps, think half a loaf better than no bread, especially when he has paid for the whole and the seller is not in a position to return any part of the price.

My Lords, when I find such a concurrence of opinion in favour of a view which seems to me to be contrary to equity, I may perhaps be forgiven for referring to one authority, a very old one, * but none the worse, I think, for that. *Betteswortb* [* 552] v. *Dean and Chapter of St. Paul's*, 1 Bro. P. C. 240, was decided in this House in 1728. The facts are rather complicated, but the point may be stated shortly. Before the disabling statute of Elizabeth the dean and chapter granted a lease for a long term with a covenant for renewal for ninety-nine years. In 1725, a bill was brought to enforce the covenant, or to compel the dean and chapter, who had had the benefit of the agreement, to grant a renewal for such a term as might by law be granted. The case was twice argued in Chancery. On the second occasion the Lord Chancellor was assisted by Raymond, L. C. J., Jekyll, M. R., and Price, J. The Court (the Master of the Rolls dissenting) declared that the plaintiffs were not entitled to any relief either in law or equity; and so the bill was dismissed. On appeal, the objections which had prevailed in the Court below were repeated. It was urged that the grant of a lease for ninety-nine years was prohibited by the statute, and that the covenant was one entire covenant, which could not be varied or divided. "In answer to these objections," to quote the words of the report, which gives the arguments of counsel at length, but not the reasons for the judgment, "it was said to be a harsh way of reasoning that because a person was now supposed to be prohibited from doing the whole of what he had agreed to do, he therefore should not do what was in his power and was lawful for him to perform, or to say that because part of a thing was taken away the whole must be so too, though part was still reserved; and in truth such construction and reasoning were apprehended to be inconsistent with the rules of

equity." All the Judges having been consulted, the House took that view, and it was ordered and adjudged that the decree should be reversed, and that the dean and chapter should make a new lease for forty years.

In the result, therefore, and for the reasons I have given, I am of opinion that the case of the respondent entirely fails. The original proposition is not, I think, well founded. If it were sound, the conclusion attempted to be drawn from it could not, as it seems to me, be maintained.

I have, therefore, no hesitation in concurring in the motion which has been proposed.

[* 553] * Lord WATSON: —

My Lords, with reference to what fell from my noble and learned friend opposite (Lord FITZGERALD), I desire to explain that I do not understand the present to be a test case in any other sense than this, that a question of some general importance is fairly raised by the actual facts, as these have been stated by the parties, in both Courts below as well as in this House. I purposely abstain from expressing any opinion upon the matters of fact discussed in the judgment of my noble and learned friend, because I am not satisfied that we have before us sufficient materials for their decision, and they were not referred to in the arguments of counsel.

Lord HERSCHELL: —

My Lords, I desire to express my concurrence with what my noble and learned friend on my left (Lord WATSON) has said. I certainly did not understand this appeal to be a test case upon a question not raised by the facts. I did not enter into the discussion of the points raised by my noble and learned friend on my right (Lord FITZGERALD) because they were not adverted to in the courts below, nor was any reliance placed upon them by any of the counsel at your Lordships' bar.

Order appealed from reversed; order of the Queen's Bench Division restored; the respondent to pay to the appellant his costs in the Court of Appeal and the costs of the appeal in this House; cause remitted to the Queen's Bench Division.

Lords' Journals, 30th July, 1888.

ENGLISH NOTES.

The decision of the House of Lords in the latter of the above principal cases does away with a conflict of decisions in regard to a supposed limitation of the equitable doctrine contained in the above rule. It had been strongly maintained on the authority of some expressions of Lord WESTBURY, in the former of the principal cases, that the doctrine was limited to cases where the contract relied on as an equitable assignment was one of the class of contracts of which a Court of Equity would decree the specific performance. Until the decision of the House of Lords in the latter of the principal cases, this limitation of the doctrine had the high authority of the decision of the Exchequer Chamber in *Belding* v. *Read* (1865), 2 H. & C. 955, 34 L. J. Ex. 212, 11 Jur. (N. S.) 547, 13 L. T. 66, 13 W. R. 867. In a number of subsequent cases the decisions turned upon the question whether the case in point could be distinguished from *Belding* v. *Read*. But in *Clements* v. *Matthews* (C. A. 1883), 11 Q. B. D. 808, 52 L. J. Q. B. 772, the doctrine of *Belding* v. *Read* was expressly assailed by Lord Justice BOWEN, who asked (11 Q. B. D. at p. 817): "Is a bill of sale too vague because it says that the grantee shall have all the future property of the grantor on Blackacre, and on all other premises which may happen to be his thereafter? I should think if the matter rested on one's natural instinct that as soon as the property by its coming into existence becomes sufficiently ascertained to fulfil the description of the contract, it ought to be bound by the terms of the contract." A similar view was again expressed by the same learned authority in *Re Clarke*, *Coombe* v. *Carter* (C. A. 1887), 36 Ch. D. 348, 56 L. J. Ch. 981, 57 L. T. 823, 36 W. R. 293. He reiterated the view that "vagueness" in the original description was not an objection to the assignment taking effect upon property when it has come into existence and is capable of being identified as that to which the contract refers. He at the same time guarded himself from expressing an opinion as to the effect of a contract embracing all property generally. "It is suggested (he says, 36 Ch. D. 355) that, as distinct from vagueness, there may be such wideness in a contract that it ought not to be enforced by a Court of Equity. Thus it is said that a contract by a man to assign all the property that shall come to him would be too wide to be enforced. I will give no opinion on that point till it comes before us for decision." These judgments of Lord Justice BOWEN are here cited as showing that (with perhaps the reservation last mentioned) that very high authority was prepared to concur in the general principles subsequently enunciated in the judgments of Lord HERSCHELL, Lord WATSON,

and Lord MACNAGHTEN, (and particularly by the last named) in the latter of the above principal cases. It seems clear, upon the authority of these judgments, not only that *Belding* v. *Read* is overruled, but that all expressions in any of the judgments in this class of cases which limit the doctrine of equitable assignment by the requirement of specific definition are no longer authorities.

It may, therefore, be safely affirmed — subject perhaps to the question on which Lord Justice BOWEN reserved his opinion in *Re Clarke, Coombe* v. *Carter*, (p. 473, *supra*), as to the effect of an assignment of property generally — that the only limits to the effectual operation of an assignment of future property are the Bankrupt laws (including the common law principles as to frauds on creditors) and the Bills of Sale Acts. The restriction imposed by the Bills of Sale Act 1882 is illustrated by *Thomas* v. *Kelly* (H. L. 1888), 5 R. C. 117. It will be remembered that this Act does not apply to Bills of Sale given otherwise than by way of security for money. So that, under the vesting clause in an ordinary building contract, the chattels brought on the premises vest in the landowner, as upon an executory sale of goods, *Reeves* v. *Barlow* (C. A. 1884), 12 Q. B. D. 436, 53 L. J. Q. B. 192. In such a case indeed the legal title becomes vested. But an assignment by way of mortgage, although property within the description has come into existence, creates a right which is a mere equity, until the mortgagee intervenes by taking possession. *Joseph* v. *Lyons* (C. A. 1884,— a case of after-acquired chattels under a bill of sale registered before 1882), 15 Q. B. D. 280, 54 L. J. Q. B. 1; 51 L. T. 740, 33 W. R. 145. See to similar effect, *Collyer* v. *Isaacs* (C. A. 1881), 19 Ch. D. 342, 51 L. J. Ch. 14, 45 L. T. 567, 30 W. R. 70; *Hallas* v. *Robinson*, (C. A. 1885), 15 Q. B. D. 288, 54 L. J. Q. B. 364, 33 W. R. 246. Where goods have come into the hands of a person under a commercial contract under which that person has no right until they come into possession, but, on their coming into possession, has acquired the right to retain them, the transaction is in effect a legal pledge, and the Bills of Sale Acts have no application. *Morris* v. *Delobbel-Flipo* (STIRLING, J., 11 Mar. 1892), 1892, 2 Ch. 352, 61 L. J. Ch. 518, 66 L. T. 320, 40 W. R. 492.

The husband by his marriage settlement covenanted to settle his estate and interest in any property or estate of or to which he should become possessed or entitled during the marriage by devise, bequest, purchase, or otherwise. He effected policies of insurance on his life and died without settling them. The Court of Appeal, giving judgment shortly after the decision of the House of Lords in *Tailby* v. *Official Receiver*, held that the settlor's interest in the policies was bound by the covenant. The Court held that the effecting of the

policies was a "purchase" within the meaning of the covenant, but left the question open how they would have dealt with the question if the policies could only have been brought in under the general words of the covenant. *In re Turcan* (C. A. 1888), 40 Ch. D. 5, 58 L. J. Ch. 101, 59 L. T. 712, 37 W. R. 70.

The two principal cases were cited by STIRLING, J. in *Re Pyle Works*, (1889, affirmed C. A. 1890), 44 Ch. D. 534, 557, 59 L. J. Ch. 489, as an authority for holding that a mortgage of uncalled capital of a company binds the proceeds of a call when paid. See to same effect the decision of the Judicial Committee in *Newton* v. *Anglo-Australian Investment Co.* (6 March 1895), 1895, A. C. 244, 64 L. J. P. C. 57, 72 L. T. 305, 43 W. R. 401.

A question came before the Irish Court of Appeal in *Bannatyne* v. *Ferguson* (6 Dec. 1895), 1896, 1 Ir. Rep. 149; arising out of a not uncommon expression in a Scotch marriage contract, whereby the husband by marriage-contract bound himself, his heirs, &c. "out of the first and readiest of his means estate and effects" to pay the wife's jointure. There was a subsequent obligation to secure the annuity out of certain land in Ireland. The Court of Appeal, affirming the judgment of the VICE CHANCELLOR, held that the former clause was not intended to create a charge upon the settlor's estate generally, and that the general estate was accordingly not charged in priority to creditors. They reserved their opinion — following the example of Lord Justice BOWEN in *Re Clarke, Coombe* v. *Carter* (cited at p. 473, *ante*) — as to what would be the effect of an assignment by way of charge of property generally.

AMERICAN NOTES.

This subject is pretty fully examined by the present writer in his manual on Sales, chap. 4. It is there said: "At law one cannot bind himself by a sale of what he does not then own, but which he expects to acquire and afterwards does acquire; as for example a take of fish. *Low* v. *Pew*, 108 Massachusetts, 347; 11 Am. Rep. 357; *Jones* v. *Richardson*, 10 Metc. (Mass.) 481; *Williams* v. *Briggs*, 11 Rhode Island, 176; 23 Am. Rep. 518; *Gittings* v. *Nelson*, 86 Illinois, 591; *Hunter* v. *Bosworth*, 43 Wisconsin, 583; *Parker* v. *Jacobs*, 14 South Carolina, 112; 37 Am. Rep. 724. *Contra: Frazer* v. *Hilliard*, 2 Strobhart (So. Car.), 309; especially as between the parties: *Deering* v. *Cobb*, 74 Maine, 332; 43 Am. Rep. 596. The same is true of an expected interest in an estate: *Needles* v. *Needles*, 7 Ohio State, 433; 70 Am. Dec. 85. Most of these cases discuss the question of the power to mortgage, but the principle is the same. In *Low* v. *Pew*, the holding was that a sale of fish hereafter to be caught passes no title to the fish when caught. This is put on the ground that the fisher has no property in the fish until caught, the court observing: 'It is equally well settled that it is sufficient if the seller has a potential interest in the thing sold. But a mere possibility or expectancy of acquiring property, not coupled

with any interest, does not constitute a potential interest in it, within the meaning of this rule. The seller must have a present interest in the property, of which the thing sold is the product, growth, or increase. Having such interest, the right to the thing sold, when it shall come into existence, is a present vested right, and the sale of it is valid. Thus a man may sell the wool to grow upon his own sheep, but not upon the sheep of another; or the crops to grow upon his own land, but not upon land in which he has no interest. 2 Kent Com. (4th ed.), 468 (641), note *a*; *Jones* v. *Richardson*, 10 Metc. 481; *Bellows* v. *Wells*, 36 Vt. 509; *Van Hoozer* v. *Cory*, 34 Barb. 9; *Grantham* v. *Hawley*, Hob. 132.' See *Parker* v. *Jacobs*, 14 South Carolina, 112; 37 Am. Rep. 724. The attempt to sell in such cases seems as ineffectual to pass title as the proposal of the Adversary to the Saviour on the mountain to give him all 'the kingdoms of the world.'

"In equity however the subsequently acquired title works a binding sale as between the parties. *Holroyd* v. *Marshall*, 10 H. L. Cas. 191; 2 Story (U. S. Circ. Ct.), 630; *Brett* v. *Carter*, 2 Lowell (U. S. Circ. Ct.), 458; *Pennock* v. *Coe*, 23 Howard (U. S. Sup. Ct.), 117; *Morrill* v. *Noyes*, 56 Maine, 458; 96 Am. Dec. 486; *Phila., etc. Co.* v. *Woelpper*, 64 Pennsylvania State, 366; 3 Am. Rep. 596; *Phillips* v. *Winslow*, 18 B. Monroe (Kentucky), 431; 68 Am. Dec. 729; *Sillers* v. *Lester*, 48 Mississippi, 513; *Pierce* v. *Milwaukee, &c. R. Co.*, 24 Wisconsin, 551; 1 Am. Rep. 203; *Smithurst* v. *Edmunds*, 14 New Jersey Equity, 408; *McCaffrey* v. *Woodin*, 65 New York, 459; 22 Am. Rep. 644; *Williams* v. *Winsor*, 12 Rhode Island, 9; *Butt* v. *Ellett*, 19 Wallace (U. S. Sup. Ct.), 544; *Apperson* v. *Moore*, 30 Arkansas, 56; 21 Am. Rep. 170. But *contra*: *Phelps* v. *Murray*, 2 Tennessee Chancery, 746; *Hunter* v. *Bosworth*, 43 Wisconsin, 583; *Blanchard* v. *Cooke*, 144 Massachusetts, 225. 'It is now established, upon indisputable authority, that a contract for the sale and future delivery of a commodity of a designated kind or class, which the seller does not own, and which was at the time in actual existence, but which may be supplied by purchase in the market at the proper time, is a valid contract, provided it is the intention of the parties, or of one of them, at the time the contract is made, that the commodity shall actually be procured by the seller, and supplied to the purchaser, at or before the maturity of the agreement. *Cobb* v. *Prell*, 15 Fed. Rep. 774; 22 Am. Law Reg., N. S., 609, and note; *Crawford* v. *Spencer*, 92 Missouri, 498; 1 Am. St. Rep. 745, and notes.' *Sondheim* v. *Gilbert*, 117 Indiana, 71; 10 Am. St. Rep. 23.

"As to the potential existence of the natural product or increase of something already belonging to the vendor, this is the proper subject of a sale, and the purchaser may take the property when it comes into existence. As the unborn young of animals, during or even before gestation: *Hull* v. *Hull*, 48 Connecticut, 250; *McCarty* v. *Blevins*, 5 Yerger (Tennessee), 195; 26 Am. Dec. 262; *Fonville* v. *Casey*, 1 Murphey (Nor. Car.), 389; 4 Am. Dec. 559; *Sawyer* v. *Gerrish*, 70 Maine, 254; 25 Am. Rep. 323. So of a crop then sown or growing on the seller's land: *Cotten* v. *Willoughby*, 83 North Carolina, 75; 35 Am. Rep. 561; *Stephens* v. *Tucker*, 55 Georgia, 543: *Wiant* v. *Hays*, 38 West Virginia, 681: 23 Lawyers' Rep. Annotated, 82; *Sanborn* v. *Benedict*, 78 Illinois, 309: *Wilkinson* v. *Ketler*, 69 Alabama, 435; *Polley* v. *Johnson*, 52 Kansas, 478; 23 Lawyers' Rep. Annotated, 258. Or even to be planted or

grown thereon: *Andrews* v. *Newcomb*, 32 New York, 417; *Rawlings* v. *Hunt*, 90 North Carolina, 270; *Hurst* v. *Bell*, 72 Alabama, 336; *Watkins* v. *Wyatt*, 9 Baxter (Tennessee), 250; 40 Am. Rep. 90; *Everman* v. *Robb*, 52 Mississippi, 653; 24 Am. Rep. 682; *Heald* v. *Builders' Ins. Co.*, 111 Massachusetts, 38; *Smith* v. *Atkins*, 18 Vermont, 461; *Cutting Packing Co.* v. *Packers' Exchange*, 86 California, 574; 21 Am. St. Rep. 63; *Arques* v. *Wasson*, 51 California, 620; 21 Am. Rep. 718; *Headrick* v. *Brattain*, 63 Indiana, 438; *Moore* v. *Byrum*, 10 South Carolina, 452; 30 Am. Rep. 58; *Conderman* v. *Smith*, 41 Barbour (N. Y. Sup. Ct.), 404; 'the butter and cheese to be made this season:' *Van Hoozer* v. *Cory*, 34 Barbour, 9, an admirable treatment of the topic. But *contra*: *Hutchinson* v. *Ford*, 9 Bush (Kentucky), 318; 15 Am. Rep. 711; mortgage by lessee of crop to be raised but not yet sown on the leased land: *Rochester Distilling Co.* v. *Rasey*, 142 New York, 570; mortgage on crops to be planted, as against purchaser at subsequent execution sale: *Redd* v. *Burrus*, 58 Georgia, 574; *Comstock* v. *Scales*, 7 Wisconsin, 159; *Gittings* v. *Nelson*, 86 Illinois, 591; *Shaw* v. *Gilmore*, 81 Maine, 396." In *Hutchinson* v. *Ford*, *supra*, the court say: "When the crop is growing, although not matured, it may be sold or mortgaged; but when the fruit is to be obtained from the tree that is hereafter to blossom and form it, or the grain to be grown on ground thereafter to be sown, it is difficult to conceive how such an existence can be given it as to make it the subject of an executed contract, by which the title passes to the purchaser. Agreements to sell may be made with reference to such potential interests, but no such agreement as would vest the party buying with any title.' The precise contrary is explicitly held in *Watkins* v. *Wyatt*, and *Moore* v. *Byrum*, *supra*. In the former the court say: 'The question presented is, whether a crop of cotton yet to be planted is the subject of a valid mortgage; and the adjudged cases seem to be very much in conflict on the subject. A humane policy would seem to favor the affirmative of the proposition, as if such is the law, the indigent farmer may obtain credit upon his prospects, and be enabled to subsist his family pending the cultivation of his crop. The crop has a potential existence because it was to be the natural product and expected increase of the land then owned by him.' It is admitted that if the seed is sown the sower may sell or mortgage the crop the next moment. It really seems a foolish distinction to say that ownership and power to confer title depend on some motions of the seller's hand and the fall of seed upon the earth. Undoubtedly one could sell the wool to grow on his sheep instantly after shearing and before the new clip had begun to grow, and there is no just difference between the cases. In *Hull* v. *Hull*, 48 Conn. 250; 40 Am. Rep. 165, this doctrine was held concerning colts to be foaled; and very similar is *Sawyer* v. *Gerrish*, 70 Me. 254; 25 Am. Rep. 323."

A mere possibility is not assignable; as for example, a physician's accounts to be earned in future years. *Skipper* v. *Stokes*, 42 Alabama, 255; 94 Am. Dec. 646, and note, p. 649.

Assignment of wages to be thereafter earned under an existing employment is valid, although the employment is for no definite time. *Kane* v. *Clough*, 36 Michigan, 436; 24 Am. Rep. 599, a useful collection of the authorities; *Mulhall* v. *Quinn*, 1 Gray (Mass.), 105; 61 Am. Dec. 414; *Thayer* v.

Kelley, 28 Vermont, 19; 65 Am. Dec. 220; *Field* v. *Mayor*, 6 New York, 179; 57 Am. Dec. 437: "Whatever doubts may have heretofore existed on this subject, the better opinion I think now is, that courts of equity will support assignments, not only of *choses in action*, but of contingent interests and expectations, and of things which have no present actual existence, but rest in possibility only, provided the agreements are fairly entered into, and it would not be against public policy to uphold them. Authorities may be found which seem to incline the other way, but which upon examination will be found to have been overruled, or to have turned upon the question of public policy." To the same effect: *Norton* v. *Whitehead*, 81 California, 263; 18 Am. St. Rep. 172; *Manly* v. *Bitzer*, 91 Kentucky, 596; 34 Am. St. Rep. 242; *Warren* v. *First N. Bank*, 149 Illinois, 9; 25 Lawyers' Rep. Annotated, 746.

It has even been held that equity will uphold an assignment of wages expected to be earned in the future, although not under a present employment or contract. *Edwards* v. *Peterson*, 80 Maine, 367; 6 Am. St. Rep. 207, citing *Holroyd* v. *Marshall*.

In *Fairbanks* v. *Sargent*, 117 New York, 320; 6 Lawyers' Rep. Annotated, 475, an agreement by a suitor that his attorney shall have a fixed share of any recovery in an action to be brought and conducted by him was held valid.

Section III. — *Priorities.*

No 5. — DEARLE *v.* HALL.

(1823, 1828.)

RULE.

Where A., having a beneficial interest present or future by a right available against B., assigns his interest to C., and subsequently assigns the same interest to D: — If, before B. has received any intimation of the assignment to C., D. gives notice to B. of the assignment to him, D. has a better equity than C.

Dearle v. Hall.

3 Russell, 1–60 (s. c. 2 L. J. (O. S.) Ch. 62).

Equitable Assignment. — Notice. — Priorities.

A person having a beneficial interest in a sum of money, invested in the [1] names of trustees, assigns it for valuable consideration to A., but no notice of the assignment is given to the trustees; afterwards, the same person proposes to sell his interest to B., and B., having made inquiry of the trustees as to the

nature of the vendor's title, and the amount of his interest, and receiving no intimation of the existence of any prior incumbrance, completes the purchase, and gives the trustees notice: B. has a better equity than A. to the possession of the fund, and the assignment to B., though posterior in date, is to be preferred to the assignment to A.

* The case arose out of the following transactions: — [* 2]

Peter Brown, by his will, dated the 11th of September, 1794, after bequeathing some legacies, and giving an annuity of £40 to a granddaughter, made the following disposition of a part of the residue of his personal estate and of the money to arise by the sale of his real estates: — "I do hereby direct my said executrix and executors, and the survivors and survivor of them, and the executors and administrators of such survivor, to place one moiety of the said residue of my personal estate, and of the money to arise from the sale of my real estates, out at interest upon government or real security, during the life of my son Zachariah Brown, and to pay the interest and produce thereof unto him my said son Zachariah Brown during his life."

Ann Bircham, William Foster the elder, William Foster the younger, and William Unthank, the executrix and executors of Peter Brown, had invested the clear residue of the testator's estate, amounting to £4600, on real securities: and the share of the interest yielded by these securities, which was payable to Zachariah Brown, came to about £93 a year. Mr. Unthank was a solicitor, and took the principal share in the management of the testator's estate.

By an indenture, bearing date on the 19th of December, 1808, and made and executed by and between Zachariah Brown of the first part, Charles Martin Demages of the second part, William Birtham of the third part, and William Dearle of the fourth part, — (reciting, that Zachariah Brown was, under the last will of his father Peter Brown, entitled for life to the yearly annuity of £93, issuing out of a moiety of Peter Brown's residuary estate, and which was then paid to him by * Ann Bircham, William [* 3] Foster the elder, William Foster the younger, and William Unthank, the executors and executrix of Peter Brown; that Zachariah Brown had agreed, in consideration of the sum of £204, to sell to Dearle an annuity of £37 a year during the natural life of him Zachariah Brown, the payment of which was to be secured by the covenant and warrant of attorney of Zachariah Brown, and also of Charles Martin Demages, and William Bircham, who had agreed to

become jointly and severally sureties for him), — it was witnessed, that, in pursuance of the said agreement, and of the sum of £204 paid to Zachariah Brown, they, Zachariah Brown, and Charles Martin Demages, and William Bircham, did, for themselves, their executors and administrators, jointly and severally covenant with William Dearle, his executors, administrators, and assigns, that they, their heirs, executors, or administrators, or some or one of them, should pay or cause to be paid unto William Dearle, his executors, administrators, and assigns, during the natural life of Zachariah Brown, one annuity of £37, free of and clear from all taxes, charges, and deductions, by equal quarterly payments, on the 19th of March, the 19th of June, the 19th of September, and the 19th of December, in every year.

The indenture further witnessed, that, "for the better and more effectually securing the payment of the aforesaid annuity, he, Zachariah Brown, granted, bargained, sold, and assigned unto William Dearle, his executors, administrators, and assigns, all and singular the yearly sum or annuity of £93, and all arrears thereof, yearly arising or growing, and to which he, Zachariah Brown, was entitled for life, under the will of Peter Brown, and all the estate, right, title, interest, trust, property, benefit, claim, and demand of him Zachariah Brown in, to, or out of the same," to have and take all the interest, dividends, and proceeds of the aforesaid [*4] stocks * or sums, and all other the premises thereby assigned, in as ample and beneficial a manner as he, Zachariah Brown, was then entitled to the same; but, nevertheless, upon trust to permit and suffer Zachariah Brown and his assigns to receive and take the same, until default should be made for the space of twenty-one days in payment of some quarterly instalment of the annuity, or some part thereof; and upon further trust, in case any quarterly instalment of the annuity, or any part thereof, should happen to be in arrear or unpaid for the space of twenty-one days next after any of the days or times aforesaid, then that William Dearle, his executors, administrators, or assigns, should receive and take the thereby assigned interest, dividends, and proceeds, and should thereout, in the first place, retain and satisfy to himself and themselves the costs of receiving the same, or otherwise attending the performance of the trusts thereby declared; and, in the next place, should thereout retain, reimburse, and satisfy to himself or themselves the said annuity, or so much thereof as should be then in arrear, and should pay, or otherwise permit and suffer him Zachariah Brown, or his

assigns, to receive and take the residue or surplus thereof, if any, to and for his and their own use and benefit. This declaration of trust was followed by a proviso making the annuity redeemable. A memorial of this indenture, and of the warrant of attorney mentioned in it, was enrolled.

By another indenture, bearing date on the 26th of September, 1809, and made and executed by and between Zachariah Brown of the first part, William Bircham of the second part, and Caleb Sherring of the third part, — (reciting Zachariah Brown's title under his father's will; that he had contracted to sell an annuity of £27 for his own natural life to Caleb Sherring, which, it had been agreed, should be secured by the covenant and warrant * of [*5] attorney of Zachariah Brown and William Bircham, as his surety; and that Zachariah Brown and William Bircham had, for that purpose, jointly and severally executed a warrant of attorney to confess judgment in the sum of £300;) — it was witnessed, that, in pursuance of the said agreement, and in consideration of the sum of £150, they, Zachariah Brown and William Bircham, did for themselves, their heirs, executors, and administrators, jointly and severally covenant to pay or cause to be paid to Caleb Sherring, his executors, administrators, and assigns, from thenceforth during the natural life of Zachariah Brown, one annuity of £27, free and clear of and from all taxes, charges, and deductions, by equal quarterly payments, on the 26th of December, the 26th of March, the 26th of June, and the 26th of September: and it was thereby further witnessed, that, for the "better and more effectually securing the payment of the aforesaid annuity," Zachariah Brown granted, bargained, sold, and assigned unto Caleb Sherring, his executors, administrators, and assigns, the above-mentioned yearly sum or annuity of £93, and all arrears thereof. This assignment took no notice of the indenture of the 19th of December, 1808, but was expressed in similar language, and was upon similar trusts. A memorial of this second indenture, and of the warrant of attorney mentioned in it, was enrolled.

The annuity of £37 was paid up to the 19th of June, 1811, and that of £27, up to the 26th of June, 1811. From those dates both annuities had been unpaid; save only that, in May, 1813, Dearle, having arrested the surety, Demages, in an action upon the covenant, compelled him to pay the arrears of his annuity for one year and three quarters, up to the 19th of March, 1813.

Notwithstanding these assignments, Brown, early in 1812,
[*6] advertised his life-interest in the £93 for sale as *an unincumbered fund; and this advertisement led to a negotiation with Joseph Hall, who proposed to become the purchaser. Hall's solicitor, Mr. Patten, used all due diligence in scrutinising Brown's title; and, in a correspondence which took place between him and Mr. Unthank, the acting executor, he inquired of Mr. Unthank the exact amount payable to Brown, and called for every information respecting the fund and the title.

No notice of the assignments to Dearle and Sherring had been given to the executors; and as Mr. Unthank was in complete ignorance of the existence of such instruments, none of his letters made any mention of or allusion to any incumbrance as affecting the property. Under these circumstances, the contract between Brown and Hall was carried into effect, by an indenture dated the 20th of March, 1812, made between Joseph Hall of the one part, and Zachariah Brown of the other part; which, after reciting Brown's title and contract with Hall, witnessed, that, for the sum of £711 3*s.* 6*d.*, Zachariah Brown thereby assigned unto Joseph Hall, his executors, administrators, and assigns, all the annual income, interest, and dividends of the moiety of the residuary estate of Peter Brown, consisting (among other things) of the several sums of money due upon certain mortgages and securities specified in an annexed schedule, to receive and take the interest and dividends from the 25th of December then last past, during Zachariah Brown's life. Brown also covenanted for quiet enjoyment, and that he had done no act to encumber the fund; and he constituted Hall, his executors, administrators, and assigns, the attorney and attorneys of him, Brown, for the purpose of receiving the dividends. The executors of Peter Brown had been requested to become parties to the deed, but had refused.

[*7] *On the 25th of April, Hall served a written notice on the executors, requiring them to pay to him, as assignee of Zachariah Brown, the moiety of the dividends of the residuary fund during Brown's life; and, in July, 1812, Unthank remitted to Hall £31 12*s.* 10*d.* on account of the yearly dividends so assigned. On the 17th of October following, the executors, for the first time, received notice of the assignments to Dearle and Sherring; and they thenceforward declined to pay the interest to any of the claimants, until their rights should be ascertained.

No. 5. — Dearle v. Hall, 3 Russ. 7, 8.

The material parts of the correspondence between Hall's solicitor and the executors are stated by the MASTER OF THE ROLLS in his judgment.

On the 17th of June, 1819, Dearle and Sherring filed their bill against Hall, Zachariah Brown, the sureties for the payment of their respective annuities, and the personal representatives of Peter Brown. The bill charged, that, even if Hall had given the executor notice of his assignment before Dearle and Sherring gave notice of their incumbrances, the preferable title, which they acquired by reason of the prior date and execution of the instruments under which they claimed, could not be prejudiced by that circumstance; that Hall did not, before he completed his purchase, make or cause to be made any inquiries of the executors of Peter Brown, for the purpose of ascertaining whether they had received notice of any incumbrances affecting the funds out of which the annuity was to be paid; that it was incumbent on Hall and his agents, before the completion of his purchase, to have searched, or caused search to be made, at the proper offices, for the purpose of ascertaining whether there were any prior incumbrances affecting the funds; that he and they were *guilty of laches [*8] in omitting to make such search; and that, if such search had been made, Hall would have ascertained that the plaintiffs were entitled respectively to their annuities of £37 and £27. The prayer in substance was, that the arrears and growing payments of the annuity of £93 a year might be applied in satisfying to the plaintiffs, according to their priorities, what should be found due to them on their several annuities, and their costs in recovering the same; and that the executors of the testator might be restrained from paying any part of the arrears or growing payments of the £93 a year to Hall, or to any other person than the plaintiffs, until all the arrears due to them in respect of their annuities should have been satisfied.

Hall, by his answer, relied on the indenture of the 20th of March, 1812, and the priority of his notice; submitting to the judgment of the Court, whether the plaintiffs were not bound to have given to the executors of Peter Brown, within a reasonable time, and before March, 1812, notice of the assignments made to them respectively — whether, by having omitted to give such notice, till after the execution of the defendant's indenture of assignment, they were not precluded in a Court of Equity from having any

benefit of their assignments as against him — and whether they ought not to resort, for the payment of their annuities, to their personal remedies against Zachariah Brown and his sureties?

Hall further stated, that, before the execution of the assignment to him, and the completion of his purchase, he, by his solicitors, made inquiries of the executors respecting the title of Zachariah Brown to the dividends in question, and respecting the securities on which the fund was invested; and that, though a corre-
[*9] spondence *on the subject took place between his solicitor and Unthank, the acting executor, no notice or intimation of the existence of any incumbrance on Brown's life interest was given to him, Hall, or to any person on his behalf, either by the executors or by any other individual. But he admitted, that he did not, before he completed his purchase, make, or cause to be made, any inquiries of the executors of Peter Brown expressly for the purpose of ascertaining, whether they had received notice of any incumbrance or incumbrances affecting Zachariah Brown's life-interest in the moiety of the dividends of the residuary estate; and that he did not make, or cause to be made, any search at any of the offices, in order to ascertain whether any such incumbrances existed. He insisted, also, on some alleged defects in the memorials of the annuities granted to the plaintiffs.

Zachariah Brown stated by his answer, that, at the date of the assignment to Hall, he believed the former annuities to have been redeemed.

A former bill, filed for the same purpose as the present, had been suffered to be dismissed for want of prosecution.

The executors had paid into Court the arrears of the dividends of Zachariah Brown's moiety of the residuary fund.

Mr. Sugden and Mr. Phillimore, for the plaintiffs.

Mr. Horne and Mr. Barber, for Hall.

Mr. Roupell, for the trustees.

[*10] *The point contended for by the plaintiffs was, that, *primâ facie*, the priority of their assignments gave them a preferable title to the possession of the fund, and that nothing had been done which afforded a sufficient reason for postponing them.

The defendant, Hall, on the other hand, argued, that, by giving the first notice to the trustees, he had first done all that could be done to make the title to an equitable interest in a personal chattel complete; that the plaintiffs, on the other hand, by omitting to

give notice of their incumbrances, had chosen to remain satisfied with an imperfect title, and had enabled Brown to commit a fraud; and that, under such circumstances, the equity of him, Hall, though arising under an instrument of later date, was a better equity than theirs.

It was admitted in the argument, that there was no direct authority upon the point; but a case of *Wright* v. *Lord Dorchester*, 3 Russ. 49, was referred to, in which it appeared from an interlocutory order made by Lord ELDON, that the inclination of his opinion was in favour of the purchaser who gave the first notice, as against a prior purchaser who gave no notice.

July 1, 1823. Sir THOMAS PLUMER, M. R.,

Went through the facts of the case, and stated his opinion, that Hall's claim was to be preferred to that of the plaintiffs. The principle, on which he chiefly relied, was, that the plaintiffs had been negligent; and in consequence of their negligence, third parties had been involved in transactions which could not have taken place, if the first purchasers, by omitting to communicate their claims to the legal holders of the fund, had not put it out of the power of those legal holders, though acting with *perfect fairness and honesty, to represent to the subsequent purchaser the true state of circumstances; that, where a first purchaser, by his negligence, placed a subsequent purchaser, who had acted with all due caution, in such a situation, that loss must fall either upon the one or the other, he, who had been in default, and had caused the mischief, ought not to be saved harmless at the expense of an innocent party; that, under such circumstances, the general rule of priority ought to be qualified, and that he, who stood first in point of time, ought to be postponed to a competitor claiming under an instrument of later date, who had been informed by the legal holder of the fund, that there were no incumbrances affecting it, and who gave that legal holder notice of his purchase, before notice had been given of any other incumbrance. [*11]

But as the point did not appear to have been expressly determined in any preceding case, and was of great importance, his Honour declined coming to any final judgment in the cause, till the question was again argued.

December 3, 1823. The case was again argued, by Mr. Sugden for the plaintiffs, and by Mr. Barber for the defendant Hall.

December 26. Sir THOMAS PLUMER, M. R.

No. 5. — Dearle v. Hall, 3 Russ, 11–13.

It is observable, in the first place, that the right, which Zachariah Brown had under the will of his father, was simply a right to a chose in action. The legal interest in the residue was vested in the executrix and executors; and they were to hold this moiety of the residue so long as Zachariah Brown lived. They were to pay him the dividends during his life; but it is clear, from the terms of the will, that they were not to part with the legal interest.

[*12] *Dearle, when he entered into this contract, seems to have been anxious to secure the payment of the annuity in many different modes. He took the precaution to have, not only Brown's covenant, but the joint and several security of Demages and Wm. Bircham; he took also a warrant of attorney to confess judgment. In fact, the fund in question was the last security resorted to, and is specified as a further and collateral security.

One of the terms of the contract was, that Brown and his assigns were to be permitted to receive the £93 a year, until default should be made for the space of twenty-one days in payment of the annuity. Not only, therefore, was the contract not followed by possession of the fund, but there was an express stipulation to the contrary; so that the transaction with Dearle, at the time when it happened, was nothing more than an equitable contract for a collateral security, to be issuing out of a chose in action, not followed by equitable possession, nor by any thing tantamount thereto. It was not possible for Brown to transfer the legal interest: that could not but remain with the executors; but wherever it is intended to complete the transfer of a chose in action, there is a mode of dealing with it which a court of equity considers tantamount to possession, namely, notice given to the legal depositary of the fund. Where a contract, respecting property in the hands of other persons, who have a legal right to the possession, is made behind the back of those in whom the legal interest is thus vested, it is necessary, if the security is intended to attach on the thing itself, to lay hold of that thing in the manner in which its nature permits it to be laid hold of, — that is, by giving notice of the contract to those in whom the legal interest is. By such notice the legal holders are converted into trustees for the new purchaser, and are charged with responsibility towards

[*13] *him; and the *cestui que trust* is deprived of the power of carrying the same security repeatedly into the market, and

of inducing third persons to advance money upon it, under the erroneous belief that it continues to belong to him absolutely free from incumbrance, and that the trustees are still trustees for him, and for no one else. That precaution is always taken by diligent purchasers and incumbrancers: if it is not taken, there is neglect; and it is fit that it should be understood, that the solicitor, who conducts the business for the party advancing the money, is responsible for that neglect. The consequence of such neglect is, that the trustee of the fund remains ignorant of any alteration having taken place in the equitable rights affecting it: he considers himself to be a trustee for the same individual as before, and no other person is known to him as his *cestui que trust*. The original *cestui que trust*, though he has in fact parted with his interest, appears to the world to be the complete equitable owner, and remains in the order, management, and disposition of the property as absolutely as ever; so that he has it in his power to obtain, by means of it, a false and delusive credit. He may come into the market to dispose of that which he has previously sold; and how can those, who may chance to deal with him, protect themselves from his fraud? Whatever diligence may be used by a *puisne* incumbrancer or purchaser, — whatever inquiries he may make in order to investigate the title, and to ascertain the exact state of the original right of the vendor, and his continuing right, — the trustees, who are the persons to whom application for information would naturally be made, will truly and unhesitatingly represent to all who put questions to them, that the fund remains the sole absolute property of the proposed vendor. These inconveniences and mischiefs are the natural consequences of omitting to give notice to trustees; and they must be considered as foreseen by *those who, in transactions of that [*14] kind, omit to give notice; for they are the consequences which, in the experience of mankind, usually follow such omissions. To give notice is a matter of no difficulty: and whenever persons, treating for a chose in action, do not give notice to the trustee or executor, who is the legal holder of the fund, they do not perfect their title; they do not do all that is necessary in order to make the thing belong to them in preference to all other persons; and they become responsible, in some respects, for the easily foreseen consequences of their negligence.

It was as easy for Dearle, or his solicitor, to have given notice

in 1808 of the equitable contract with Brown, as in 1812. In not doing so, he was guilty of negligence, — of gross negligence, which exposed the property to all that has since happened; — which enabled Brown to practise on another innocent individual so as to induce him to lend his money, without any suspicion of the existence of a preceding conveyance; — which, leaving the trustees in ignorance of the fact, led them into the erroneous belief, that Brown was the owner of the whole equitable right, and induced them to represent him as the owner to the individual who, at a period long subsequent, became the purchaser of the fund. In June, 1811, Dearle's annuity fell into arrear, and from that time was in arrear for much more than twenty-one days. Dearle had then a right to take immediate possession of the fund; yet he allowed Brown to continue in undisturbed enjoyment of it, and for more than a year afterwards, he took no step towards obtaining possession of the £93 a year, which was a collateral security for the payment of what was due to him. Not even then did he give notice of the existence of his incumbrance to the executors; and they continued to hand over the income to Brown, as the only person having any claim to it.

[*15] *The deed under which the other plaintiff, Caleb Sherring, claims, is, with little variation, similar to the deed to Dearle, and was probably drawn by the same professional gentleman; yet no notice is taken in it of the prior conveyance to Dearle, nor is anything done by Sherring to obtain immediate possession of the fund. On the contrary, in this as in the other indenture, it is expressly stipulated, that Brown and his assigns should be permitted to receive the £93 a year, till default was made for twenty-one days in the payment of the annuity. Sherring's annuity of £27 was paid up to June, 1811, and then fell into arrear, but no step was taken to reach the fund. It was not till the 17th of October, 1812, that notice of these two annuities was, for the first time, given to the executors. The act of then giving notice shows, that the annuitants were aware that notice was necessary in order to complete their security; but their tardiness in giving notice constitutes the negligence which has produced all the mischief. For Brown, having, by the conduct of Dearle and Sherring, been thus left at liberty to deal with the property as he pleased, availed himself of this power, and was even so confident as to advertise his life-interest for sale, publicly

No. 5. — Dearle v. Hall, 3 Russ. 15, 16.

inviting purchasers to treat with him as for an unincumbered fund. In March, 1812, more than half a year before Dearle and Sherring gave the executors notice of their annuities, the contract was made between Brown and the defendant Hall; and in the same month, an indenture of assignment was executed, reciting Brown's right under his father's will to the £93 a year, by which, in consideration of £700 and upwards, Brown transferred that £93 a year to Hall.

In concluding this contract, Hall conducted himself in a way very different from that in which the plaintiffs had acted; for, before he paid his money, he took the * precaution of [*16] making, by his solicitor, all due inquiries of the trustees and executors; not trusting to his personal contract with Brown, but going immediately to the legal holders of the fund, strictly investigating the title, and employing a very exact and scrutinising industry to ascertain whether the fund was as represented by Brown, and whether Brown could completely transfer the interest which he stated himself to have.

The correspondence between Mr. Patten, the solicitor of Hall, and Mr. William Unthank, the acting executor, commenced early in February, 1812. On the 4th of that month, Mr. Patten wrote to Mr. Unthank, stating that he had drawn a contract between Brown and Hall, for the purchase of Brown's life-interest under his father's will, and requesting to be furnished with an abstract of Brown's title, and of the titles on which the money was invested, as well as with any other information on the subject, "and with the exact clear amount you pay to Brown annually." Mr. Unthank, in his answer, dated the 6th of February, sent an extract of the will of Peter Brown, and stated, that Zachariah Brown "is entitled during his life to a moiety of the income arising from the residue of his father's estate, after payment of an annuity of £40 bequeathed by the will, and that the residue amounted to £4,000, which was invested in real securities, bearing 5 per cent. interest."

On the 8th of February, Mr. Patten wrote again, requesting an abstract of the titles of the estates on which the money was secured. "Be so good," he adds, "as to say on what days in the year the interest is payable, and to what time Mr. Brown has received it, and if there be any other deduction from the interest-money than the property tax."

[*17] *Mr. Unthank, in his answer, dated the 10th of February, refuses to disclose the titles of the mortgagors without their permission; and then adds, "The interest of the principal mortgage is paid half-yearly, in June and December; and at those times I have usually divided the surplus of the interest of the residue of the late Mr. Brown's property between Mr. Z. Brown and his sister, which was done in December last. There is no other deduction made from the interest than the property tax, except that I have deducted from Mr. Z. Brown's moiety the postage of letters I have received from him. The will of Mr. Brown furnishes all the information that can be necessary for preparing an assignment of the interest and annual produce of one moiety of his residuary property from his son; the date of the assignment from whom will of course determine the period from which I shall have to account for the interest to the assignee. I see no reason why the executors should become parties to the proposed assignment, which, Mr. Z. Brown having an undoubted right to make, requires no confirmation from them; but for myself, I do not choose in any way to express my approbation of it, though I shall as readily pay the interest to his assignee as I should do to him, if he were not to part with it."

Further communications took place between Mr. Patten and Mr. Unthank, with respect to the securities on which the money was invested; and this part of the correspondence is terminated by a letter from Mr. Unthank, dated the 1st of March, in which he states, that he has not the least reason to suppose that there were any outstanding demands on the estate of the late Mr. Brown.

[*18] *This correspondence affords a complete answer to a topic which was strenuously urged in favour of the plaintiffs. It was said that Hall had not exercised due diligence; for that the question — whether there was any prior incumbrance on the fund — was not put directly either to Brown or to the executor. And it is true that the question was not put in express words; but was it not put in substance? The inquiries were such as drew from Unthank what is tantamount to an assurance that there was an absolute title in Brown; and if Unthank had received any intelligence of a prior incumbrance, and yet had acted and written in the manner in which he has, he would have involved himself in all the responsibilities which would affect an individual,

who should stand by and see another person, upon the faith of the representations made by him, entering into a contract and parting with his money on the supposition that a certain fund, known by him, who so stood by, to have been already pledged, was free from incumbrances. When Mr. Unthank was asked whether there was any deduction from the interest-money except the property tax, would he, if the assignments to Dearle and Sherring had been notified to him, have answered, "There is no other deduction from the interest, except the property tax"? When Mr. Unthank said in one of his letters, that the date of the assignment would determine the period from which he would have to account to all for the interest, that was in fact a statement that he was thenceforth to account to no person else; and he could not have spoken of himself as liable to account for the whole of the interest to Hall, if he had known that he was to account for part of it to Dearle and Sherring. The very first letter addressed to the executor, calling for an abstract of Brown's title, the amount of the residue, and the sum which was then paid yearly to Brown, was in fact a request to the * executor to communicate every [* 19] information, of every circumstance relating to the fund, which it could be of importance to a purchaser to know.

With respect to the circumstance that the question was not put directly to Brown, he covenants in the deed of assignment that the fund was free from incumbrances; and, consequently, the necessity of making inquiries of him was superseded.

These proceedings are antecedent to the execution of the contract. After so much precaution, the assignment of Brown's interest is executed; and Hall pays the purchase-money. Does he content himself with remaining in this situation? After having given notice to the legal holder of the fund, and having obtained from him an engagement to pay the interest to him, Hall, as readily as it had been before paid to Zachariah Brown, Hall is let into possession. Mr. Unthank fulfils his promise; having become a trustee for a new *cestui que trust*, he accounts to him, and in July, 1812, pays over to him his share of the income of the residuary fund: thus Hall is actually admitted into the enjoyment of the thing which had been assigned to him. On the 6th of July, Unthank writes a letter to Patten, in which he says, "As I have not been instructed as to the means by which Mr. Hall wishes to have his moiety of the interest of Mr. Brown's residuary estate

conveyed to him, I have enclosed you a draft for £31 19*s.* 10*d.*, belonging to him, and now in my hands." He then goes on to render an account, to show, that, as a trustee, he has accounted to his *cestui que trust* for all that was in his hands; and he begs Mr. Patten to communicate to him Mr. Hall's orders, "if you would have me in future make any remittances directly to him." Thus, Mr. Unthank becomes virtually a party to the transaction, [*20] giving Hall all the assurance *a purchaser could have. Such is the contrast between the conduct of the subsequent incumbrancer and of the incumbrancer who stands first in point of time.

Some months afterwards, on the 17th of October, 1812, Dearle and Sherring caused notice of their annuities to be given to the executors; accompanied with an intimation that the £93 a year must not be paid any longer to Hall, inasmuch as they were entitled to have their demands first satisfied out of it. Upon receiving that notice, the executors, acting like cautious men, who thought that it was not for them to enter into any contest, stayed their hands, and did not make any further payment; but, had the notice not been given, they would have continued to have paid the interest of the moiety of the residue to Hall.

The present suit was instituted on the 17th of June, 1819, six years and a half after the date of the notice, when ten years had elapsed from the date of Sherring's assignment, and eleven, from the date of the assignment to Dearle, and long after a former bill had been dismissed for want of prosecution; and what the plaintiffs seek by this new suit is, — that a Court of Equity shall, at this remote period, interpose to stop the £93 a year from being paid to Hall, to throw upon him the loss which must be sustained by some one or other, and to direct the fund to be applied in satisfaction of the arrears and growing payment of their annuities.

The ground of this claim is priority of time. They rely upon the known maxim, borrowed from the civil law, which in many cases regulates equities — "*qui prior est in tempore, potior est in jure.*" If by the first contract all the thing is given, there remains nothing to be the subject of the second contract, and [*21] priority must *decide. But it cannot be contended that priority in time must decide where the legal estate is outstanding. For the maxim, as an equitable rule, admits of exception, and gives way when the question does not lie between bare

and equal equities. If there appears to be, in respect of any circumstance independent of priority of time, a better title in the *puisne* purchaser to call for the legal estate than in the purchaser who precedes him in date, the case ceases to be a balance of equal equities, and the preference, which priority of date might otherwise have given, is done away with and counteracted. The question here is, — not which assignment is first in date, — but whether there is not, on the part of Hall, a better title to call for the legal estate than Dearle or Sherring can set up? or rather, the question is, Shall these plaintiffs now have equitable relief to the injury of Hall?

What title have they shown to call on a court of justice to interpose on their behalf, in order to obviate the consequences of their own misconduct? All that has happened is owing to their negligence (a negligence not accounted for) in forbearing to do what they ought to have done, what would have been attended with no difficulty, and what would have effectually prevented all the mischief which has followed. Is a plaintiff to be heard in a Court of Equity, who asks its interposition in his behoof, to indemnify him against the effects of his own negligence at the expense of another who has used all due diligence, and who, if he is to suffer loss, will suffer it by reason of the negligence of the very person who prays relief against him? The question here is not, as in *Evans* v. *Bicknell*, 6 Ves. 174, (5 R. R. 245), whether a Court of Equity is to deprive the plaintiffs of any right — whether it is to take from them, for instance, a legal estate, or to impose any charge upon them. It is simply, whether they are entitled to * relief against their own negligence. They [* 22] did not perfect their securities; a third party has innocently advanced his money, and has perfected his security as far as the nature of the subject permitted him: is this Court to interfere to postpone him to them?

They say, that they were not bound to give notice to the trustees; for that notice does not form part of the necessary conveyance of an equitable interest. I admit, that if you mean to rely on contract with the individual, you do not need to give notice; from the moment of the contract, he, with whom you are dealing, is personally bound. But if you mean to go further, and to make your right attach upon the thing which is the subject of the contract, it is necessary to give notice; and unless notice is given, you

do not do that which is essential in all cases of transfer of personal property. The law of England has always been, that personal property passes by delivery of possession; and it is possession which determines the apparent ownership. If, therefore, an individual, who in the way of purchase or mortgage contracts with another for the transfer of his interest, does not divest the vendor or mortgagor of possession, but permits him to remain the ostensible owner as before, he must take the consequences which may ensue from such a mode of dealing. That doctrine was explained in *Ryall* v. *Rowles*, 1 Ves. sen. 348, 1 Atk. 165, before Lord HARDWICKE and three of the Judges. If you, having the right of possession, do not exercise that right, but leave another in actual possession, you enable that person to gain a false and delusive credit, and put it in his power to obtain money from innocent parties on the hypothesis of his being the owner of that which in fact belongs to you. The princi-
[* 23] ple has been long recognised, even in courts of law. * In *Twyne's* case, 3 Co. Rep. 80, one of the badges of fraud was, that the possession had remained in the vendor. Possession must follow right; and if you, who have the right, do not take possession, you do not follow up the title, and are responsible for the consequences.

"When a man," says Lord BACON (Maxims of the Law, max. 16) "is author and mover to another to commit an unlawful act, then he shall not excuse himself by circumstances not pursued."

It is true that a chose in action does not admit of tangible actual possession, and that neither Zachariah Brown nor any person claiming under him were entitled to possess themselves of the fund which yielded the £93 a year. But in *Ryall* v. *Rowles* the Judges held, that in the case of a chose in action, you must do every thing towards having possession which the subject admits; you must do that which is tantamount to obtaining possession, by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as your property. For this purpose, you must give notice to the legal holder of the fund; in the case of a debt, for instance, notice to the debtor is, for many purposes, tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired a title, in the actual possession, and under the absolute control, of another person.

No. 5. — Dearle v. Hall. 3 Russ. 23–25.

Is there the least doubt, that if Zachariah Brown had been a trader, all that was done by Dearle and Sherring would not have been in the least effectual against his *assignees; but [*24] that, according to the doctrine of *Ryall* v. *Rowles*, his assignees would have taken the fund, because there was no notice to those in whom the legal interest was vested? In that case it was the opinion of all the Judges, that he who contracts for a chose in action, and does not follow up his title by notice, gives personal credit to the individual with whom he deals. Notice, then, is necessary to perfect the title, — to give a complete right *in rem*, and not merely a right as against him who conveys his interest. If you are willing to trust the personal credit of the man, and are satisfied that he will make no improper use of the possession in which you allow him to remain, notice is not necessary; for against him the title is perfect without notice. But if he, availing himself of the possession as a means of obtaining credit, induces third persons to purchase from him as the actual owner, and they part with their money before your pocket-conveyance is notified to them, you must be postponed. In being postponed, your security is not invalidated; you had priority, but that priority has not been followed up; and you have permitted another to acquire a better title to the legal possession. What was done by Dearle and Sherring did not exhaust the thing (to borrow the principle of the civil law), but left it still open to traffic. These are the principles on which I think it to be very old law, that possession, or what is tantamount to possession, is the criterion of perfect title to personal chattels, and that he, who does not obtain such possession, must take his chance.

I do not go through the cases which constitute exceptions to the rule, that priority in time shall prevail. A man may lose that priority by actual fraud or constructive fraud, — by being silent, for instance, when he ought to speak; by standing by, and keeping his own *security concealed. By such [*25] conduct even the advantage of possessing the legal estate may be lost.

The principle, which I have stated, is recognised in many authorities. In *Evans* v. *Bicknell* Lord Eldon says, 6 Ves. 192, (5 R. R. 261), "If in this case I could be perfectly satisfied that the intention was, according to the allegations in this bill, taken altogether, that he might represent himself as entitled to credit as

owner of the premises, and obtain credit in his trade by representing himself as owner of the premises, and that Bicknell acceded to that purpose, so understood, I should be strongly disposed to hold Bicknell liable to the extent in which Stansell's holding himself out as owner had involved a third party."

The case of *Wright* v. *Lord Dorchester*, 3 Russ. 49, though a qualified and conditional determination, and made without prejudice to a final decision, yet, considering the known habits and caution of the great Judge by whom that interlocutory order was pronounced, and the weight due even to the first impressions of his Lordship, is entitled to considerable authority. The preference given in that case to the *puisne* incumbrancer, who had made inquiry of the trustees, over the prior incumbrancer, who had not, must have proceeded on the principle which I have applied to the present case. The *puisne* incumbrancer was not put into permanent possession in that case by a power of attorney to receive the dividends, more than by actual payment of the current interest in the present case, and a promise of regular payment in future.

In *Ryall* v. *Rowles*, 1 Ves. sen. 371, 1 Atk. 182, Lord Hardwicke puts his opinion principally on the ground, that [*26] when a vendor * is left in possession of that which he has disposed of, he "gains a delusive credit by a false appearance of substance" (1 Atk. 185). "I will not say," he observed, "but some inconveniences may arise on each part. . . . But this I will say, that very great inconveniences may arise by giving an opportunity to people to make such securities, and yet appear to the world as if they had the ownership of all those goods of which they are in possession, when perhaps they have not one shilling of the property in them." Mr. Justice Burnett said (1 Ves. sen. 360, 361), "Where the neglect naturally tended to deceive creditors, it has been held a badge of fraud where left in his hands. . . . It is difficult, unless in very special cases, to assign a reason why an absolute or conditional vendee of goods should leave them with the vendor, unless to procure a collusive credit; and it is the same, whether in absolute or conditional sales. . . . If the conditional vendee, on paying his money for the goods, will not insist upon delivery to him, he confides in the vendor, not in the goods; and, therefore, should come in the same case with other creditors, especially as he has been the bait to draw other creditors in." Then he argues, with respect to the assignment of a

bond-debt or other chose in action (1 Ves. sen. 362, 363), "Why is not delivery as requisite on such an assignment as a delivery in the conveyance of a thing in possession? . . . Why will not the means of reducing into possession be considered in the same light as a conveyance of the thing itself at law? . . . The debt, by the assignor's continuing it in his hand, is in his order and disposition, as he may receive the money due, and cancel the bond, and assign it over to another creditor; and cannot have this bond but by consent of the true owner in equity; and, therefore, as he is not obliged to *accept a defective security, it is [*27] his own fault. As to bulky goods, the means of reducing into possession has been held sufficient: why not, then, in the case of a chose in action?"

Lord Chief Baron PARKER expresses himself thus:[1] "It is said, there can be only an equitable assignment of a chose in action, which is true; and yet, in case of bonds assigned, (for bills of exchange, or promissory notes, are assignable at law), they must be delivered; and such delivery of the bond, on notice of assignment, will be equivalent to the delivery of the goods; for the debtor cannot afterwards justify payment to the assignor, Domat. lib. I. This clause extends to things in action; and all has not been done to divest the right from the bankrupt, and to vest a right in the mortgagee; for no notice appears to be given." So Lord Chief Justice LEE spoke "of an honest creditor or mortgagee," who has had a conveyance made to him for valuable consideration, but "is not to have any preference to another creditor, because he does not give notice to other creditors by having that delivery to him to which he was entitled" (1 Ves. sen. 369).

*I cite these authorities to show, that in assignments of [*28] choses in action notice to the legal holder has always been deemed necessary; and it would be very dangerous for the solic-

[1] 1 Ves. 367. This passage of the judgment of the Lord Chief Baron is given by Atkyns (1 Atk. 177) in the following words: — "If a bond is assigned, the bond must be delivered, and notice must be given to the debtor; but in assignments of book-debts, notice alone is sufficient, because there can be no delivery; and such acts as are equal to a delivery of goods which are capable of delivery. Domat. l. i. t. 2, s. 2, par. 9, says, 'Things incorporeal, such as debts, cannot properly be delivered.' This is to show the nature of assignments of debts by notice to the debtor. This clause, therefore, extends to things in action; and all has not been done that might have been done by the assignee to vest the right of them in himself, and to take away from the bankrupt the power and disposition of them, for no notice has been given to the debtors."

itor of the purchaser to neglect it. A solicitor, who should neglect it, would find it difficult to make out, that he had not become responsible to his client.

It was said that Hall had himself been negligent; for he had not searched in the enrolment-office, where he would have found memorials which would have given him notice of these incumbrances. I answer, that Hall, in contracting for the purchase of Brown's life-interest, was not in any respect called upon by the nature of the transaction to search for memorials of annuities. If the fund could not have been transferred or incumbered without a memorial, he would have been bound to search in the enrolment-office; but there was nothing to lead him to search in that quarter; and the transfer of an interest in the £93 did not, taken by itself, call for a memorial. How, then, could he be expected to look for documents which had no natural connection with the transference of the fund? It was the mere accident that the prior charges had been created by way of security for the payment of annuities, which caused memorials to be made; and memorials would have been equally necessary if the annuities had not been secured on the fund in question. It would be too much to impose on a purchaser the obligation of making a search, to which there is nothing to lead him. In affairs of great importance, a careful individual would probably search everywhere. But it is impossible to say, that Mr. Hall was bound to conjecture, that Brown had raised money by granting an annuity, and had secured that annuity by pledging his life-interest under his father's will.

[*29] *On these grounds, I think that the plaintiffs have not shown a title to call on a Court of Equity to interpose in their behalf, and to take the fund from an individual who has used due diligence in order to give it to those whose negligence has occasioned all the mischief. There is no equality of equities between the defendant Hall and the plaintiffs.

What opportunities of fraud would be afforded if a party, who, having obtained an equitable conveyance, conceals it from everybody, and lies by for years, while intermediate transactions are taking place, could at any time come forward with his secret deed, and say to a subsequent purchaser, who had advanced his money in ignorance of the existence of such a claim, "My deed is in date prior to yours; and, therefore, whatever may have been my negligence, or your diligence, the property belongs to me."

Good sense, reason, authority, and equity are all on the other side.

The bill, therefore, must be dismissed, but, as against Hall, without costs. I do not make the plaintiffs pay costs to Hall, because they may have been losers without any intention to commit a fraud, and I am unwilling to add to their loss. Constructive fraud is the utmost that can be imputed to them.

I may mention, further, that the language of text writers (though, of course, I do not refer to them as authorities) shows, that the rule, as I have stated it, is in accordance with what has been the current practice and the understanding of the profession on the subject of priorities. "On the mortgage of a chose in action," says one of the text writers,[1] "it should never be * omitted to give notice of the transfer to the trustee; for [* 30] upon the authority of the cases quoted in the text, *Tourville* v. *Nash*, 3 P. Wms. 308., and *Stanhope* v. *Verney*, Butl. Co. Lit. 290. b. n. (1.) s. 15., it has been thought, (and indeed, as it should seem, with a great degree of reason), that if a mortgagee of this equitable right neglect to give notice of his incumbrance to the trustee, and such equitable right be afterwards assigned to a second mortgagee, who takes the precaution of giving the trustee proper notice, the first mortgagee will be postponed."

There was some discussion concerning the minutes of the decree. The result was, that His Honour ordered the costs of Unthank and his co-trustees to be paid by the plaintiffs; and the fund in Court to be paid to Hall.

"His Honour doth order and decree, that the £919 2*s.* 5*d.* 3 per cent. bank annuities, standing in the name of the accountant-general, in trust in this cause, be transferred to the defendant Joseph Hall; and it is ordered, that thereupon the plaintiff's bill do stand dismissed out of this Court as against the defendants, William Unthank and Ann Bircham, with costs, to be paid by the plaintiffs, &c., and without costs as against the several other defendants." Reg. Lib. 1823. A. 1102.

From this decree the plaintiffs appealed.

The appeal was argued before Lord Lyndhurst. (Lord Chancellor) who on 24th Dec. 1828, gave judgment as follows: —

* Zachariah Brown was entitled, during his life, to [* 56] about £93 a year, being the interest arising from a share of

[1] Powell's Law of Mortgages, by Coventry, p. 451, note T.

the residue of his father's estate, which, in pursuance of the directions in his father's will, had been converted into money and invested in the names of the executors and trustees. Among those executors and trustees was a solicitor of the name of Unthank, who took the principal share in the management of the trust. Zachariah Brown, being in distress for money, in consideration of a sum of £204 granted to Dearle, one of the plaintiffs in the suit, an annuity of £37 a year, secured by a deed of covenant and a warrant of attorney of the grantor and a surety; and, by way of collateral security, Brown assigned to Dearle all his interest in the yearly sum of £93: but neither Dearle nor Brown gave any notice of this assignment to the trustees under the father's will.

Shortly afterwards, a similar transaction took place between Brown and the other plaintiff, Sherring, to whom an annuity of £27 a year was granted. The securities were of a similar description; and on this occasion, as on the former, no notice was given to the trustees.

These transactions took place in 1808 and 1809. The annuities were regularly paid till June, 1811; and then, for the first time, default was made in payment.

Notwithstanding this circumstance, Brown, in 1812, publicly advertised for sale his interest in the property under his father's will. Hall, attracted by the advertisement, entered, through his solicitor, Mr. Patten, into a treaty of purchase; and it appears from the correspondence between Mr. Patten and Mr. Unthank, that the former exercised due caution in the transaction,

[*57] and *made every proper inquiry concerning the nature of Brown's title, the extent of any incumbrances affecting the property, and all other circumstances of which it was fit that a purchaser should be apprised. No intimation was given to Hall of the existence of any previous assignment; and his solicitor being satisfied, he advanced his money for the purchase of Brown's interest, and that interest was regularly assigned to him. Mr. Patten requested Unthank to join in the deed: but Mr. Unthank said, "I do not choose to join in the deed; and it is unnecessary for me to do so, because Z. Brown has an absolute right to this property, and may deal with it as he pleases." The first half-year's interest, subject to some deductions, which the trustees were entitled to make, was duly paid to Hall; and shortly afterwards, Hall for the first time ascertained, that the property had

been regularly assigned, in 1808 and 1809, to Dearle and to Sherring.

Sir THOMAS PLUMER was of opinion, that the plaintiffs had no right to the assistance of a Court of Equity to enforce their claim to the property as against the defendant Hall, and that, having neglected to give the trustees notice of their assignments, and having enabled Z. Brown to commit this fraud, they could not come into this Court to avail themselves of the priority of their assignments in point of time, in order to defeat the right of a person who had acted as Hall had acted, and who, if the prior assignments were to prevail against him, would necessarily sustain a great loss. In that opinion I concur.

It was said, that there was no authority for the decision of the MASTER OF THE ROLLS — no case in point to support it; and certainly it does not appear that the precise question has ever been determined, or that it has * been even brought before [* 58] the Court, except, perhaps, so far as it may have been discussed in an unreported case of *Wright* v. *Lord Dorchester*. But the case is not new in principle. Where personal property is assigned, delivery is necessary to complete the transaction, not as between the vendor and the vendee, but as to third persons, in order that they may not be deceived by apparent possession and ownership remaining in a person, who, in fact, is not the owner. This doctrine is not confined to chattels in possession, but extends to choses in action, bonds, &c.: in *Ryall* v. *Rowles*, 1 Ves. sen. 348, 1 Atk. 165, it is expressly applied to bonds, simple contract-debts, and other choses in action. It is true that *Ryall* v. *Rowles* was a case in bankruptcy; but the LORD CHANCELLOR called to his assistance Lord Chief Justice LEE, Lord Chief Baron PARKER, and Mr. Justice BARNETT; so that the principle, on which the Court there acted, must be considered as having received most authoritative sanction. These eminent individuals, and particularly the LORD CHIEF BARON and Mr. Justice BURNETT, did not, in the view which they took of the question before them, confine themselves to the case of bankruptcy, but stated grounds of judgment which are of general application. Lord Chief Baron PARKER says, that, on the assignment of a bond debt, the bond should be delivered, and notice given to the debtor; and he adds, that, with respect to simple contract-debts, for which no securities are holden, such as book-debts for instance, notice of the assignment should be given

to the debtor, in order to take away from the debtor the right of making payment to the assignor, and to take away from the assignor the power and disposition over the thing assigned (1 Ves. sen. 367; 2 Atk. 177). In cases like the present, the act of giving the trustee notice, is, in a certain degree, taking pos-
[*59] session of the fund; it is going as far towards *equitable possession as it is possible to go; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice. It is upon these grounds that I am disposed to come to the same conclusion with the late MASTER OF THE ROLLS.

I have alluded to a case of *Wright* v. *Lord Dorchester*, which was cited as an authority in support of the opinion of the MASTER OF THE ROLLS. In that case, a person of the name of Charles Sturt was entitled to the dividends of certain stock, which stood in the names of Lord DORCHESTER and another trustee. In 1793, Sturt applied to Messrs. Wright and Co., bankers at Norwich, for an advance of money, and, in consideration of the monies which they advanced to him, granted to them two annuities, and assigned his interest in the stock as a security for the payment. No notice was given by Messrs. Wright and Co. to the trustees. It would appear that Sturt afterwards applied to one of the defendants, Brown, to purchase his life-interest in the stock; Brown then made inquiry of the trustees, and they stated that they had no notice of any incumbrance on the fund; upon this, B. completed the purchase, and received the dividends for upwards of six years. Messrs. Wright then filed a bill and obtained an injunction, restraining the transfer of the fund or the payment of the dividends; but, on the answer of Brown, disclosing the facts with respect to his purchase, Lord ELDON dissolved that injunction. At the same time, however, that he dissolved the injunction, he dissolved it only on condition that Brown should give security to refund the money, if at the hearing the Court should give judgment in favour of any of the other parties. That case was attended also with this particular circumstance, that the party who pledged the fund stated by his answer, that, when he executed the security to Wright and Co., he considered that the pledge
[*60] was meant *to extend only to certain real estates. For these reasons, I do not rely on the case of *Wright* v. *Lord Dorchester* as an authority; I rest on the general principle to

which I have referred; and on that principle I am of opinion that the plaintiffs are not entitled to come into a Court of Equity for relief against the defendant Hall. The decree must, therefore, be affirmed, and the deposit paid to Hall.

ENGLISH NOTES.

The case of *Loveridge* v. *Cooper*, which had many circumstances in common with, and was treated as being the same in principle with, the above case of *Dearle* v. *Hall*, was argued before the same judges, and the judgments in both were delivered together. The facts and arguments in *Loveridge* v. *Cooper* are set forth *pari passu* with those in the principal case in the report in Russell. But it does not seem necessary to set them out here.

The two cases of *Dearle* v. *Hall* and *Loveridge* v. *Cooper* are commonly cited together as the primary authorities for the above rule.

It will be sufficient here to mention some of the more recent cases in which the rule has been applied or distinguished.

The principle was distinguished in *McCreight* v. *Foster* (before Lord Hatherley, L. C. 1870), L. R. 5 Ch. 604. It was there held that the agreement by a purchaser to assign to a third party the benefit of his contract for the purchase of land does not place the vendor, even when he has notice of the new agreement, in the position of a trustee for the assignee; but that the vendor, notwithstanding such notice, is entitled to complete the purchase with the original purchaser. This is not the case of the assignment of a simple equitable interest. "The distinction," the Lord Chancellor observes (L. R. 5 Ch. at p. 612), "is this: that the vendor is not a complete trustee for the purchaser and those who claim under him, until the whole contract is finally completed; and during that stage, I apprehend that other persons, by saying that they have acquired an interest in the agreement, will not stay the performance of the agreement with the original purchaser. The duty imposed on those who wish to intervene is to take their own steps, to file their own bill, and to claim the benefit of the contract in such a way that the Court may have the opportunity of dealing with the matter according to the rights of the parties interested in it, and may determine their position accordingly. I asked, during the course of the argument, what would have been the position of Sir W. Foster (the vendor) if Pooley (the original purchaser) either paid or offered to pay the money, and then had filed his bill to have completion of the contract. I apprehend that Sir W. Foster would have been compelled to perform specifically his contract with Pooley, and to pay the costs of the suit; and the fact of other persons having given their notice, and not following it up by

payment of the money, or by any step to complete the contract, would not be any defence."

A similar distinction was drawn by the judges of the Appellate Court in Chancery in *Ex parte Rabbidge, In re Pooley* (C. A. 1878), 8 Ch. D. 367, 38 L. T. 663, 26 W. R. 646, where the purchaser of leasehold estate, after the vendor had been adjudicated a bankrupt, paid the purchase money to the vendor, the deeds being handed over but no assignment of the lease being made. This was before the adjudication had been advertised, and without the purchaser having any knowledge of it. The Court held that the trustee in bankruptcy could not be compelled to assign the lease to the purchaser except upon the terms of paying the purchase money.

The rule was applied (citing the principal case), by the MASTER OF THE ROLLS (Sir G. JESSEL), in *Re Freshfield's Trusts* (1879), 11 Ch. D. 198, 40 L. T. 57, 27 W. R. 375, where the second assignment of the equitable interest was made by the legal personal representative of the person who had made the earlier assignment of which no notice had been given. The purchaser from the personal representative having first given notice, was held entitled to priority.

In *Palmer* v. *Locke* (1881), 18 Ch. D. 381, 386, the MASTER OF THE ROLLS held that, under the Bankruptcy Act of 1869, the bankruptcy of a person entitled to an equitable interest in a fund does not confer a good title on the trustee in bankruptcy without notice to the trustees of the fund, as against a subsequent assignee from the bankrupt who gives notice. This decision was based on the authority of *In re Barr's Trusts* (1858), 4 K. & J. 219, which related to the effect of the vesting of property under a commission of Bankruptcy according to the old law before the Act of 1849. Under the Act of 1849, the point had been decided differently, upon the negative words in sect. 141. *Re Coombe's Estate* (1859), 1 Giff. 91; *In re Bright's Settlement* (C. A. 1880), 13 Ch. D. 413, 42 L. T. 308, 28 W. R. 551. The Court of Appeal, in affirming the decision of the MASTER OF THE ROLLS, in *Palmer* v. *Locke*, rested their decisions upon narrower grounds. If the decision of the MASTER OF THE ROLLS is right, that the rule of the principal case applies to the vesting of property under the Bankruptcy Act of 1869, the same would apply to a bankruptcy under the Act of 1883.

In the *West of England Bank* v. *Batchelor* (1882), 51 L. J. Ch. 199, 46 L. T. 132, 30 W. R. 364, FRY, J. held that the rule did not apply so as to postpone the solicitor having a lien on a policy of assurance, to assignees who gave notice to the Company. For the policy holder was not a trustee for the solicitor, and no notice that the solicitor could have given would have placed the Company in the position of trustees for him.

In *Société Générale de Paris* v. *Walker* (H. L. 1885), 11 App. Cas. 20, 55 L. J. Q. B. 169, 54 L. T. 389, 34 W. R. 662. Lord SELBORNE held, that the rule as to the effect of notice in determining priorities is inapplicable to dealings with shares in a Company, by whose articles it was stated that the shares were transferable only by deed, that the Company would not recognise equitable interests, and that no transfer would be registered until the certificate had been delivered at the Company's office. This view has the implied concurrence of all the learned Lords who gave judgment.

In *English and Scottish Mercantile Investment Trust* v. *Brunton* (26 April and C. A. 3 August, 1892), 1892, 2 Q. B. 1–700, 66 L. T. 766, 67 L. T. 406, 41 W. R. 133, the rule was applied by a Divisional Court and the Court of Appeal, to fix the priorities between holders of debentures of a Company charging all its property present and future, and an assignee by way of security of an interest in money due from an Insurance Company. It was held that the assignee, by giving notice to the Insurance Company, acquired priority over the debenture holders who had not given such notice.

A lady entitled to a reversionary interest in leasehold property vested in trustees of a will makes a settlement of it upon her marriage. Subsequently she joins her husband in mortgaging the interest without disclosing the settlement. The mortgagees, who had written to the trustees of the will without obtaining any information of a prior incumbrance, gave notice of their mortgage to the trustees of the will. One of the trustees of the will, who died before the reversion fell in, had notice of the settlement, but the other had not. *Held*, that the settlement had priority to the mortgage; and that the subsequent death of the trustee who alone knew of the settlement did not alter the priorities. *Ward* v. *Duncombe* (H. L. 3 Feb. 1893), 1893, A. C. 369, 62 L. J. Ch. 881, 69 L. T. 121, 42 W. R. 59.

AMERICAN NOTES.

There is some dispute about the doctrine of the Rule in this country. The principal case is cited in Am. & Eng. Enc. of Law, vol. 1, p. 840, and its doctrine is sustained by *Spain* v. *Hamilton's Adm'r*, 1 Wallace (U. S. Sup. Ct.), 604; *Barron* v. *Porter*, 44 Vermont, 587.

Where there are several successive assignments they will take effect in the order in which notice was communicated to the debtor. *Spain* v. *Hamilton's Adm'r, supra*; *Loomis* v. *Loomis*, 26 Vermont, 201; *Hobson* v. *Stevenson*, 1 Tennessee Chancery, 203; *McWilliams* v. *Webb*, 32 Iowa, 577; *Murdock* v. *Finney*, 21 Missouri, 138; *Bishop* v. *Holcomb*, 10 Connecticut, 444; *Switzer* v. *Noffsinger*, 82 Virginia, 518.

But in New York it is well settled that the first assignment of a *chose in action* takes precedence of a subsequent assignment, though notice of the

latter is first given to the debtor, but the debtor may lawfully pay the later transferee unless he has been notified of the former transfer. *Muir* v. *Schenck*, 3 Hill (N. Y Sup. Ct.), 228; 38 Am. Dec. 633. And this doctrine prevails in several other States: *Thayer* v. *Daniels*, 113 Massachusetts, 129; *Littlefield* v. *Smith*, 17 Maine, 327; *United States* v. *Vaughan*, 3 Binney (Penn.), 394; *Kennedy* v. *Parke*, 17 New Jersey Equity, 415; *Fairbanks* v. *Sargent*, 104 New York, 108; 58 Am. Rep. 490: "It is undoubtedly the general rule that the assignee of a *chose in action* takes it subject to all the equities existing against it in the hands of his assignor, and can acquire no greater right or interest therein than belonged to his transferor." "One assignee of such a claim from the owner must necessarily acquire the same interest in it that any other assignee does, and that is, in the absence of other controlling equities, an interest subject to the rule that he who is prior in point of time is prior in right. Such a claim is at common law non-assignable, and its assignee takes, by virtue of an assignment thereof, an equitable interest only, which must be governed by equitable rules for its protection and enforcement." In *Thayer* v. *Daniels*, *supra*, the court remark the English rule of priority of right by notice, but deny it, observing: "It is well settled that the assignment of a chose in action is complete upon the mutual assent of the assignor and assignee, and does not gain additional validity as against third persons by notice to the debtor."

In *Tingle* v. *Fisher*, 20 West Virginia, 497, a case of successive conflicting assignments of a mortgage, the court said: "It is claimed by counsel for appellee, that the second assignment will take the whole fund, because no notice of the first was given to the debtor before the second assignment was made. I find no authority which holds that the second assignee must be notified, except those that require assignments to be recorded. In no other way could notice be brought home to the second assignee, unless it would be through the debtor. Is it necessary to notify the debtor? Upon this question there is conflict of authority. In *Judson* v. *Corcoran*, 17 How. 615, Mr. Justice Catron, in delivering the opinion of the court, said: 'The assignment was held up, and operated as a latent and lurking transaction calculated to circumvent subsequent assignees; and such would be its effect upon Corcoran, were priority acceded to it under our decree. It is certainly true as a general rule, as above stated, that the purchaser of a *chose in action*, or of any equitable title, must abide by the case of the person from whom he buys, and will only be entitled to the remedies of the seller; and yet there may be cases in which a purchaser, by sustaining the character of a *bona fide* assignee, will be in a better situation than the person was of whom he bought; as for instance, when the purchaser, who alone had made inquiry, and given notice to the debtor, or to a trustee holding the fund (as in this instance), would be preferred over the prior purchaser, who neglected to give notice of his assignment and warn others not to buy.'"

"The doctrine held in *Judson* v. *Corcoran* is also sustained by *Spain* v. *Hamilton's Adm'r*, 1 Wallace (U. S. Sup. Ct.), 604; *Mott* v. *Clark*, 9 Barr (Penn.), 399; *Ward* v. *Morrison*, 25 Vermont, 593; *White's Heirs* v. *Prentiss' Heirs*, 3 T. B. Monroe (Kentucky), 510; *Bloomer* v. *Henderson*, 8 Michigan,

395, and a number of authorities to the same effect cited in Leading Cases in Equity, vol. 2, part 2, 1165–66. Many authorities are found which hold directly to the contrary." Citing *Muir* v. *Schenck*, *supra*, and other New York cases; *Summers* v. *Hutson*, 48 Indiana, 230; *Thayer* v. *Daniels*, and other Massachusetts cases; *Kamena* v. *Huelbig*, 23 New Jersey Equity, 78; and cases cited in Leading Cases in Equity, vol. 2, part 2, 1166.

The principal case is cited by Mr. Pomeroy (2 Equity Jurisprudence, p. 965), as "the leading case."

No. 6. — RICE *v.* RICE.

(V. C. KINDERSLEY, 1854.)

No. 7. — NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE CO. *v.* WHIPP.

(C. A. 1884.)

RULE.

If one of the persons having an equitable interest has by negligence or misplaced confidence done or omitted something contrary to the ordinary and reasonable course, and advantage has been taken of that act or omission to mislead the other person so as to induce him to accept the equitable title, the latter person has the better equity.

But the person having the prior legal title will not be postponed to one having a subsequent equitable title unless he has been guilty of, or participated in, the fraud whereby the latter has been deceived; or has got in the legal estate by participating in a breach of trust.

Rice v. Rice.

23 L. J. Ch. 289–294 (s. c. 2 Drew. 73).

Equitable Mortgage. — Priority. — Possession of Title Deeds. — Negligence. [289]

Certain leasehold property was assigned to a purchaser. The assignment, with the receipt for purchase-money, was executed, and the title deeds were given up to the purchaser, but part of the purchase-money was left unpaid. The purchaser, on the following day, deposited the title deeds by way of equi-

No. 6. — Rice v. Rice, 23 L. J. Ch. 289, 290.

table mortgage, to secure a sum of money previously advanced to him: — *Held*, that the equitable interests of the two parties, the vendor in respect of his lien for unpaid purchase-money and the equitable mortgagee, being in all other respects equal, the equitable mortgagee, by the possession of the title deeds, had the better equity, and that the rule *qui prior est tempore potior est jure* can only apply where the equitable interests are in every respect equal.

This case came on upon motion for a decretal order.

The bill stated that by an indenture of assignment, dated the 6th of October, 1852, certain leasehold premises at Chislehurst were assigned by Edmund Moore and Mary his wife, and by the plaintiffs, George Rice, Lydia Rice, and William Nail and Hannah his wife, who were tenants in common of the property, to the defendant, Michael Rice. The consideration money was expressed to be £160, being £40 each to the persons beneficially entitled. The assignment was executed, and the receipt for the purchase-money was duly signed by all the conveying parties; but, [*290] in fact, none of the purchase-money was ever *paid by Michael Rice, with the exception of the sum of £40 to Edmund Moore and Mary his wife. The title deeds and conveyance, however, were given into the possession of Michael Rice, who, on the day after the execution of the assignment, deposited the deed with the defendant Joseph Ede, together with a memorandum to the effect that such deeds were deposited by way of securing to the said J. Ede and to Samuel Knight a sum of £100, which had been previously advanced by them to Michael Rice, and at the same time a promissory note for the said sum of £100 was given to J. Ede and S. Knight by Michael Rice. At the time of the aforesaid deposit the defendants J. Ede and S. Knight had no notice or information that any part of the purchase-money for the said leasehold premises remained unpaid.

On the 18th of October, 1852, the defendant, Michael Rice, absconded, without having paid any portion of the sum of £100 so secured by the deposit of the title deeds.

The bill prayed that an account might be taken of what was due to the plaintiffs in respect of the aforesaid purchase-money; that the defendants might be ordered to pay to the plaintiffs the amount, or in default thereof that the leasehold premises might be sold, and the amount due to the plaintiffs might be paid out of the proceeds.

The defendants, J. Ede and S. Knight, by their answer, sub-

mitted that the amount secured to them by the deposit of title deeds ought to be paid before the sum due to the plaintiffs in respect of their unpaid purchase-money; and upon that question the case now came on for argument.

Mr. E. Smith, for the plaintiffs, contended that they had an equitable lien upon the estate for so much of the purchase-money as remained unpaid; that their interest was equal in all respects to the interest of the equitable mortgagee; but as the vendor's lien was prior in point of time to the deposit of deeds with the equitable mortgagee, the rule must prevail *qui prior est tempore potior est jure*, and the plaintiffs, therefore, had the better equity. Cases cited:—*Mackreth* v. *Symmons*, 15 Ves. 329 (10 R. R. 85); *Nairn* v. *Prowse*, 6 Ves. 752 (6 R. R. 37); *Allen* v. *Knight*, 5 Hare, 272; 15 L. J. (N. S.) Ch. 430, and 16 L. J. (N. S.) Ch. 370; *Barnett* v. *Weston*, 12 Ves. 130 (8 R. R. 319); *Stevens* v. *Stevens*, 2 Col. 20; 14 L. J. (N. S.) Ch. 252; *Goode* v. *Burton*, 1 Ex. 189; 16 L. J. (N. S.) Ex. 309.

Mr. Elmsley and Mr. Prior, for the defendants, submitted that although the interests of the vendor for unpaid purchase-money and of the equitable mortgagee were in other respects equal, the equitable mortgagee ought to have his debt satisfied first, as he was in possession of the title deeds. When the assignment of the leaseholds was executed by the plaintiffs, the receipt for the purchase-money was also signed by them, and there was nothing on the face of the transaction to show the mortgagee that any of the purchase-money was left unpaid. The title deeds were deposited in the ordinary way with the mortgagee, and it was not his duty to ascertain whether the purchase-money had been paid or not. Still, if any one had a prior right it was the mortgagee, since the debt, to secure which the deeds were deposited, was prior to the execution of the assignment. If all the circumstances of this case were taken into consideration, it would be found that the vendors were very much to blame in allowing the deeds to go out of their possession before payment of the whole purchase-money, and that the mortgagees were the most injured parties. *Stanhope* v. *Earl Verney*, 2 Eden, 81, and Co. Lit. 290, *b*, note 1, sec. 15, 3 Sugden's Vend. and Pur. 10th edit. p. 217; *Maundrell* v. *Maundrell*, 7 Ves. 567, 10 Ves. 246 (7 R. R. 393); *Foster* v. *Blackstone*, 1 Myl. & K. 297, 2 L. J. (N. S.) Ch. 84; *White* v. *Wakefield*, 7 Sim. 401, 4 L. J. (N. S.) Ch. 195; *Mangles* v. *Dixon*, 1 Hall & Tw. 542; 1 M. & G. 437.

No. 6. — Rice v. Rice, 23 L. J. Ch. 290, 291.

KINDERSLEY, V. C. — The question to be decided in
[* 291] this case is, whether the * equitable interest of the plaintiffs, in respect of the vendor's lien for unpaid purchase-money, is to be preferred to the equitable interest of the defendant Ede, as equitable mortgagee. What is the rule of a Court of Equity for determining the preference as between persons having adverse equitable interests? The rule is sometimes expressed in this form: as between persons having only equitable interests *qui prior est tempore potior est jure.* This is an incorrect statement of the rule, for that proposition is far from being universally true. In fact, not only is it not universally true as between persons having only equitable interests, but it is not universally true even where their equitable interests are of precisely the same nature, and in that respect precisely equal; as in the common case of two successive assignments for valuable consideration of a reversionary interest in stock standing in the names of trustees, where the second assignee has given notice and the first assignee has omitted it. Another form of stating the rule is this: "As between persons having only equitable interests, if their equities are equal, *qui prior est tempore potior est jure.*" This form of stating the rule is not so obviously incorrect as the former, and yet even this enunciation of the rule (when accurately considered) seems to me to involve a contradiction. For when we talk of two persons having equal or unequal equities, in what sense do we use the term "equity"? For example, when we say that A. has a better equity than B., what is meant by that? It means only that, according to those principles of right and justice which a Court of Equity recognises and acts upon, it will prefer A. to B., and will interfere to enforce the rights of A. as against B. And therefore it is impossible (strictly speaking) that two persons should have equal equities, except in a case in which a Court of Equity would altogether refuse to lend its assistance to either party as against the other. If the Court will interfere to enforce the right of one against the other on any ground whatever, say on the ground of priority of time, how can it be said that the equities of the two are equal? that is, in other words, how can it be said that the one has no better right to call for the interference of a Court of Equity than the other? To lay down the rule, therefore, with perfect accuracy, I think it should be stated in some such form as this: "As between persons having only equitable interests, if

their equities are in all other respects equal, priority of time gives the better equity, or *qui prior est tempore potior est jure.*" I have made these observations not, of course, for the purpose of a mere verbal criticism on the enunciation of a rule, but in order to ascertain and illustrate the real meaning of the rule itself. And I think the meaning is this: that in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to, — that is, that a Court of Equity will not prefer the one to the other, on the ground of priority of time, until it finds upon an examination of their relative merits that there is no other sufficient ground of preference between them, or, in other words, that their equities are in all respects equal; and that if the one has on other grounds a better equity than the other, priority of time is immaterial. In examining into the relative merits (or equities) of two parties having adverse equitable interests, the points to which the Court must direct its attention are obviously these: the nature and condition of their respective equitable interests; the circumstances and manner of their acquisition; and the whole conduct of each party with respect thereto. And in examining into these points, it must apply the test, not of any technical rule, or any rule of partial application, but the same broad principles of right and justice which a Court of Equity applies universally in deciding upon contested rights.

Now, in the present case, each of the parties in controversy has nothing but an equitable interest; the plaintiff's interest being a vendor's lien for unpaid purchase-money, and the defendant Ede having an equitable mortgage. Looking at these two species of equitable interests abstractedly, and without reference to priority of time or possession of the title deeds, or any other special circumstances, is there anything in their respective natures or qualities which would lead to the conclusion that in natural justice the one is better, *or more worthy, or more en- [*292] titled to protection than the other? Each of the two equitable interests arises out of the forbearance by the party of money due to him. There is, however, this difference between them: that the vendor's lien for unpaid purchase-money is a right created by a rule of equity, without any special contract; the right of the equitable mortgagee is created by the special contract of the parties. I cannot say that in my opinion this constitutes any

sufficient ground of preference; though, if it makes any difference at all, I should say it is rather in favour of the equitable mortgagee, inasmuch as there is no *constat* of the right of the vendor to his lien for unpaid purchase-money until it has been declared by a decree of a Court of Equity; whereas there is a clear *constat* of the equitable mortgagee's title immediately on the contract being made. But I do not see in this any sufficient ground for holding that the equitable mortgagee has the better equity. So far then as relates to the nature and quality of the two equitable interests abstractedly considered, they seem to me to stand on an equal footing. And this I conceive to have been the ground of Lord ELDON'S decision in *Mackreth* v. *Symmons*, where, in a contest between the vendor's lien for unpaid purchase-money and the right of a person who had subsequently obtained from the purchasers a mere contract for a mortgage, and nothing more, he decided in favour of the former, as being prior in point of time.

If, then, the vendor's lien for unpaid purchase-money, and the right of an equitable mortgagee by a mere contract for a mortgage, are equitable interests of equal worth in respect of their abstract nature and quality, is there anything in the special circumstances of the present case to give to the one a better equity than the other?

One special circumstance that occurs is this, that the equitable mortgagee has the possession of the title deeds. The question, therefore, arises between two persons having equitable interests of equal worth: does the possession of the title deeds by one of them give him the better equity? In *Foster* v. *Blackstone*, Sir J. LEACH, M. R., says: "A declaration of trust of an outstanding term, accompanied by a delivery of the deeds creating and continuing the term, gives a better equity than a mere declaration of trust to a prior incumbrancer." That is a case in which the two parties have equitable interests in the terms of precisely the same nature, viz., a declaration of trust of the term without an actual assignment; and there the delivery of the deeds to the subsequent incumbrancer gives him the better equity. To the same effect is the decision in *Stanhope* v. *Earl Verney*, according to Lord ST. LEONARDS' view of it, as reported in Butler's Co. Lit. 220 *b*. n. 1, s. 15 (which seems a more satisfactory report than that in 2 Eden, 81). Lord ST. LEONARDS, in 3 Sug. Vend. 217, states it thus: — "In *Stanhope* v. *Earl Verney*, Lord NORTHINGTON held that a

declaration of trust of a term in favour of a person was tantamount to an actual assignment, unless a subsequent incumbrancer, *bonâ fide* and without notice, procured an assignment; and that the custody of the deeds respecting the term, with the declaration of the trust of it in favour of a second incumbrancer, was equivalent to an actual assignment of it, and therefore gave him an advantage over the first incumbrancer, which equity could not take from him." The same doctrine appears to be recognised by Lord ELDON in *Maundrell* v. *Maundrell*, where he says, "It is clear with regard to mortgagees and incumbrancers, that if they do not get in the satisfied term in some sense, either taking an assignment, making the trustee a party to the instrument, or taking possession of the deed creating the term, that term cannot be used to protect them against any person having mesne charges or incumbrances;" implying, that taking possession of the deed creating the term would confer on a subsequent incumbrancer such right of protection by means of the term. We have here, then, ample authority for the proposition, or rule of equity, that, as between two persons whose equitable interests are of precisely the same nature and quality, and in that respect precisely equal, the possession of the deeds gives the better equity. And, applying this rule to the present case, it appears to me that the equitable interest of the two parties being in their nature and quality of equal worth, *the defendant, having possession of the deeds, [*293] has the better equity; and that there is therefore in this case no room for the application of the maxim *qui prior est tempore potior est jure*, which is only applicable where the equities of the two parties are in all other respects equal. I feel all the more confidence in arriving at this conclusion, inasmuch as it is in accordance with the opinion expressed by Lord ST. LEONARDS in his work on Vendors and Purchasers; and I have no doubt that in *Mackreth* v. *Symmons*, if the equitable mortgagee had, in addition to his contract for a mortgage, obtained the title deeds from his mortgagor, Lord ELDON would have decided in his favour.

I must, however, guard against the supposition that I mean to express an opinion that the possession of title deeds will, in all cases and under all circumstances, give the better equity. The title deeds may be in the possession of a party in such a manner and under such circumstances as that such possession will confer no advantage whatever. For example, in *Allen* v. *Knight*

(affirmed by the Lord Chancellor and reported on appeal in 11 Jur. 527), the deeds had been delivered to the first equitable mortgagee, and by some unexplained means they had got back into the possession of the mortgagor, who delivered them to a subsequent equitable mortgagee. It was insisted by the latter that it must be presumed that it was by the fault or neglect of the first mortgagee that the deeds had got out of his possession, or that, at all events, the Court should direct an inquiry as to the circumstances. But the Court held that the *onus* lay on the second mortgagee of proving such alleged fault or neglect of the first mortgagee; and as he had failed to prove it, the Court could not presume it nor direct an inquiry on the subject, and decreed in favour of the first mortgagee. I think it may be clearly inferred from this case that if the first mortgagee had never had the deeds delivered to him, or if it had been proved that the deeds had got back to the mortgagor through his fault or neglect, the decision would have been in favour of the second mortgagee, who had the deeds.

So the deeds may have come into the hands of a subsequent equitable mortgagee by means of an act committed by another person, which constituted a breach of an express trust as against the person having the prior equitable interest; in such a case it would be contrary to the principles of a Court of Equity to allow the subsequent mortgagee to avail himself of the injury which had been thus done to the party having the prior equitable estate or interest. Indeed, it appears to me that in all cases of contest between persons having equitable interests, the conduct of the parties and all the circumstances must be taken into consideration, in order to determine which has the better equity. And if we take that course in the present case, everything seems in favour of the defendant, the equitable mortgagee. The vendors, when they sold the estate, chose to leave part of the purchase-money unpaid, and yet executed and delivered to the purchaser a conveyance by which they declared in the most solemn and deliberate manner, both in the body and by a receipt indorsed, that the whole purchase-money had been duly paid. They might still have required that the title deeds should remain in their custody with a memorandum by way of equitable mortgage as security for the unpaid purchase-money, and if they had done so they would have been secure against any subsequent equitable incumbrancer;

but that they did not choose to do, and the deeds were delivered to the purchaser. Thus they voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of incumbrance or adverse equity. In truth, it cannot be said that the purchaser in mortgaging the estate by the deposit of the deeds has done the vendors any wrong, for he has only done that which the vendors authorized and enabled him to do. The defendant who afterwards took a mortgage was, in effect, invited and encouraged by the vendors to rely on the purchaser's title. They had, in effect, by their acts assured the mortgagee that (as far as they, the vendors, were concerned) the mortgagor had an absolute indefeasible title, both at law and in equity. The mortgagee was guilty of no negligence; he was perfectly justified in trusting to the security of the equitable mortgage by *deposit of the deeds, without [*294] the slightest obligation to go and inquire of the vendors whether they had received all their purchase-money, when they had already given their solemn assurance in writing that they had received every shilling of it, and had conveyed the estate and delivered over the deeds. And I do not think that the fact of the conveyance bearing date only the day before the mortgage imposed on him any such obligation. The defendant omitted nothing that was necessary to constitute a complete and effectual equitable mortgage; and although the mortgage was taken, not for money actually advanced at the time, but for an antecedent debt, the forbearance of that debt constitutes a full and sufficient valuable consideration.

Upon a comparison, then, of the conduct of the two parties, and a consideration of all the circumstances of the case, and especially the fact of the possession of the deeds, which the mortgagee acquired with perfect *bona fides*, and without any wrong done to the vendors, I am of opinion that the equity of the mortgagee is far better than that of the vendor, and ought to prevail.

I may in conclusion venture to make the suggestion, that the point now under consideration is often put by text writers in a form calculated to mislead, when it is propounded as a question, whether the vendor, in respect of his lien for unpaid purchase-money, or an equitable mortgagee, ought to be preferred; or when an opinion is expressed that the one or the other has the better equity. If I am right in my view of the matter, neither the one

nor the other has necessarily and under all circumstances the better equity. Their equitable interests, abstractedly considered, are of equal value in respect of their nature and quality; but whether their equities are in other respects equal, or whether the one or the other has acquired the better equity, must depend upon all the circumstances of each particular case, and especially the conduct of the respective parties. And among the circumstances which may give to the one the better equity, the possession of the title deeds is a very material one. But if, after a close examination of all these matters, there appears nothing to give to the one a better equity than the other, then and then only, resort must be had to the maxim *qui prior est tempore potior est jure*, and priority of time then gives the better equity.

Northern Counties of England Fire Insurance Co. v. Whipp.

26 Ch. D. 482-496 (s. c. 53 L. J. Ch. 629; 51 L. T. 806; 32 W. R. 626).

[482] *Mortgage. — Priority. — Negligence of First Mortgagee in custody of Deeds.*

C., the manager of a joint stock company, executed a legal mortgage to the company of his own freehold estate, and handed over the title deeds to them. The deeds were placed in a safe of the company, which had only one lock having duplicate keys, one of which was intrusted to C., as manager. Some time afterwards C. took out of the safe the deeds, except the mortgage, and handed them to W., to whom at the same time he executed a mortgage for money advanced to him by her, without notice of the company's security: —

Held, reversing the decision of the Vice-Chancellor of the Court of the County Palatine of Lancaster, that the mortgage of the company had priority over the mortgage to W.

The Court will postpone a legal mortgage to a subsequent equitable security: (1) where the legal mortgagee has assisted in or connived at the fraud which led to the creation of the subsequent equitable estate, of which assistance or connivance the omission to use ordinary care in inquiring after or keeping the title deeds may be sufficient evidence where such conduct cannot otherwise be explained; or (2), where the legal mortgagee has made the mortgagor his agent with authority to raise money, and the security given for raising such money has by misconduct of the agent been represented as the first estate.

But the Court will not postpone a legal mortgagee to a subsequent equitable mortgagee on the ground of any mere carelessness or want of prudence on the part of the legal mortgagee.

This was an appeal by the plaintiff company from a judgment of the VICE-CHANCELLOR of the County Palatine of Lancaster.

No. 7. — Northern Counties of England Fire Ins. Co. v. Whipp, 26 Ch. D. 482, 483.

On the 11th of January, 1878, Crabtree, who was the manager of the plaintiff company, executed a legal mortgage of a freehold property, known as Milbank, to the plaintiff company, to secure £4500, and, according to the conclusion drawn by the Court of Appeal from the evidence, Crabtree, at or about the same time, delivered the title deeds to the company, and received the £4500 from the company in cash.

On the 24th of May, 1878, Crabtree made a legal mortgage to the plaintiff company of certain other freehold property to secure £2500, and the title deeds were (according to the conclusion at *which the Court of Appeal arrived on the evi- [*483] dence) delivered to the plaintiff company. In respect to this mortgage, it was not proved that the £2500 passed in cash from the company to Crabtree, but it was in the opinion of the Court of Appeal the true conclusion from the evidence, that at the date of the mortgage Crabtree was indebted to the plaintiff company in a sum greatly exceeding £2500 beyond the previous £4500.

The deeds of the mortgaged properties were placed in a safe of the company, and were seen there on the occasion of the audit in May, 1878.

Crabtree, who, as already stated, was the manager of the plaintiff company, was entrusted with one of the two keys which opened the one lock which secured the safe in which the deeds of the company were kept, and it appeared that in November, 1878, he produced the deeds in question to the defendant's solicitor, Mr. Milne Whitehead, to whom Crabtree had applied for a loan on mortgage of these two properties. As the result of this application the defendant, Mrs. Whipp, advanced £3500 to Crabtree on a mortgage, dated the 19th of December, 1878, of the two properties included in the plaintiffs' securities, and she at the same time received from Crabtree the title deeds of the two properties, but not the mortgages to the plaintiff company. The defendant's mortgage was taken by her, and the mortgage money paid by her to Crabtree, in entire ignorance of the securities to the plaintiff company.

Crabtree went into liquidation in November, 1879, and in the following month an order was made for winding up the plaintiff company.

In 1880, the liquidator commenced, in the name of the com-

pany, this action against Mrs. Whipp and Crabtree's trustee in liquidation, for foreclosure. The trustee disclaimed, and the action was dismissed as against him. Mrs. Whipp put in a defence and counterclaim by which she asked that the securities of the plaintiff company might be declared fraudulent and void as against her, or in the alternative that they might be postponed to her security, and that the company might be ordered to convey the property to her, subject only to such equity of redemption as it was subject to under her mortgage.

[*484] *The Vice-Chancellor held that the company ought to be postponed to Mrs. Whipp, and gave a judgment on that footing. The plaintiff company appealed, and the appeal was heard on the 23rd of February and the 7th and 10th of March, 1884.

Ambrose, Q. C., and Maberly, for the appeal: —

The Vice-Chancellor has misconceived the principle on which the Court deprives the owner of a legal first mortgage of the benefit of his position. There is no case in the books in which he has been postponed for mere negligence in the custody of the deeds. In *Hewitt* v. *Loosemore*, 9 Hare, 449, 21 L. J. Ch. 69, it was held only that making no inquiry for the deeds would postpone the legal mortgagee. There is this distinction here: the company did get the deeds, and they had a right to suppose that their confidential servant would not commit a crime — they had a right to trust him.

[Cotton, L. J.: — You have to consider whether they can trust their agent with a security given by himself.]

Mere negligence in the custody of documents does not make a person liable for the use improperly made of them: *Baxendale* v. *Bennett*, 3 Q. B. D. 525, 47 L. J. Q. B. 624; so as to a corporate seal: *Bank of Ireland* v. *Evans' Charities*, 5 H. L. C. 389. There is no general duty to all the world that a man should be careful as to the custody of his documents: *Arnold* v. *Cheque Bank*, 1 C. P. D. 578. Then we come to the equity cases. *Evans* v. *Bicknell*, 6 Ves. 174 (5 R. R. 245), is the leading case. There Lord Eldon lays it down, 6 Ves. 190 (5 R. R. 259), that a first mortgagee is not to be postponed for parting with the deeds "unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence that amounts to evidence of a fraudulent intention." *Martinez* v. *Cooper*, 2 Russ. 198, and *Hewitt* v. *Loosemore*, adopt that rule. *Perry-Herrick* v.

Attwood, 2 De G. & J. 21, went on the ground that the deeds were left with the mortgagor for the purpose of enabling him to raise money; *Briggs* v. *Jones*, L. R., 10 Eq. 92, goes on the same ground; * *Hunt* v. *Elmes*, 2 D. F. & J. 578, is a [*485] strong authority in our favour, as also *Ratcliffe* v. *Barnard*, L. R., 6 Ch. 652, 40 L. J. Ch. 147. In order to postpone a first legal mortgage, there must be evidence of connivance or assistance in the fraud of the mortgagor.

W. W. Karslake, Q. C., and Pankhurst, *contra*: —

The appellants put it that the deeds came into the custody of the company, and that they were guilty of no negligence in trusting their manager; but as Crabtree had free access to the deed chest, the deeds, in fact, were never taken out of his custody. The negligence of the directors as to the deed chest was extreme, — it was manifest that, if Crabtree had free access to it, he could deal with his own property as he pleased by suppressing the mortgages. It is said that the negligence must be such that the Court will on the ground of it impute fraud; but the rule is not so laid down in *Colyer* v. *Finch*, 5 H. L. C. 905, 928. It is there said that to postpone the first mortgagee the party claiming by subsequent title must satisfy the Court "that the first mortgagee has been guilty either of fraud or gross negligence." *Roberts* v. *Croft*, 2 De G. & J. 1, lays down the rule in the same way.

[Fry, L. J.: — In the *Agra Bank* v. *Barry*, L. R., 7 H. L. 135, the rule appears to be laid down rather differently.

Cotton, L. J.: — In *Colyer* v. *Finch*, 5 H. L. C. 905, 929, the expression is used that it must be negligence so gross as to make the mortgagee answerable for the frauds which he enables others to commit.]

Waldron v. *Sloper*, 1 Drew. 193, is for us.

[Fry, L. J.: — That is a case where the contest was between equitable incumbrancers. Can you take away the benefit of the legal estate from the first incumbrancer in favour of the second if there be no fraud?]

It may be done, though not often. *Worthington* v. *Morgan*, 16 Sim. 547.

[Fry, L. J.: — The question there was whether there was a purchase for value without notice.]

* *Perry-Herrick* v. *Attwood*, 2 De G. & J. 21; *Briggs* v. [*486] *Jones*, L. R., 10 Eq. 92.

[Cotton, L. J. : — In both cases the decision went on the ground of authority — not of mere negligence.

Fry, L. J. : — If you give the key of the wine-cellar to your butler, does that enable him to make a valid pledge of your wine ?]

Clarke v. *Palmer*, 21 Ch. D. 124, 51 L. J. Ch. 634, is almost identical with the present case. If there is any rule under which a first mortgagee having the legal estate can be postponed without having been guilty of actual fraud, and Judge after Judge has said that there is, that rule ought to be applied here. A mortgagee who knows that his mortgagor is in possession of the mortgaged property, and yet suffers him to retain the title deeds, is wilfully enabling him to commit a fraud. In such circumstances he is bound to take care that the mortgagor has not the means of representing himself as an unincumbered owner. The decision in *Halifax Union* v. *Wheelwright*, L. R., 10 Ex. 183, is in our favour.

[Bowen, L. J. : — That is one of the cases as to fraud in drawing cheques and other negotiable instruments, which are almost innumerable, and seems to me to have little bearing upon a question as to the custody of title deeds.]

Ambrose, in reply.

1884. April 3. The judgment of the Court (Cotton, Bowen, and Fry, L. JJ.) was now delivered by Fry, L. J., who, after shortly stating the facts as to the securities in the same terms as above, proceeded as follows : —

The plaintiffs being possessed of mortgages earlier in date than the mortgage of the defendant, and, under these instruments, being the owners of the legal estate, are *primâ facie* entitled to priority over the defendant, but the defendant seeks to postpone the plaintiffs' legal estate on various grounds.

The main contention on the part of the defendant, which succeeded in the Court below, was that by reason of the neg-
[*487] ligent *conduct of the plaintiffs, after they had taken their mortgages, these securities ought to be postponed to the security of the defendant; and this point has been argued at such length and with so extensive a reference to the authorities, that it appears to us necessary to consider the matter fully.

The question which has thus to be investigated is — What conduct in relation to the title deeds on the part of a mortgagee

who has the legal estate, is sufficient to postpone such mortgagee in favour of a subsequent equitable mortgagee who has obtained the title deeds without knowledge of the legal mortgage? The question is not what circumstances may as between two equities give priority to the one over the other, but what circumstances justify the Court in depriving a legal mortgagee of the benefit of the legal estate. It has been contended on the part of the plaintiffs that nothing short of fraud will justify the Court in postponing the legal estate. It has been contended by the defendant that gross negligence is enough.

The cases which assist in answering the question thus raised will be found to fall into two categories — (1), those which relate to the conduct of the legal mortgagee in not obtaining possession of the title deeds; (2), those which relate to the conduct of the legal mortgagee in giving up or not retaining the possession of the title deeds after he has obtained them. The two classes of cases will not be found to differ in the principles by which they are to be governed, but they do differ much in the kind of fraud which is to be most naturally looked for. In the case of a person taking the legal estate, and not seeking for or obtaining the title deeds from the mortgagor, the question may arise between the legal mortgagee and either a prior or a subsequent incumbrancer or purchaser. But in such a transaction the fraud about which the Courts are most solicitous is that which is practised when a man takes the legal estate with knowledge of a prior equitable sale or incumbrance, and yet strives to place himself in a position to show that he took without notice, — that kind of fraud which Lord HARDWICKE explained in *Le Neve* v. *Le Neve*, Amb. 436, 445, when he said: — "The taking of a legal estate after notice of a prior right makes a person a *malâ fide* purchaser. . . .
*This is a species of fraud, and *dolus malus* itself; for he [*488] knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate."

On the other hand, when the legal mortgagee has obtained the possession of the title deeds and subsequently gives them up, no question can arise between him and a prior equitable owner, and no suspicion of the particular fraud which we have referred to can arise; the estate of the legal mortgagee can never be improved by any subsequent dealings with the deeds, and therefore, before the

Court can find a fraudulent intent in the legal mortgagee, it must be shown that he concurred in some project to enable the mortgagor to defraud a subsequent mortgagee, or that he was a party or privy to some other fraud in fact. The kind of fraud most to be looked for in this class of cases is such as was described by the Lord Chancellor, Lord COWPER, in the case of the *Thatched House*, when he said (1 Eq. Ca. Abr. 322) : — "If a man makes a mortgage, and afterwards mortgages the same estate to another, and the first mortgagee is in combination to induce the second mortgagee to lend his money, this fraud will without doubt in equity postpone his own mortgage. So if such mortgagee stands by and sees another lending money on the same estate without giving him notice of his first mortgage, this is such a misprision as shall forfeit his priority."

On the head of law, now under consideration, the observations of Lord ELDON in giving judgment in the case of *Evans* v. *Bicknell*, 6 Ves. 174 (5 R. R. 245), are without doubt the leading authority. That case is remarkable for several reasons, and not the least so because it is the leading authority on a point which did not naturally arise in it. In that case a settlement had been made on the marriage of Stansell and his wife, the defendant Bicknell being the trustee of the settlement, and as such having possession of the title deeds. Bicknell had delivered the deeds to Stansell, and Stansell, having obtained the deeds, mortgaged the property to the plaintiffs and delivered to them the deeds. The plaintiffs alleged that Bicknell so delivered the deeds to assist Stansell in his fraud. Bicknell, on the contrary, alleged [*489] and swore that he did it to enable Stansell * to obtain credit in his trade by showing that his wife was tenant for life of the property; and the real question for decision was whether Bicknell could, on the ground of his alleged participation in Stansell's fraud, be made liable for the difference between the value of Stansell's life interest under the settlement and the amount of the plaintiff's mortgage. In considering this point, the LORD CHANCELLOR was led to discuss the question of postponing the legal estate on the ground of conduct. It is, we think, impossible to read the judgment and not to come to the conclusion that Lord ELDON considered that the same fraud and the same kind of negligence which would support a suit for personal relief would justify the postponement of the legal estate, and that noth-

ing less would have that effect. Having referred to the evidence of the principal witness, Lord ELDON said, 6 Ves. 189 (5 R. R. 258): "I still entertain great doubt, whether upon such a transaction a party should be charged personally; for even upon that it amounts to no more than that a trustee delivers the deeds into the hands of a party, who has the settlement. I do not say, it is not negligence; but it is too dangerous upon such loose evidence to hold, that it is that gross negligence that amounts to evidence of fraud."

The LORD CHANCELLOR then turned to consider a judgment in which Mr. Justice BULLER had erroneously affirmed that it was an established rule in equity that a second mortgagee who has the title deeds without notice should be preferred, and after adverting to his mistake, observed, 6 Ves. 190 (5 R. R. 259): "The doctrine at last is, that the mere circumstance of parting with the title deeds, unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence that amounts to evidence of a fraudulent intention, is not of itself a sufficient ground to postpone the first mortgagee."

The expression "gross negligence that amounts to evidence of a fraudulent intention" is certainly embarrassing, for negligence is the not doing of something from carelessness and want of thought or attention; whereas a fraudulent intention is a design to commit some fraud, and leads men to do or omit doing a thing not carelessly, but for a purpose. But Lord ELDON seems to have meant by his words to describe the not doing of something, so *ordinarily done by honest men under the given circum- [*490] stances, as to be really attributable not to negligence or carelessness, but to a fraudulent intention. In short, it appears to us that in the mouth of Lord ELDON the word "negligence" was used simply to express non-feasance.

In a subsequent passage of his judgment the LORD CHANCELLOR varies the form of his language, but without throwing any fresh light on his meaning. In one place (6 Ves. 191), he speaks of "negligence so gross as to amount to fraud," which seems like speaking of carelessness so great as to amount to design; in another place (6 Ves. 192), of "negligence so gross as to amount to constructive fraud;" and again (6 Ves. 193), of a "circumstance of so gross negligence . . . that it is conclusive evidence of fraud."

In the subsequent case of *Martinez* v. *Cooper*, 2 Russ. 198, 217, Lord ELDON referred to *Evans* v. *Bicknell*, 6 Ves. 174 (5 R. R. 245), as having settled the principle, which he again expresses in nearly similar language. "There must be," he says, "either direct fraud, or negligence amounting to evidence of fraud, to induce this Court to interfere for the purpose of postponing a party who insists on the legal benefit of his deed." All this language of Lord ELDON, though loose and difficult to construe, appears to us to point to fraud, as the necessary conclusion before the Court can deprive the owner of the legal estate of his legal rights derived from that estate. This fraud, no doubt, may be arrived at either by direct evidence or by evidence circumstantial and indirect, and it does not cease to be fraud, because the particular object in contemplation of the parties may have been a fraud in some respects different from the fraud actually accomplished; or because the person intended to have been defrauded may be different from the person actually defrauded; or because the original fraudulent intention had no particular person in view. See *Beckett* v. *Cordley*, 1 Bro. C. C. 353, and per Lord ELDON in *Evans* v. *Bicknell*, 6 Ves. 192.

That fraud and fraud alone was the ground for postponing the legal estate was, we think, the opinion of Lord HARD-
[*491] WICKE in * *Le Neve* v. *Le Neve*, Amb. 436, 447. "Fraud, or *mala fides*, therefore," he said, "is the true ground on which the Court is governed in the cases of notice."

That Sir WILLIAM GRANT entertained the same view, and considered it as the result of *Evans* v. *Bicknell*, 6 Ves. 174 (5 R. R. 245), is apparent from his observations in *Barnett* v. *Weston*, 12 Ves. 130, 133 (8 R. R. 319), where he said that the old cases for postponing the first mortgagee had been shaken unless a case of fraud could be made out.

That Lord Justice JAMES adopted the same rule is plain from what he said in the case of *Ratcliffe* v. *Barnard*, L. R., 6 Ch. 652, 40 L. J. Ch. 147. "The legal mortgagee must," he said, "have been guilty of fraud, or of that wilful negligence which leads the Court to conclude that he is an accomplice in the fraud."

From this consensus of expression as to the true rule, some departure is said by the learned counsel for the defendant to have occurred in the language used by Lord CRANWORTH, L. C., in the case of *Colyer* v. *Finch*, 5 H. L. C. 905, and of *Roberts* v. *Croft*,

2 De G. & J. 1. It is enough to say that in our opinion the LORD CHANCELLOR plainly intended in both of these cases to lay down no new principle, and his use of the expression "negligence so gross as to be tantamount to a fraud," and his emphatic reliance on the cases of *Evans* v. *Bicknell* and *Martinez* v. *Cooper*, 2 Russ. 198, in his judgment in *Colyer* v. *Finch*, are sufficient evidence of this intention.

Turning now to the decisions, mostly subsequent to that of *Evans* v. *Bicknell*, which have been cited in argument, it will be found that the cases which have arisen on the conduct of the mortgagee in not obtaining possession of the title deeds may be ranged in the following classes: —

(1.) Where the legal mortgagee or purchaser has made no inquiry for the title deeds and has been postponed, either to a prior equitable estate as in *Worthington* v. *Morgan*, 16 Sim. 547, or to a subsequent equitable owner who used diligence in inquiring for the title deeds, as in *Clarke* v. *Palmer*, 21 Ch. D. 124, 51 L. J. Ch. 634. In these cases the Courts have considered the conduct of the mortgagee in making no * inquiry to be evi- [*492] dence of the fraudulent intent to escape notice of a prior equity, and in the latter case that a subsequent mortgagee, who was, in fact, misled by the mortgagor taking advantage of the conduct of the legal mortgagee, could as against him take advantage of the fraudulent intent.

(2.) Where the legal mortgagee has made inquiry for the deeds, and has received a reasonable excuse for their non-delivery, and has accordingly not lost his priority, as in *Barnett* v. *Weston*, 12 Ves. 130 (8 R. R. 319); *Hewitt* v. *Loosemore*, 9 Hare, 449; *Agra Bank* v. *Barry*, L. R., 7 H. L. 135.

(3.) Where the legal mortgagee has received part of the deeds under a reasonable belief that he was receiving all, and has accordingly not lost his priority, as in *Hunt* v. *Elmes*, 2 D. F. & J. 578; *Ratcliffe* v. *Barnard*, L. R., 6 Ch. 652, 40 L. J. Ch. 147, and *Colyer* v. *Finch*, 5 H. L. C. 905.

(4.) Where the legal mortgagee has left the deeds in the hands of the mortgagor with authority to deal with them for the purpose of his raising money on security of the estate, and he has exceeded the collateral instructions given to him. In these cases the legal mortgagee has been postponed, as in *Perry-Herrick* v. *Attwood*, 2 De G. & J. 21. This case was decided not on the ground that

the legal mortgagees had been guilty of fraud, but on the ground that as they had left the deeds in the hands of the mortgagor for the purpose of raising money, they could not insist, as against those who in reliance on the deeds lent their money, that the mortgagor had exceeded his authority.

The cases where the mortgagee having received the deeds has subsequently parted with them, or suffered them to fall into the hands of the mortgagor, will be found to fall into the following classes: —

(1.) Where the title deeds have been lent by the legal mortgagee to the mortgagor upon a reasonable representation made by him as to the object in borrowing them, and the legal mortgagee has retained his priority over the subsequent equities, as *Peter* v. *Russel*, or *Thatched House Case*, 1 Eq. Ca. Abr. 321; *Martinez* v. *Cooper*, 2 Russ. 198.

[* 493] (2.) * Where the legal mortgagee has returned the deeds to the mortgagor for the express purpose of raising money on them, though with the expectation that he would disclose the existence of the prior security to any second mortgagee: *Briggs* v. *Jones*, L. R., 10 Eq. 92. In such cases the Court has, on the ground of authority, postponed the legal to the equitable estate. This is the same in principle as the decision in *Perry Herrick* v. *Attwood*, 2 De G. & J. 21.

No case has been cited in which the legal mortgagee has (as by the Vice-Chancellor in this case) been postponed by reason of negligence in the custody of the deeds.

The decisions on negligence at common law have been pressed on us in the present case, but it appears to us enough to observe, that the action at law for negligence imports the existence of a duty on the part of the defendant to the plaintiff, and a loss suffered as a direct consequence of the breach of such duty; and that in the present case it is impossible to find any duty undertaken by the plaintiff company to the defendant, Mrs. Whipp. The case was argued as if the legal owner of land owed a duty to all other of Her Majesty's subjects to keep his title deeds secure; as if title deeds were in the eye of the law analogous to fierce dogs or destructive elements, where from the nature of the thing the Courts have implied a general duty of safe custody on the part of the person having their possession or control. This view is, in our opinion, impliedly negatived by the whole course of decisions, and it

is expressly repelled by the observations of the present LORD CHANCELLOR in *Agra Bank* v. *Barry*, L. R., 7 H. L. 157, where he said, "It has been said in argument that investigation of title and inquiry after deeds is 'the duty' of a purchaser or a mortgagee; and, no doubt, there are authorities (not involving any question of registry), which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man dealing *bonâ fide* in the proper and usual manner for his own interest, ought, by himself or his solicitor, to follow, with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted * for or explained. It may be evi- [* 494] dence, if it is not explained, of a design, inconsistent with *bonâ fide* dealing, to avoid knowledge of the true state of the title. What is a sufficient explanation, must always be a question to be decided with reference to the nature and circumstances of each particular case." These observations appear to us conclusive on the point, and they at the same time suggest the conclusion, that if in any case it shall appear that a prior legal mortgagee has undertaken any duty as to the custody of the deeds towards any given person, and has neglected to perform that duty with due care, and has thereby injured the person to whom the duty was owed, there the legal estate might be postponed by reason of the negligence. But no such case appears as yet to have arisen, nor does it seem one likely often to occur. The point certainly does not arise in the present case, and we therefore give no opinion upon it.

The authorities which we have reviewed appear to us to justify the following conclusions: —

(1.) That the Court will postpone the prior legal estate to a subsequent equitable estate: (*a*), where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal estate; of which assistance or connivance, the omission to use ordinary care in inquiry after or keeping title deeds may be, and in some cases has been, held to be sufficient evidence, where such conduct cannot otherwise be explained; (*b*), where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus cre-

ated has by the fraud or misconduct of the agent been represented as being the first estate.

But (2) that the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner.

Now, to apply the conclusions thus arrived at to the facts of the present case. That there was great carelessness in the manner in which the plaintiff company through its directors dealt with their securities seems to us to admit of no doubt. But is that carelessness evidence of any fraud? We think that it is not. Of what fraud is it evidence? The plaintiffs never com-
[* 495] bined * with Crabtree to induce the defendant to lend her money. They never knew that she was lending it, and stood by. They can have had no motive to desire that their deeds should be abstracted and their own title clouded. Their carelessness may be called gross, but in our judgment it was carelessness likely to injure and not to benefit the plaintiff company, and accordingly has no tendency to convict them of fraud.

Then comes the inquiry whether the plaintiff company constituted Crabtree their agent to raise money, in which case the defendant might be entitled to priority. The circumstance most favourable to this contention was, in our opinion, the possession by Crabtree of the key. But the defendant has not proved the circumstances attending this fact, or the duties for the performance of which the key may have been essential, with sufficient distinctness to enable us to conclude from the possession of the key that it implied an authority to deal with the securities of the plaintiff company. The cases in which Crabtree did so deal with the securities, when carefully considered, appear to us insufficient to support the authority claimed; and the fact that Crabtree, in dealing with the defendant, suppressed his mortgage to the company and dealt with her, not as agent of the company having an authority to pledge its securities, but as the unencumbered owner of the property, goes, we think, far to negative the suggested authority. On this point, therefore, we agree with the Vice-Chancellor.

One other point was argued and demands decision. Of the £3500 paid by Mrs. Whipp to Crabtree, it appears that £1900 found its way from Crabtree into the banking account of the plaintiff company; but on the evidence we conclude that it was

paid to the company on account of and as the money of Crabtree, and not of Mrs. Whipp, and further, that it was paid in part satisfaction of a much larger debt, and without notice to the company of the source from whence it was derived. It has been argued that to the extent of this £1900 the company should be postponed to Mrs. Whipp, on the ground that the defendant is entitled to follow this money obtained from her by fraud. The proposition that money obtained by fraud can be followed into the hands of persons who take it in satisfaction of a *bonâ fide*
* debt without notice, is in our judgment devoid of sup- [* 496]
port from principle or authority.

Differing as we do from the learned VICE-CHANCELLOR on the one point on which he decided against the plaintiffs, we conclude that his judgment must be discharged, and that instead of it the Court must declare the plaintiffs entitled to priority and give the usual consequent relief. The plaintiffs must add to their security so much of the costs of the action in the Court below as would have been incurred if the action had been a simple action for foreclosure and no question of priority had been raised, and the defendant must pay to the plaintiffs the residue of the plaintiffs' costs in the Court below and the whole of the costs of the appeal.

ENGLISH NOTES.

The two cases above set forth contain so clear an exposition of principles, that it is not necessary to multiply examples in a note. The case of *Manners* v. *Mew*, fully reported as No. 15 of "Deed," 8 R. C. 682, follows the latter of the principal cases; and several cases illustrating the principles of the above rule will be found in the Notes to Nos. 15 & 16 of "Deed," 8 R. C. 704 *et seq.*

The former of the principal cases was followed in *Hunter* v. *Walters* (1870), L. R., 11 Eq. 292, 24 L. T. 276 (affirmed L. R., 7 Ch. 75, 41 L. J. Ch. 175, 25 L. T. 765, 20 W. R. 418), *Spencer* v. *Clarke* (1878), 9 Ch. D. 137, 47 L. J. Ch. 692, 27 W. R. 133; *Bickerton* v. *Walker* (C. A. 1885), 31 Ch. D. 151, 55 L. J. Ch. 227, 53 L. T. 731, 34 W. R. 141; *In re Eyton; Bartlett* v. *Charles* (1890), 45 Ch. D. 458, 59 L. J. Ch. 733.

A person is not guilty of negligence or misplaced confidence within the meaning of the former part of the rule, merely because the confidence reposed by him, in the ordinary way, in a trustee or solicitor has been betrayed by that trustee or solicitor. *Shropshire Union Railway and Canal Co.* v. *Reg.* (H. L. 1875), L. R., 7 H. L. 496,

45 L. J. Q. B. 31, 32 L. T. 283, 23 W. R. 709; *In re Vernon Ewens & Co.* (C. A. 1886), 33 Ch. D. 402, 56 L. J. Ch. 12, 55 L. T. 416, 35 W. R. 225.

In two cases subsequent to the latter of the principal cases it is shown that the rule established by that case does not apply as between two equitable claims. These are *National Provincial Bank of England* v. *Jackson* (C. A. 1886), 33 Ch. D. 1, 55 L. T. 458, 34 W. R. 597; and *Farrand* v. *Yorkshire Banking Co.* (1888), 40 Ch. D. 182, 58 L. J. Ch. 238, 60 L. T. 669, 37 W. R. 318. See notes to Nos. 15 & 16 of "Deed," 8 R. C. 709. And see further on a nearly analogous question, *Taylor* v. *Russell*, No. 9, p. 545, *post* and Notes.

AMERICAN NOTES.

Mr. Pomeroy says (2 Eq. Jur. §§ 686, 687): "The equity acquired by a party who has been misled is superior to the interest in the same subject-matter of the one who wilfully procured or suffered him to be thus misled." "The rule extends to gross negligence, which is tantamount in its effects to fraud. An equity otherwise equal, or even prior in point of time, may through the gross laches of its holder be postponed to a subsequent interest which another person was enabled to acquire by means of such negligence." He cites both the principal cases, and endeavors to reconcile the conflicting decisions respecting the doctrine of *prior in tempore*. He considers that this principle "prevails only when the successive equitable interests are equal," and that the equity resulting from priority in time "is the feeblest of any, and only to be resorted to where there is no other incident or feature of superiority." Of *Rice* v. *Rice* he says: "This description of the right resulting from a priority of time is, in my opinion, much too strong; it can hardly be reconciled with the imposing line of authorities cited in the following paragraphs."

In *Bush* v. *Lathrop*, 22 New York, 535, the holder of a bond and mortgage for $1400, assigned them by an instrument absolute on its face, to secure a debt of $270, the assignee agreeing in writing to return them on payment of the latter sum. The assignee then transferred the securities to a second, and he to a third, the latter paying full value in good faith. It was held that the original owner could compel the return of the securities on tender of the $270. This is a leading case, and is a very exhaustive review of the authorities. Three judges dissented.

But in *McNeil* v. *Tenth Nat. Bank*, 46 New York, 325; 7 Am. Rep. 341, where the owner of bank shares delivered to his brokers, to secure a balance of account, the certificate of the shares, indorsed with a blank assignment and irrevocable power of attorney, signed and sealed by himself, and the brokers, without his knowledge or assent, pledged them with other securities for advances, it was held that one who paid the advances at the brokers' request and in good faith received the shares and other securities, could hold them as against the owner for the full amount of the advances remaining unpaid after the other securities were exhausted. Distinguishing *Bush* v. *Lathrop*.

In *Moore* v. *Metropolitan Nat. Bank*, 55 New York, 41; 14 Am. Rep. 173, A. was owner of a certificate of State indebtedness for $10,000, which he assigned in writing to B. as security for $7,000. The transfer was induced by fraud and promises not fulfilled. B. transferred the security to defendant, which took it on the faith of the assignment. It was ruled that the defendant could hold it against A., apparently overruling *Bush* v. *Lathrop*.

But later, in *Davis* v. *Bechstein*, 69 New York, 440; 25 Am. Rep. 218, where plaintiff had executed a bond and mortgage to R. as an accommodation, to enable him to borrow money by pledging it as collateral, and R. sold them outright to an innocent purchaser, the court cancelled them. Distinguishing the *McNeil* and *Moore* cases on the ground that there the owner, by his own affirmative act, conferred apparent title and ownership upon another. Other New York cases seem to sustain *Bush* v. *Lathrop*: *Reeves* v. *Kimball*, 40 New York, 299; *Ingraham* v. *Disborough*, 47 ibid. 421; *Schafer* v. *Reilly*, 50 ibid. 61; *Ledwick* v. *McKim*, 53 ibid. 307; *Cutts* v. *Guild*, 57 ibid. 229; *Trustees* v. *Wheeler*, 61 ibid. 88; *Greene* v. *Warnick*, 64 ibid. 220. Mr. Pomeroy considers that the *Moore* case, rather than the *Bush* case, has been overruled; he considers its doctrine "unsupported by authority and unsound in principle;" he correctly estimates "the authority of Judge Denio for ability, learning, and experience, is immeasurably superior to that of Judge Grover, and is not perhaps surpassed by any of his contemporaries among the American judiciary." In *Fairbanks* v. *Sargent*, 104 New York, 117; 58 Am. Rep. 490, the *Bush* case was declared to remain in "full force unquestioned," except in circumstances like those of the *McNeil* case.

The course of California decisions approves *Bush* v. *Lathrop*: *Barstow* v. *Savage M. Co.*, 64 California, 388.

In *International Bank* v. *German Bank*, 71 Missouri, 183; 36 Am. Rep. 468, a certificate of deposit bore the following words written in red ink across the face: "The certificate is subject to any subsequent claim for collection or any other fees arising out of the disbursement of the legacy of which this money is part of the proceeds. The payee indorsed it in blank and delivered it. *Held*, that even considering it non-negotiable, the transferee might pledge it to an innocent party who could hold it as against the true owner, to the amount advanced, unaffected by any equities between the transferor and the payee.

In *Moore* v. *Moore*, 112 Indiana, 149; 2 Am. St. Rep. 170, the doctrine of *Moore* v. *Metropolitan Bank* was applied to the case of a bond and mortgage, the court considering that *Bush* v. *Lathrop* is overruled by the later New York decisions; but it is evident that the statute making negotiable by indorsement notes, bills, "bonds or other instruments in writing" — was deemed to vest legal title in the indorsers, "whether such instruments be technically negotiable by the law merchant or not."

The New York conflict is noted also in *Combes* v. *Chandler*, 33 Ohio State, 178. There B. made and delivered his non-negotiable note to C., from whom it was obtained by fraud and misrepresentation, and without adequate consideration. The assignee so obtaining it transferred it to W., a purchaser for value in good faith. *Held*, that C. could not reclaim it from W. This

decision is founded on Mr. Pomeroy's reasoning, but without noticing that he restricts the doctrine to that class of cases where the party seeking relief has by his own act furnished evidence, outside the obligation in question, tending to show that he has parted with all title to it, and without noticing that while Mr. Pomeroy lays down the doctrine of the *McNeil* case, he approves the *Bush* case and disapproves the *Moore* case.

In *Wood's Appeal*, 92 Penn. State, 379; 37 Am. Rep. 694, one of several executors pledged to his broker, as collateral security for his own debt, certificates of stock belonging to the estate. The broker pledged them to a third, who advanced money on them, supposing the broker to be the owner. The transfers showed on their face that the title came from the executors. *Held*, that the other executors could not recover the stock without paying those advances. The court said: "By commercial usage, a certificate of stock accompanied by an irrevocable power of attorney, either filled up or in blank, is in the hands of a third party presumptive evidence of ownership in the holder. And when the party in whose hands the certificate is found is a holder for value, without notice of any intervening equity, his title cannot be impeached." Citing *Moore* and *McNeil* cases; and *Prall* v. *Tilt*, 28 New Jersey Equity, 480: *Bridgeport Bank* v. *New York, &c. R. Co.*, 30 Connecticut, 275.

Mr. Pomeroy correctly sums up the American doctrine as follows: "If the owner and holder of a thing in action not negotiable transfers it to an assignee upon condition, or subject to any reservations or claims in favor of the assignor, although the instrument of assignment be absolute on its face, this immediate assignee, holding a qualified and limited interest, cannot convey a greater property than he himself holds; and if he assumes to convey it to a second assignee by a transfer absolute in form, and for a full consideration, and without any notice to such purchaser of a defect in the title, this second assignee takes it, nevertheless, subject to all the equities, claims, and rights of the original holder and first assignor. In the second place, where the original assignment is accomplished by a forgery of the holder's name, or where it is effected by a wrongful conversion of the security, together with a written instrument of transfer which has been signed by the owner, or where it is made upon an illegal consideration between the owner and his immediate assignee, or where it is procured by fraud, duress, or undue influence upon the owner, and in either of these cases the thing in action is afterwards transferred from the first to a second or other subsequent assignee, who takes it for value and without notice, the same rule must control; the equities of the original owner must prevail over the claims of the subsequent though innocent assignee."

Mr. Pomeroy however recognizes the correctness of the *McNeil* and *Moore* decisions on the ground of estoppel by the owner's affirmative act in supplying the *indicia* of ownership of stock certificates, and thus enabling the first transferee to deceive others by a breach of trust. 2 Eq. Jur. § 710. To the same effect: *Combes* v. *Chandler*, 33 Ohio State, 178. See also *Laughlin* v. *District of Columbia*, 116 United States, 489; *Joslyn* v. *St. Paul Distilling Co.*, 44 Minnesota, 183; *Caulkins* v. *Gas Light Co.*, 85 Tennessee, 683; 4 Am. St. Rep. 786; *Wood's Appeal*, 92 Penn. State, 379; 37 Am. Rep. 694; *Walker* v. *Detroit Ry. Co.*, 47 Michigan, 338; *Moores* v. *Citizens' Nat. Bank*, 111 United

States, 165; *Young* v. *Erie Iron Co.*, 65 Michigan, 111; *Moore* v. *Moore*, 112 Indiana, 149; 2 Am. St. Rep. 170. If a mortgagee permits the mortgagor to retain the mortgage, and the latter fraudulently cancels it of record, the mortgagee cannot enforce it as against a subsequent grantee in good faith and for value. *Heyder* v. *Excelsior B. L. Ass'n*, 42 New Jersey Equity, 403; 59 Am. Rep. 49.

The like doctrine has been held in respect of an unauthorized sale of a chattel entrusted by the owner to the seller for a special purpose: *Smith* v. *Clews*, 114 New York, 190; 11 Am. St. Rep. 627.

In this country, under the recording acts which exist in every State, the assignment of a mortgage, even if not explicitly named, is generally deemed a "conveyance," which the assignee must put on record in order to protect himself against other and subsequent assignees of the mortgage, or other mortgages previously recorded. *Westbrook* v. *Gleason*, 79 New York, 23; *Byles* v. *Tome*, 39 Maryland, 461; *Bowling* v. *Cook*, 39 Iowa, 200; *Bank* v. *Anderson*, 14 Iowa, 544; 83 Am. Dec. 390; *Henderson* v. *Pilgrim*, 22 Texas, 464; *Pepper's Appeal*, 77 Penn. State, 373.

No. 8. — PHILLIPS *v.* PHILLIPS.

(L. C. 1862.)

RULE.

THE grant of a person entitled in equity to an interest in land passes only that which he is justly entitled to and no more. The subsequent grantee takes only what is left in the grantor. As between two grantees, therefore, of such an interest, the grant which is prior in date will prevail.

But a person who has purchased, and had conveyed to him, an equitable interest in land, may plead purchase for value without notice against a prior equity not in the nature of an equitable estate.

Phillips v. Phillips.

31 L. J. Ch. 321–327 (s. c. 4 De G. F. & J. 208).

Purchase for Value without Notice.— Priorities.— Equity.— Equitable Estate

A., being entitled to the equity of redemption in fee in certain lands, by [321] a deed of family arrangement dated in February, 1820, granted to his brother, B., an annuity of £20 charged on those lands and payable on the death of his mother, C. By a settlement made on his marriage in May, 1821, A. settled the above lands, subject to the mortgage existing thereon, and he at the same

No. 8. — Phillips v. Phillips, 31 L. J. Ch. 321.

time covenanted that they were not otherwise incumbered. A. died in 1825, and C. died in 1839. The first payment of the annuity became due in March, 1840. In 1859 B. filed a bill against those claiming under the settlement for payment of the annuity. The defendants set up orally at the bar the defence that they were purchasers for value without notice of B.'s annuity: —*Held*, that such defence should have been pleaded formally, and could not be set up orally at the hearing; and also that the prior equitable interest of B. under the charge, which was in the nature of an equitable estate, could not be displaced by the equitable interests of the defendants, although they were purchasers for value without notice. If B.'s claims had been merely to an equity such as a claim arising out of fraud or mistake, the defence of purchase for value without notice might have been good.

By indenture dated the 4th of February, 1820, and made between Rebecca Phillips, widow, of the first part, John Phillips, her eldest son, of the second part, and the plaintiff William Phillips, her younger son, of the third part, after reciting the death of William Phillips, the husband of Rebecca Phillips, on the 29th of September then last, intestate, leaving John Phillips, his eldest son and heir-at-law, and Annie, the wife of George Butcher, and Rebecca, the wife of James Jones, and the plaintiff, his younger children; and after also reciting that subject to a life interest therein of Rebecca Phillips, W. Phillips, the intestate, died possessed of or entitled to the reversion in fee of an estate called Grosmont Wood, subject to a mortgage thereon for £800, and that he also died possessed of, or entitled to, for an estate of inheritance in fee simple in possession, an estate called Blanaway, subject to a mortgage thereon to General Kinsey for securing £1200 and interest; and after also reciting that the personal estate of the intestate did not amount to £500 and was subject to the payment of the debts and funeral and testamentary expenses of the intestate, and that the residue would be divisible among his wife and four children, in thirds, viz., one-third to his wife and two-thirds equally among his children; that Rebecca Phillips had obtained letters of administration on the 19th of October then last, and that J. Phillips was satisfied that the mode in which the property would devolve in consequence of his father's intestacy would be contrary to his father's wishes, and that he had in consequence voluntarily agreed to make a better provision for his sisters and his younger brother, the plaintiff, W. Phillips, by paying to each of his sisters £150 and securing to his brother William an annuity of £20 per annum from the decease of his mother, Rebecca Phillips, she having consented

to support the plaintiff in the mean time, and she being empowered by J. Phillips to receive her share of the intestate's personalty after payment of debts, except those due on mortgage, in consideration whereof the younger children were to assign to J. Phillips all their shares in their father's personal estate; and after also reciting that in part performance of such agreement, J. Phillips had given his note of hand to G. Butcher and his wife for £150 and a like note of hand to J. Jones and his wife, and that by an indenture of even date, in consideration of such notice and of the annuity intended to be secured to the plaintiff, G. Butcher and his wife, J. Jones and his wife and the plaintiff, had assigned to J. Phillips their shares in the residuary personal estate of the intestate, it was witnessed that, in consideration of the said assignment and of natural love and affection, J. Phillips granted to his brother, the plaintiff, an annuity of £20 to be charged and chargeable upon and issuing out of the said Blanaway estate, to have, hold, receive, and take the same immediately after the death of the said Rebecca Phillips to the plaintiff and his assigns for life. The indenture contained a power of distress and entry on the Blanaway estate for the recovery of the annuity, and Rebecca Phillips thereby covenanted that she would during her life, at her own costs and charges, maintain and
* support the plaintiff, provided he continued to live with [* 322]
and assist her as usual in the management of her business.

By indentures of lease and release, dated the 4th and 5th days of May, 1821, being the settlement made prior to and in consideration of the marriage afterwards solemnized between John Phillips and Mary Phillips, then Mary Roberts, spinster, John Phillips conveyed the hereditaments called Blanaway (subject to a mortgage for £1200 to W. Kinsey), together with other hereditaments, to John Roberts and William Roberts, their heirs and assigns, to the use of himself for ninety-nine years, if he should so long live, with remainder to the use of the said Mary Phillips, so long as she should continue his widow, with remainder, and in default of joint appointment by himself and the said Mary Phillips, to the use of all and every the children of the said intended marriage as tenants in common in fee.

John Phillips, by the indenture of the 5th of May, 1821, covenanted that the hereditaments called Blanaway were not subject, charged, or incumbered in title, estate, or otherwise howsoever, except with the mortgage thereon for £1200 to William Kinsey.

No. 8. — Phillips v. Phillips, 31 L. J. Ch. 322.

John Phillips died in 1825, intestate, and without having exercised the joint power of appointment limited to him and his wife Mary Phillips, by the indenture of the 5th of May, 1821, and leaving two sons, John Phillips and George Phillips.

Mary Phillips afterwards intermarried with John Ellis.

Rebecca Phillips died in December, 1839.

The plaintiff filed his bill originally, in December, 1859, against John Phillips, only alleging that the first payment of the annuity became due on the 8th of March, 1840, and praying for an account of what was due to him in respect of the annuity, and that in default of payment the amount might be raised by sale or mortgage or second mortgage of the Blanaway estate, and if necessary for a receiver.

The defendant John Phillips, by his answer, said that if any such deed as that alleged in the answer had been executed, it was without consideration and void as against the settlement of the 4th and 5th of May, 1821; and he stated that on the death of his father, the estate of Blanaway had devolved upon him and his brother George Phillips, as tenants in common, subject to the charges thereon. On the 24th of February, 1860, the bill was amended by making George Phillips a defendant; and he by his answer to the amended bill submitted that it appeared by the recitals in the deed of the 4th of February, 1820, and that it was the fact, that such deed was voluntary and made without any consideration, and that it was void against the settlement of the 4th and 5th of May, 1821; and he claimed the benefit of the statute, 27 Eliz., against fraudulent conveyances, as if he had pleaded the same.

Mary Phillips, the mother of the defendants, and William Roberts, one of the trustees of the indenture of the 5th of May, 1821, deposed that they had no notice of the annuity either prior to or at the date of that indenture.

The plaintiff sued *in formâ pauperis.*

Mr. F. O. Haynes, for the plaintiff.

Mr. Malins and Mr. John Pearson, for the defendants, contended that they were purchasers for value without notice of the deed of the 4th of February, 1820 — *Wallwyn* v. *Lee,* 9 Ves. 24 (7 R. R. 142). The defence of a purchaser for value without notice is good, although the legal estate is outstanding in a mortgagee. *Bowen* v. *Evans,* 1 Jo. & Lat. 178; *Joyce* v. *De Moleyns,* 2 Jo. & Lat. 374;

Penny v. *Watts*, 1 Mac. & G. 150; 1 H. & Tw. 266; 19 L. J. Ch. 212; *The Attorney General* v. *Wilkins*, 17 Beav. 285, 293; 22 L. J. Ch. 830; *Colyer* v. *Finch*, 19 Beav. 500; affirmed by House of Lords, 5 H. L. Cas. 905; 26 L. J. Ch. 65. The defence of a purchaser for value without notice need not be pleaded. *Patterson* v. *Slaughter*, Amb. 293; *Jerrard* v. *Saunders*, 2 Ves. jun. 458; *Ranelliffe* v. *Parkyns*, 6 Dow, 149, 230 (19 R. R. 36).

In *Lincoln* v. *Wright*, the Lords Justices held, that in a suit for specific performance the defence of the Statute of Frauds might be pleaded orally at the hearing. 5 Jur. N. S. 1142; 4 De Gex & Jo. 16; 28 L. J. Ch. 705.

*The deed of the 4th of February, 1820, was voluntary. [*323]

Stuart, V. C., held that the defence of purchase for value without notice could not be entertained, as it had not been pleaded so as to put the question properly in issue. He accordingly decreed a declaration that the plaintiff is en- [324] titled to have the arrear of his annuity raised out of the Blanaway estate; an account of what is due to him; and an order that the amount, with his costs of the suit, be raised by sale or mortgage of the estate, with liberty to apply.

Dec. 9, 10. — From this decision the defendants appealed.

Mr. F. O. Haynes, for the plaintiff, contended that no claim had been made by the defendants' pleadings on the ground of a purchase for value without notice; nor were the facts necessary for raising such a claim stated in the answer — *Ranelliffe* v. *Parkyns*.

Mr. Malins and Mr. J. Pearson, for the defendants. — Looking to what was on the face of the bill, as amended, there was no reason for the Court's interference. In the amended bill there was no allegation that the settlement was made with notice of the plaintiff's charge — *Harris* v. *Ingledew*, 3 P. Wms. 91. The defendants' equitable claim was sufficiently shielded against a legal claim, and *a fortiori* was it against an equitable claim as in this case. As to equal equities, it was said, in *Jerrard* v. *Saunders*, "A purchaser *bonâ fide*, without notice of any defect in his title at the time he made the purchase, may buy in a statute or mortgage, or any other incumbrance; and if he can defend himself at law by any such incumbrance bought in, his adversary shall never be aided in a Court of equity for setting aside such incumbrance; for equity will not disarm a purchaser, but assist him; and precedents of this nature are very ancient and numerous, viz., where the Court hath

refused to give any assistance against a purchaser, either to an heir or to a widow, or to the fatherless, or to creditors, or even to one purchaser against another." This rule was also exemplified in the cases of *Bowen* v. *Evans* and *Joyce* v. *De Moleyns*, where Lord ST. LEONARDS said (2 Jo. & LaT. p. 377), — "There is no question as to their title to recover at law; but I apprehend that the defence of a purchaser for value without notice is a shield as well against a legal as an equitable title." *The Attorney General* v. *Wilkins*; *Peacock* v. *Monk*, 1 Ves. sen. 127; 2 Ves. sen. 190; *Wallwyn* v. *Lee*, 9 Ves. 24 (7 R. R. 142); *Head* v. *Egerton*, 3 P. Wms. 280; *Lane* v. *Jackson*, 20 Beav. 535, 538.

[The LORD CHANCELLOR referred to *Jackson* v. *Rowe*, 2 Sim. & Stu. 472; 4 L. J. Ch. 118 (25 R. R. 250).]

They contended also that the deed under which the plaintiff claimed was voluntary, and therefore void — see 27 Eliz. c. 4.

Mr. Haynes in reply, referred to *Rooper* v. *Harrison*, 2 Kay & J. 86, and also, as to a sale being ordered to satisfy the plaintiff's claim, to *Cupit* v. *Jackson*, 13 Price, 721; 1 M'Clel. 495; *Manby* v. *Hawkins*, 1 Dru. & Wal. 363; *White* v. *James*, 26 Beav. 191; 28 L. J. Ch. 179; *Graves* v. *Hicks*, 11 Sim. 536; 10 L. J. Ch. 185.

[*325] *Jan. 11. — The LORD CHANCELLOR (WESTBURY). — When I reserved my judgment at the conclusion of the argument in this case, it was rather out of respect to that argument than from a feeling of any difficulty with regard to the question that had been so strenuously contested before me. The case is a very simple one. The plaintiff claims as the grantee of an annuity granted by a deed dated in the month of February, 1820, to issue out of certain lands in the county of Monmouth, secured by powers of distress and entry. The rent charge was not to arise until the death of one Rebecca Phillips, who died in the month of December, 1839, and the first payment of the annuity became due on the 8th of March, 1840. The case was argued on both sides on the admitted basis that the legal estate was outstanding in certain incumbrancers at the time of the grant, and is still outstanding. Subject to this annuity, the grantor was entitled in fee simple in equity. In May, 1821, the grantor intermarried with one Mary Roberts, and on the occasion of that marriage a marriage settlement, dated in May, 1821, was executed; and under this deed the defendants claim, and claim, therefore, as purchasers for valuable

consideration. No payment has ever been made in respect of the annuity. The bill was filed within twenty years, and claims the ordinary relief applicable to the case. The defendants by their answer insist that the deed was voluntary, and therefore void, under the Statute of Elizabeth, as against them in their character of purchasers for valuable consideration; and they also insist upon the Statute of Limitations. But in the answer the defence of purchaser for valuable consideration without notice is not attempted to be raised. At the hearing an affidavit of Mary Phillips and another person was produced, denying the fact of notice of the annuity at the time of the grant and at the time of the execution of the marriage settlement; and the contention made at the bar was, that the defence of purchaser for valuable consideration without notice was available to the defendants under these circumstances, and ought to be allowed, as a bar to the claim, by the Court. The VICE-CHANCELLOR, in his judgment, refused to recognize the defence of purchaser for valuable consideration without notice, and I entirely agree with him in the conclusion that such a defence requires to be pleaded by the answer, more especially when an answer has been put in. But I do not mean to rest my decision upon that particular ground, because I permitted the argument to proceed with reference to the general doctrine, and it was maintained before me with great energy and learning that the doctrine of a Court of equity was this, that it would give no relief whatever to any claimant against a purchaser for valuable consideration without notice, and it was urged upon me that the authority to this effect was to be found in some recent decisions of this Court, and particularly in the case decided at the Rolls of *The Attorney General* v. *Wilkins*. I undoubtedly was struck very much with the novel extent of the doctrine that was thus advanced, and in order to meet the argument it becomes necessary to resort to elementary principles. Now, I take it to be a clear proposition, that every conveyance of an equitable interest is an innocent conveyance; that is to say, the grant of a person entitled in equity passes only that which he is justly entitled to and no more. If, therefore, a person seised of an equitable estate, the legal estate being outstanding, makes an assurance by way of mortgage or grants an annuity and afterwards conveys the whole estate to a purchaser, he can only grant to the purchaser that which he has; namely, the estate subject to the annuity or mortgage, and no more. The subse-

quent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities, and the maxim applies *qui prior est in tempore, potior est in jure.* The first grantee is *potior*, that is, a *potentior*. He has a better, and superior, because a prior, equity. The first grantee has a right to be paid first, and it is quite immaterial whether the subsequent incumbrancers, at the time they took their securities and paid their money, had notice of the first incumbrance or not. These elementary rules are recognized in the case of *Brace* v. *the Duchess of Marlborough*, 2 P. Wms. 491, and they are further illustrated * by the familiar doctrine of this Court as to the tacking of securities. It is well known that if there are three incumbrancers, and the third incumbrancer at the time of his incumbrance and payment of his money, had no notice of the prior incumbrances, then if the first mortgagee or incumbrancer has the legal estate and the third pays him off and takes an assignment of his securities and a conveyance of the legal estate, he is entitled to tack his third mortgage to the first mortgage he has acquired, and to exclude the intermediate incumbrancer. But this doctrine is limited to the case where the first mortgagee has the legal title: for if the first mortgagee has not the legal title, the third mortgagee, by payment off of the first, acquires no priority over the second. Now, the defence of purchaser for valuable consideration is the creature of the Court of equity, and it never can be used in a manner at variance with the elementary rules which have already been stated. It seems at first to have been used as a shield against the claim in equity of persons having a legal title. *Bassett* v. *Nosworthy*, Finch, 102, is, if not the earliest, the best early reported case on the subject. There the plaintiff claimed under a legal title, and this circumstance, together with the maxim I have referred to, probably gave rise to the notion that this defence was good only against the legal title. But there appear to be three classes of cases in which the use of this defence is most familiar. First, where an application is made to the auxiliary jurisdiction of the Court by the possessor of a legal title, as by an heir-at-law, which was the case of *Bassett* v. *Nosworthy*, or by a tenant for life for the delivery of title-deeds, which was the case of *Wallwyn* v. *Lee*, and the defendant pleads he is a *bonâ fide* purchaser for valuable consideration without notice, the defence is good, and the reason given is, that as against

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a purchaser for valuable consideration without notice, the Court gives no assistance; that is, no assistance to the legal title.

But this rule does not apply where the Court exercises a legal jurisdiction concurrently with Courts of law. Thus it was decided, by Lord THURLOW, in *Williams* v. *Lambe*, 3 Bro. C. C. 264, that the defence could not be pleaded to a bill for dower; and by Sir John LEACH, in *Collins* v. *Archer*, 1 Russ. & M. 284, that it was no answer to a bill for tithes. In those cases a Court of equity was not asked to give to the plaintiff any equitable as distinguished from legal relief. The second class of cases is the ordinary one of several purchasers or incumbrancers, each claiming in equity, and one who is later or last in time succeeds in obtaining an outstanding legal estate, not held upon existing trusts, or a judgment, or any other legal advantage, the possession of which may be a protection to himself, or an embarrassment to other claimants. He will not be deprived of this advantage by a Court of equity. To a bill filed for the purpose by a prior purchaser or incumbrancer, he may maintain the plea of purchase for valuable consideration without notice; for the principle is, that a Court of equity will not disarm a purchaser; that is, will not take from him the shield of any legal advantage. This is the common doctrine of the *tabula in naufragio*. Thirdly, where there are circumstances that give rise to an equity as distinguished from an equitable estate, as, for example, an equity to set aside a deed for fraud, or to correct it for mistake, and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the Court will not interfere. Now, those are the three cases in which the defence in question is most commonly found. None of them involve the case that is now before me. It was indeed said at the bar that the defendants being in possession had a legal advantage in respect of that possession, of which they ought not to be deprived. But that is to confound the subject of adjudication with the means of determining it. The possession is the thing which is the subject of controversy, and is to be awarded by the Court to one or to the other. But the subject of controversy and the means of determining the right to that subject are perfectly different. The argument, in fact, amounts to this: I ought not to be deprived of possession, because I have possession. The purchaser will not be deprived of anything that gives him a legal right to the possession, but the possession itself must * not be confounded with the right to it. [* 327]

The case, therefore, that I have to decide is the ordinary case of a person claiming under an innocent equitable conveyance that interest which existed in the grantor at the time when that conveyance was made. But, as I have already said, that interest was diminished by the estate and grant that had been previously granted to the annuitant; and as there was no ground whatever for pretending that the deed creating the annuity was a voluntary deed, so there is no ground whatever for contending that the estate of the person taking under the subsequent marriage settlement is not to be treated by this Court, being an equitable estate, as subject to the antecedent annuity, just as effectually as if the annuity itself had been noticed, and excepted out of the operation of the subsequent instrument. I have no difficulty, therefore, in holding that the plea of purchase for valuable consideration is, upon principle, not at all applicable to the case before me, even if I could take notice of it as having been rightly and regularly raised. We next come to examine the authorities upon which the defendants rely. Now, undoubtedly, I cannot assent to some observations which I find attributed to the MASTER OF THE ROLLS in the report of the case of *The Attorney General* v. *Wilkins;* but to the decision of that case, as explained by his Honour in the subsequent case of *Colyer* v. *Finch*, I see no reasonable objection, and the principles that I have here been referring to are fully explained and acted on by the MASTER OF THE ROLLS in *Colyer* v. *Finch*. It is impossible, therefore, to suppose that he intended to lay down anything in the case of *The Attorney General* v. *Wilkins* which is at variance with the ordinary rules of the Court as I have already explained them, or which could give countenance to the argument that has been raised before me at the bar. I have no difficulty, therefore, in holding that the decree of his Honour the VICE-CHANCELLOR is right — right upon the grounds on which he placed it in the Court below; and also it would have been right if he had considered the grounds which have been urged before me in support of this petition of re-hearing. I therefore affirm the decree, and dismiss the petition of re-hearing; but inasmuch as the plaintiff sues *in formâ pauperis*, of course it must be dismissed without costs.

Decision affirmed.

ENGLISH NOTES.

In the case of *Cave* v. *Cave* (1880), 15 Ch. D. 639, 49 L. J. Ch. 505, 42 L. T. 730, 28 W. R. 793, FRY, J. held that the right of a

beneficiary to follow trust money which had been fraudulently misapplied by a trustee was an equitable estate or interest, and not a mere equity like the equity to set aside a deed; and that therefore, such a right had priority over an equitable interest subsequently acquired without notice. The facts in *Cave* v. *Cave*, were that C., the fraudulent trustee, applied trust money in the purchase of an estate in the name of a brother of his. The estate was subsequently mortgaged to D., to whom the legal estate was conveyed. C. acted as solicitor for D. in this transaction, and of course the fraud was concealed from D. Subsequently a second mortgage was made to E. The judgment of FRY, J. was to the effect that D., the legal mortgagee, had priority, the fraud of C. running through the transaction preventing any imputation of notice. But that the beneficiaries under the trust had an equity equal in quality and prior in time to that of E., and had therefore priority over E.

A similar decision was given by STIRLING, J. in *Re Richards, Humber* v. *Richards* (28 June 1890), 45 Ch. D. 589, 59 L. J. Ch. 728. There a solicitor receiving money from a client for investment represented to his client that he had invested it in a particular mortgage, being in fact a mortgage which he had previously taken in his own name. The client's equity to the benefit of this mortgage was held to have priority to the equitable mortgage of a bank who advanced money on the security of the deeds without notice of the prior equity.

The decision of FRY, J. in *Cave* v. *Cave*, has been questioned in the Court of Appeal in Ireland in *Re Ffrench's Estate* (1887), 21 L. R., Ir. 283, a decision followed by MUNROE, J. in *Re Sloane's Estate* (14 Nov. 1894), 1895, 1 Ir. 146.

AMERICAN NOTES.

Of the principal case, Mr. Pomeroy says (2 Eq. Jur. p. 1038): "Amidst this apparent conflict and real uncertainty, various judges had attempted to find a mode of reconcilement and to formulate a rule which should furnish a universal criterion. It remained, however, for Lord Westbury to bring order out of the confusion, and by his remarkable grasp of principles and wonderful power of generalization to reduce the doctrine into a universal formula, so accurate and comprehensive that it has been taken by most subsequent text-writers as the basis of their discussions, and has been accepted by subsequent judges almost without exception."

Mr. Pomeroy cites this case also (2 Eq. Jur. p. 1083) to the doctrine that a *bonâ fide* purchaser is protected against "equities" as distinguished from equitable estates or interests — "parties, that is, who simply claim, and are seeking to obtain, some peculiar equitable remedy, such as reformation or cancellation, and the like. In this respect the defence is a protection alike to defendants who have a legal estate and those who have purchased an equitable

interest." Mr. Beach makes the principal case very prominent in 1 Eq. Jur. p. 115, *et seq.*

In *Fitzsimmons* v. *Ogden*, 7 Cranch (U. S. Sup. Ct.), 2, it was said: "Between merely equitable claimants, each having equal equity with the other, he who hath the precedency in time hath the advantage in right." The same is laid down in *Berry* v. *Mut. Ins. Co.*, 2 Johnson Chancery (New York), 603.

An equitable lien for purchase money of land is lost when the grantee conveys to a third, taking bonds for the purchase money, which the grantee transfers to innocent assignees for value. *Moore* v. *Holcombe*, 3 Leigh (Virginia), 597; 24 Am. Dec. 683; *Blight's Heirs* v. *Banks*, 6 T. B. Monroe (Kentucky), 192; 17 Am. Dec. 136.

In *Indiana, &c. Ry. Co.* v. *Bird*, 116 Indiana, 217; 9 Am. St. Rep. 842, it was held that a party guilty of negligence in suffering a fraudulent and erroneous judgment against him by agreement, may not have an amendment of it to the prejudice of an innocent third party, purchaser, and assignee for value, where the record shows no fraud on its face.

An assignee of a mortgage takes it free of any latent equity which a third person may have against the parties thereto. *Bloomer* v. *Henderson*, 8 Michigan, 395.

The recording acts in this country dispose of difficulty on this score in most instances. Thus in *St. John* v. *Spaulding*, 1 Thompson & Cook (N. Y. Sup. Ct.), 483, a *bonâ fide* assignee of a recorded mortgage, having recorded his assignment, was held not affected by a prior unrecorded satisfaction of the mortgage. So as against subsequent *bonâ fide* purchasers for value, the court will not relieve a grantor who has been misled or executed a conveyance through mistake, ignorance, or duress. *Ligon's Adm'rs* v. *Rogers*, 12 Georgia, 281, 292; *Whitman* v. *Weston*, 30 Maine, 285; *Knobloch* v. *Mueller*, 123 Illinois, 554; *Martin* v. *Nixon*, 92 Missouri, 26; *Garrison* v. *Crowell*, 67 Texas, 626; *Toll* v. *Davenport*, 74 Michigan, 386; *Rogers* v. *Adams*, 66 Alabama, 600.

The same doctrine applies to creditors of a grantor, where his grantee has conveyed to a purchaser in good faith for value. *Fletcher* v. *Peck*, 6 Cranch (U. S. Sup. Ct.), 87, 133; *Rowley* v. *Bigelow*, 12 Pickering (Mass.), 307; 23 Am. Dec. 607; *Anderson* v. *Roberts*, 18 Johnson (New York), 513; 9 Am. Dec. 235; *Hood* v. *Fahnestock*, 8 Watts (Penn.), 489; 34 Am. Dec. 489; and cases cited 2 Pomeroy's Eq. Jur. p. 1084.

No. 9. — TAYLOR *v.* RUSSELL.

(C. A. 1891, H. L. 1892.)

RULE.

WHERE equities are equal, the legal title prevails.

No. 9. — Taylor v. Russell, 1892, A. C. 244, 245.

Herbert Taylor and Richard Nugent, Plaintiffs and Appellants v. Arthur Henry Russell and Donald Sween Mackay, Defendants and Respondents.

1891, 1 Ch. 8-30; 1892, A. C. 244-262 (s. c. 61 L. J. Ch. 657; 66 L. T. 565; 41 W. R. 43).

Priorities. — Equitable Mortgagees. — Legal Estate. [244]

Land was devised to the S. trustees in strict settlement, the trustees, who were devisees to uses, having powers of sale and mortgage and as incidental thereto power to revoke the uses declared by the will. The trustees made a legal mortgage of the land with other property and afterwards sold the land to T. without notice of the mortgage (which appeared to have been forgotten) and handed the title deeds to him. T. shewing a forged title mortgaged the land to the plaintiffs (who believed they thereby acquired a good legal mortgage) and handed the forged title deeds to them. T. then made another mortgage shewing the true title to the defendant (who also thought he had a legal mortgage) and handed the genuine title deeds to him. Neither the plaintiffs nor the defendant had at the date of their respective mortgages any notice of the prior legal mortgage, and the defendant had no notice of the plaintiffs' mortgage. Afterwards the defendant discovered the existence of the plaintiffs' mortgage and of the prior legal mortgage, and thereupon induced the legal mortgagees to release the land from their mortgage (the remaining property being sufficient for their security) and to reconvey the legal estate by a * voluntary deed to the S. trus- [*245] tees on the express condition that the latter should immediately thereafter convey the legal estate to the defendant. This the S. trustees accordingly did, having at the time notice of the plaintiffs' mortgage. The plaintiffs having brought an action as first equitable mortgagees to establish their priority over the second equitable mortgagee :—

Held, by the House of Lords, affirming the decision of the Court of Appeal, that there was nothing to show that the second equitable mortgagee had acted inequitably in getting in the legal estate; that there was no equity which prevented him from availing himself of its protection; and that he was entitled to priority over the first equitable mortgagee.

The facts of the case are related in the report of the decision of the Court of Appeal and in the judgments of Lords HERSCHELL and MACNAGHTEN in the House of Lords. The following is an outline in the order of time: —

The property in question was a plot of land at old Shildon in the county of Durham, the fee simple of which belonged to Robert Surtees, who died in 1857. Surtees devised his real estates in strict settlement. The trustees of his will, who were devisees to uses, had under the will powers of sale and mortgage and, as inci-

dental thereto, power to revoke the uses declared by the will. On the 19th of November, 1862, the trustees executed a legal mortgage of the land in question together with other land to Sir F. D. Legard to secure £9000 with interest. The mortgage contained a proviso of redemption under which the property was to be reconveyed "according to the ownership of the equity of redemption of the same premises." By deed of the 30th of January, 1883, the surviving trustee of Surtees' will, having apparently forgotten that the land in question was included in the mortgage to Legard, conveyed it to Toward, who had no notice of the mortgage. The conveyance recited a contract to sell the land free from incumbrances for £1060, and contained the usual covenant by the trustee that he had not incumbered. The title-deeds (which for some unexplained reason had not been deposited with Legard) were handed to Toward.

On the 15th of February, 1883, Toward mortgaged the land in question to the appellants to secure £2500 and interest,
[* 246] * representing that he had bought the land from the trustees of one Smithson and producing in support of his title a deed which was in fact forged. The circumstances under which the appellants accepted the title are fully stated in Lord MACNAGHTEN'S judgment.

By deed of the 20th of October, 1887, Toward mortgaged the land in question to the respondent Russell to secure £2500 and interest, Russell having no notice of the appellants' mortgage. On this occasion Toward disclosed to Russell his real title as derived from Surtees' trustee and handed to Russell the title-deeds.

In 1888 Toward absconded, and the respondent Russell, having discovered the fact of the appellants' mortgage, induced the trustees of Sir F. D. Legard's will, in whom the legal estate of the land in question was vested, to convey it to the Surtees' trustees upon the express condition agreed to between them and the Legard trustees, that the Surtees' trustees would immediately thereafter convey the legal estate to Russell. Accordingly, on the 21st of November, 1888, the trustees of the will of Sir F. D. Legard executed a deed of that date by which — after reciting that they had been requested by the trustees of Surtees' will to release the land in question from the mortgage of the 19th of November, 1862, and that being satisfied that their mortgage debt was otherwise

sufficiently secured they had agreed to do so — they conveyed the land in question to the trustees of Surtees' will to the uses upon the trusts and with and subject to the powers and provisions of Surtees' will, or such of them as were then subsisting and capable of taking effect. By a deed of the 26th of November, 1888, the trustees of Surtees' will in pursuance of a request by the respondent Russell conveyed the land in question to him subject to the equity of redemption subsisting by virtue of the mortgage of the 20th of October, 1887. The Surtees' trustees, before executing the deed of the 26th of November, had been (as KAY, J., found) informed of the appellants' mortgage.

In 1889, the appellants brought an action against Russell and the other respondent (who claimed under Russell's title), claiming a declaration that the appellants were first mortgagees of the land in question, and to have their security of the 15th of February, 1883, realized. The action was tried [*247] before KAY, J., who made a declaration and order in favour of the plaintiffs.

From this decision the defendants appealed. The appeal came on for hearing on the 5th of November, 1890 [1891, 1 Ch. 21].

J. Scott Fox, for the appellants: —

We contend, first, that there was such negligence on the part of the plaintiffs as would postpone them to us if the case were only between two equities; and, secondly, that, even if that be not so, the possession of the legal estate gives us priority.

[As to the first point, the following cases were referred to; but the Court did not decide it: *Northern Counties of England Fire Insurance Company* v. *Whipp*, 26 Ch. D. 482, 53 L. J. Ch. 629 (No. 7 p. 516, *ante*); *Waldron* v. *Sloper*, 1 Drew. 193, 200; *Peto* v. *Hammond*, 30 Beav. 495; *National Provincial Bank of England* v. *Jackson*, 33 Ch. D. 1; *Farrand* v. *Yorkshire Banking Company*, 40 Ch. D. 182; *Rice* v. *Rice*, 2 Drew. 73, 23 L. J. Ch. 289 (No. 6 p. 507, *ante*); *Cory* v. *Eyre*, 1 D. J. & S. 149; *Dixon* v. *Muckleston*, L. R., 8 Ch. 155; *Roberts* v. *Croft*, 2 De G. & J. 1; *Shropshire Union Railways and Canal Company* v. *Reg.*, L. R., 7 H. L. 496; *Worthington* v. *Morgan*, 16 Sim. 547.]

[FRY, L. J., referred to *Bickerton* v. *Walker*, 31 Ch. D. 151.]

As to the defendants having the legal estate and the possession of the title-deeds. In *Blackwood* v. *London Chartered Bank of Australia*, L. R., 5 P. C. 92, 111, 43 L. J. P. C. 25, 29, the gen-

eral principle is laid down that a man who has *bonâ fide* paid money without notice of any other title, though he gets nothing but an equitable title, may afterwards get in a legal title if he can, and may hold it, though during the interval between the payment and the getting in the legal title, he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself. The only qualification to this is that the legal estate must not be got in by joining with a trustee [*22] in a breach of trust. The *text-books all state that the legal estate may be got in as a protection after notice of the adverse title. In *Bates* v. *Johnson*, Joh. 304, Lord HATHERLEY (Joh. 315, 316) discusses the result of the authorities, and says there is no case where it has been held that where a trustee of a satisfied term or a satisfied mortgagee conveys to a purchaser, such trustee or mortgagee having notice of an intervening charge or trust, the purchaser can protect himself by the legal estate so obtained, but that there is no decision that he cannot.

[FRY, L. J. : — Has the purchaser ever been held protected where no consideration passed on the transfer of the legal estate ?]

Yes. *Churchil* v. *Grove*, 1 Ch. Cas. 35 ; *Holt* v. *Mill*, 2 Vern. 279, 1 Eq. Ca. Ab. 229 ; *Stanton* v. *Sadler*, 2 Vern. 30 ; *Wallwyn* v. *Lee*, 9 Ves. 24 (7 R. R. 142) show that the merits of the purchaser depend on his having no notice when he paid his purchase-money, not on his paying a consideration when he gets the legal estate. *Goleborn* v. *Alcock*, 2 Sim. 552, decides the precise point that the absence of consideration for the transfer of the legal estate is of no importance. It was decided in *Harpham* v. *Shacklock*, 19 Ch. D. 207, that an equitable incumbrancer cannot, after receiving notice of a prior incumbrance, obtain priority over it by getting in a legal estate from a bare trustee ; but *Dodds* v. *Hills*, 2 H. & M. 424, is in my favour ; and in *Pilcher* v. *Rawlins*, L. R., 7 Ch. 259, JAMES, L. J., though stating that he could not understand the principle of the cases where a person after notice acquired priority by a conveyance from a trustee, does not show any doubt that those cases were binding on him, and Lord HATHERLEY also admits their authority. But I say that this is not the case of a conveyance by a bare trustee. Legard's trustees, when they conveyed the legal estate in this property, were unsatisfied mortgagees ; they were amply secured, and were willing to release this property from their security, and they conveyed it on the express bargain that it

should be conveyed to the defendants, which puts the matter on the same footing as if the unsatisfied mortgagees had conveyed directly to the defendants.

* Levett (Haldane, Q. C., with him), for the plain- [*23] tiffs: —

The defendants cannot protect themselves by the possession of the legal estate, which was made to them without consideration. It is argued, indeed, that the conveyance was not voluntary, but was made in consequence of a bargain by which the Surtees trustees were bound. But as between us and the Surtees trustees, we are absolute unincumbered owners, and they could not have any right to convey the legal estate so as to prejudice us. In conveying it to the defendants they were violating a prior obligation. They were bound by the covenant against incumbrances contained in Toward's purchase-deed, and as soon as they got the legal estate they were trustees of it for us. They were bound to make good their covenant; and it was a breach of trust on their part to convey it to the defendants. Moreover, the Surtees trustees had no power under their settlement to deal with the legal estate in that way; they had only powers of sale and mortgage. The legal estate was reconveyed to them upon the trusts of Surtees' will, which were exhausted so far as this property was concerned, and they could only hold it as bare trustees for the purchasers who had the best equity to it. A second mortgagee cannot gain priority by getting the legal estate from a bare trustee: *Harpham* v. *Shacklock*, 19 Ch. D. 214. But we also contend that the re-conveyance of the legal estate to the Surtees trustees by the Legard trustees, under these circumstances, was a breach of trust of which the defendants cannot take advantage: *Mumford* v. *Stohwasser*, L. R., 18 Eq. 556; *Allen* v. *Knight*, 5 Hare, 272. A mortgagee is trustee for the person entitled to the equity of redemption, subject only to securing his own debt: *Matthison* v. *Clarke*, 3 Drew. 3. In equity the mortgagor is still owner, and the mortgagee can only part with the estate and get rid of his responsibility to the mortgagor in two ways, — by selling under his power of sale, or by assigning his debt and the estate with it to a transferee. He has no power to transfer the property to a third party without transferring the debt also. If the defendants had taken a transfer of the first mortgagees' debt, they might have gained priority; but the first mortgagees conveyed away the estate without trans-

[*24] ferring the debt and without any *consideration. By so doing they committed a breach of trust as against the plaintiffs, who were entitled to the equity of redemption. The defendants cannot take advantage of this breach of trust which they induced the first mortgagees to commit.

[With respect to the question of negligence, they cited *Cory* v. *Eyre*, 1 D. J. & S. 149; *Dixon* v. *Muckleston*, L. R., 8 Ch. 155.]

J. Scott Fox in reply.

1890. Nov. 20. The judgment of the Court (Sir J. Hannen, and Bowen and Fry, L. JJ., was delivered, as follows, by

Fry, L. J.: —

The plaintiffs in this action have obtained from Lord Justice Kay, when a justice of the High Court, a declaration that a mortgage security vested in them is entitled to priority over a mortgage vested in the defendants. The defendants have appealed. The questions for decision arise from the conjoint operation of an honest blunder and a fraud.

The circumstances of the case are shortly as follows: In the year 1862, certain land was, under the will of one Robert Surtees, limited to legal uses in strict settlement, under which Robert L. Surtees and Henry Edward Surtees were successively tenants for life. The testator had conferred on his trustees, Maude and Wilkinson, powers of sale and mortgaging, and of revoking and appointing uses to carry any sale or mortgage into effect. In 1862, Messrs. Maude and Wilkinson mortgaged certain lands to Sir Francis D. Legard to secure £9000. These lands included the property in question, together with much other property; and by some accident the deeds of the property in question remained in the custody of the Surtees trustees.

It appears that the fact that the land in question was included in this mortgage was entirely forgotten, and accordingly, by a deed of the 30th of January, 1883, Wilkinson, the surviving trustee of the Surtees will, together with Henry Edward Surtees, the tenant for life, conveyed the land in question to one Toward for valuable consideration, and Wilkinson covenanted in the [*25] usual terms *that he had done no act whereby the land was incumbered except by a lease mentioned in the conveyance. On completion Toward received the title-deeds of the land in question. Toward, having procured this conveyance, set himself to concoct a forged deed purporting to convey the same

land to himself, in order to enable him to effect two separate mortgages of it, — one under the genuine and one under the forged title; accordingly, he produced a document which bore date the 3rd of November, 1882, and purported to be made between trustees of the will of one Samuel Smithson, Mr. Smithson the tenant for life under that will, and Toward himself. It recited a title under the will of Smithson, and it purported to convey the land in question for valuable consideration. The parties named in this forgery were real persons. There had been a Samuel Smithson, a testator who was seized of an estate near the land in question. The trustees named were the trustees of that will, and Smithson was the tenant for life under it. Armed with this forged instrument, Toward obtained £2500 from the plaintiffs on the security of a mortgage of the 15th of February, 1883, by which Toward, deducing title from Smithson's trustees, conveyed the land to the plaintiffs; at the same time he deposited with the plaintiffs the forged deed of the 3rd of November, 1882. In this way the plaintiffs became possessed of a good equitable estate under Toward. Subsequently, Toward borrowed money from a bank on a mortgage of the same land, deducing the true title. The subsisting incumbrance was, on the 20th of October, 1887, paid off by the defendants; and Toward thereupon executed to them a mortgage deducing the true title, and deposited with them the genuine title-deed of the 30th of January, 1883.

It is obvious that down to this point the titles of both plaintiffs and defendants are equitable only. But in the year 1888 Toward absconded, and his misdeeds coming to light, the defendants applied to the trustees of Sir Francis Legard's will, in whom was the vested mortgage of 1862, to convey to them the legal estate in the land in question, and an arrangement was come to between the Legard trustees, Wilkinson and Jennings, who were then the Surtees trustees, and the defendants, to the effect that the Legard trustees, who were satisfied of the sufficiency of *the [*26] other mortgaged property to satisfy their claim, should convey the legal estate in the land in question to the Surtees trustees, upon the express condition that the Surtees trustees would immediately thereafter convey the same to the defendants. This arrangement was carried into effect by two deeds, the first dated the 21st of November, 1888, by which the Legard trustees conveyed the land in question unto and to the use of the Surtees trustees

in fee simple to the uses upon the trusts and subject to the powers of the Surtees will, the tenant for life under the Surtees will being a party to this deed; the second, dated the 26th of November, 1888, by which the Surtees trustees conveyed the land to the defendants, and they thus at last acquired the legal estate which had hitherto been outstanding. The defendants, being thus the legal owners of the property, are entitled to priority over the plaintiffs, who are merely equitable owners, unless the plaintiffs have some equity to deprive the defendants of that benefit.

It has not been argued that the defendants have assisted in, or connived at, any fraud, or constituted Toward their agent, so as to become responsible for his fraud; but it is argued that the defendants procured the conveyance of the legal estate under circumstances which preclude them from claiming the benefit of it in a Court of Equity. In considering this question we must bear in mind that the defendants seek no assistance from equity; they take their stand on their legal title, and the plaintiffs must fail unless they show an equity to deprive the defendants of their legal right.

It has been argued in the first place that the plaintiffs, having an equitable estate prior in time to that of the defendants, had a right, and a better right than the defendants, to call on Wilkinson to assign to them the legal estate; that on the 21st of November, 1888, this right attached; and that the defendants, taking the legal estate with knowledge of this equitable claim of the plaintiffs, cannot set it up against them. It is not necessary to consider whether, if Wilkinson and his co-trustee had obtained the legal estate free from any trust or condition, this contention ought to prevail; but they did not so obtain it; it came to them from the diligence and exertions of the defendants, and it came [*27] *to them clothed with a trust or subject to a condition to convey it to the defendants. Even if they ought never to have so taken the legal estate (which we see no reason to affirm), they could not, when they had taken it, refuse to perform the condition on which they took it without a gross violation of confidence and breach of good faith, of which no equity could, in our judgment, require them to be guilty. Furthermore, it is plain that notice of the existence of an equity prior in date to that of the person who obtains the legal estate does not prevent that person from claiming its benefit when such notice is received not

before, but after, the creation of the equitable estate, of him who gets in the legal estate. "There is nothing more familiar," said Lord SELBORNE, in expressing the opinion of the Judicial Committee of the Privy Council in the case of *Blackwood* v. *London Chartered Bank of Australia*, L. R., 5 P. C. 111, "than the doctrine of equity that a man, who has *bonâ fide* paid money without notice of any other title, though at the time of the payment he, as purchaser, gets nothing but an equitable title, may afterwards get in a legal title, if he can, and may hold it; though during the interval between the payment and the getting in the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself." "In every case," said Lord HATHERLEY, in *Bates* v. *Johnson*, Joh. 314, down to *Peacock* v. *Burt*, 4 L. J. (N. S.) Ch. 33, which is probably one of the most striking of the kind, it has been held, that, when once a subsequent incumbrancer, who, by advancing his money without notice of prior mesne incumbrances, stands in an equally good position with them in every respect, except as regards time, gets in the legal estate, he has a right to avail himself of that legal estate until the whole of his incumbrance is discharged."

An argument substantially the same as that which we have already discussed was presented by the plaintiffs' counsel in a slightly different form. Wilkinson, by the deed of the 30th of January, 1883, covenanted with Toward and his assigns that he had not incumbered; in fact, he had incumbered, and it is urged that when he got in that incumbrance, and had the legal estate *vested in him, he was bound to use it to make [*28] good, in favour of the plaintiffs as assigns of Toward, the erroneous representation contained in his covenant. We cannot accede to this argument. Wilkinson may or may not be liable to damages on his covenant; but he could never be called on to make it good by conveying to the plaintiffs an estate which he had consented to take on an express trust for the defendants; and, furthermore, the defendants, as well as the plaintiffs, were assigns of Toward, and seem to have had an equal equity with the plaintiffs to require Wilkinson to make good his statement.

It was, in the next place, urged on us that the Surtees trustees, by taking a conveyance of the legal estate to themselves, and by executing the deed of the 26th of November, were committing a breach of trust and acting in excess of their power to mortgage.

The terms of this power are not before us, nor the position of the Surtees family or the interests of its members under the will; but it is before us that the transactions complained of were carried into effect by deeds, to one of which the tenant for life was a party. But, assuming that these acts were such as those who claim under the will of Mr. Surtees could complain of, it appears to us that they afford no assistance to the plaintiffs. A man may come to equity and successfully say to a defendant, "You have obtained the legal estate in breach of an equity which I possess or of a trust under which I claim, and you shall not set it up accordingly;" but a plaintiff cannot rely on some breach of trust towards third persons, who assert no title to the estate and take no part in the litigation. The plaintiff, to deprive the defendant of the benefit of the legal estate, must rely on an equity of his own, not on that of a stranger.

Some language of the late MASTER OF THE ROLLS in *Harpham* v. *Shacklock*, 19 Ch. D. 207, 214, was pressed upon us as inconsistent with this view. He there said that "Nothing is better settled than that you cannot make use of the doctrine of *tabula in naufragio* by getting in a legal estate from a bare trustee after you have received notice of a prior equitable claim." The doctrine to which the learned Judge referred we understand to have been that more fully explained by Lord ELDON in *Maundrell* v. *Maundrell*, 10 Ves. 246, 259, 260 (7 R. R. 402), to
[*29] *the effect that where there is a term in gross the expressed object of which has been satisfied, the term is, according to the doctrine of equity, held upon trust for the successive equitable interests according to their priorities. It follows that if a subsequent equitable owner gets in the term with notice of the prior equity, he gets it in subject to the equity of the prior equitable owner, and, consequently, is restrained from setting it up against such owner by reason of an equity vested not in a third person, but in that prior equitable owner himself.

The case of *Harpham* v. *Shacklock*, 19 Ch. D. 207, 214, in which the late MASTER OF THE ROLLS used the language referred to, is no exception to this principle. In that case the defendants got in the legal estate and set it up against the plaintiff who had an equity to prevent their so doing; for the legal estate was in one Peck, who had assigned his security to the defendant Shacklock, and, not having surrendered the legal estate, held it as trus-

tee for Shacklock, and Shacklock having received the plaintiff's money to pay off Peck, was a trustee for the plaintiff; so that the plaintiff and not a stranger had an equity to prevent the defendant setting up the legal estate. "If there is a mortgage of the inheritance," said Lord ELDON in *Maundrell* v. *Maundrell*, 10 Ves. 270 (7 R. R. 407), "and a prior mortgagee, of whose title the other has no notice, if the subsequent mortgagee can get in a term, satisfied, or, according to the later cases, not satisfied, by an assignment to trustees for him, he can protect himself against the prior incumbrancer; unless there are circumstances that give that incumbrancer a better right to call for an assignment."

On authority, therefore, as well as principle, we are of opinion that a trust or equity to affect the conscience of him who has got in the legal estate must be a trust or equity not in favour of some third person who may have no care or desire to insist upon it, but a trust or equity in favour of the person against whom the legal estate is set up. The defendants were perfectly innocent holders of the equitable estate; they clothed themselves with the legal estate without notice, in our opinion, of any equity in the plaintiffs to prevent them so doing, and we see, * therefore, [*30] no reason to deprive them of the benefit they have acquired.

Taking this view of the case, it becomes needless for us to enter upon a discussion as to any question of negligence, or as to the relative equities of the plaintiffs and defendants. We allow the appeal, and dismiss the plaintiffs' action with costs as against the appealing defendants.

The plaintiff appealed to the House of Lords.

Haldane, Q. C., and Levett, Q. C., for the [1892, A.C., 247] appellants.

Legard's trustees, in whom the legal estate was, were not bound to release this land from their mortgage, but if they did, they were bound to convey to the persons entitled to the equity of redemption, *i. e.*, to the appellants. Though not a bare trustee, the mortgagee is, until foreclosure, a trustee for some purposes (per Lord HARDWICKE, in *Carborne* v. *Scarfe*, 1 Atk. 603). His only right is in security of the debt (*Seton* v. *Slade*, 7 Ves. 265, 273; *Thornbrough* v. *Baker*, 2 W. & T. L. C. 1166, 1169, 6th ed.). Beyond that he is an absolute trustee for the mortgagor (*Matthison* v. *Clarke*, 3 D. M. & G. 293; *Thornton* v. *Court*, 3 D. M. & G. 293).

You cannot make use of the doctrine of *tabula in naufragio*

by getting in a legal estate from a bare trustee after you have received notice of a prior equitable claim, *Harpham* v. *Shacklock*, 19 Ch. D. 207, 214; *Mumford* v. *Stohwasser*, L. R., 18 Eq. 556; *Cory* v. *Eyre*, 1 D. J. & S. 149, 167. The origin of the phrase *tabula in naufragio* is given in the notes to *March* v. *Lee*, 1 W. & T. L. C. 700, 701, 6th ed.

[249] The doctrine of tacking is highly technical, and the Courts have frequently said they will not extend a doctrine which has the effect of squeezing out an innocent prior mortgagee, and that it was a great misfortune it was ever introduced: see per Lord BLACKBURN in *Jennings* v. *Jordan*, 6 App. Cas. at p. 714. There is no case in the books where the doctrine of tacking has been applied to such circumstances as the present. Legard's trustees being trustees for the owner of the equity of redemption subject to the charge, the moment their security ceased to exist as to the property in question, the owner of the equity of redemption became absolute owner of that part freed from the charge, and Surtees' trustees and the respondent Russell became in succession trustees for the appellants.

[250] As to the alleged negligence, to postpone a first equitable mortgagee to a later the negligence must be "gross and wilful, which in the eye of this Court amounts to fraud": see the observations of Lord SELBORNE in *Dixon* v. *Muckleston*, L. R., 8 Ch. 155, 161; such negligence in fact as amounts to estoppel. In other words, the negligence must either itself amount to fraud or be gross, and be the means of enabling the mortgagor to

[*251] defraud the later * mortgagee; *Colyer* v. *Finch*, 5 H. L. C. 905, 928; *Roberts* v. *Croft*, 24 Beav. 223, 2 D. & J. 1; *Cory* v. *Eyre*, 1 D. J. & S. 149, 167.

J. Scott Fox and Eastwick for the respondents were not heard.

The House took time for consideration.

1892, March 28. Lord HERSCHELL: —

My Lords, the question raised in this action is whether the appellants are entitled to a first charge as mortgagees of certain hereditaments comprised in an indenture of mortgage dated the 15th of February, 1883. The learned Judge who tried the action declared them to be so entitled, but his decision was reversed by the Court of Appeal. The case is one of that unfortunate class where one of two innocent parties must suffer from the fraud of a person with whom they have dealt. Thomas Toward, whose

frauds have led to this litigation, executed on the 15th of February, 1883, an indenture of mortgage conveying to the appellants the property now in question to secure an advance of £2500. The title which he purported to show was a deed of conveyance of the property to himself from the trustees of one Samuel Smithson. The signatures of the trustees were in fact forgeries, and the land had never formed part of the Smithson estate. The appellants were content to take the title without further inquiry, because they had shortly before become the mortgagees of certain other hereditaments in the same neighbourhood, conveyed to Toward by Smithson's trustees, and had then investigated the title and had no reason to suspect that the forged deed was otherwise than genuine.

Thomas Toward had in fact acquired the land in question from the trustees of Robert Surtees by a conveyance dated the 30th of January, 1883. On the 20th of October, 1887, he mortgaged it to the respondent, Arthur Henry Russell, to secure an advance of £2500, showing in his abstract the real title and handing over the deeds to the respondent. I have said that Thomas Toward had acquired the land by conveyance from Surtees' trustees, but he did not in fact obtain the legal estate, *although so [*252] far as appeared from the conveyance and abstract of title he did so. By an indenture dated the 19th of November, 1862, the trustees under the will of Robert Surtees had conveyed a considerable quantity of land, including the piece in question, by way of mortgage to Sir Francis Legard to secure the sum of £9000 and interest. This mortgage was outstanding at the date of the conveyance to Toward and was apparently overlooked. The result was this, that although both the appellants and the respondent Russell thought they had obtained the legal estate, neither of them had in fact done so. But inasmuch as at the date of his conveyance to the appellants Toward had an equitable estate subject to the mortgage to Sir F. Legard, the appellants obtained a good equitable title. And their title being of earlier date than the equitable title of the respondent Russell would undoubtedly on that ground have had the priority but for what subsequently happened. I say this of course apart from the question of negligence, on which ground also the respondent contends that the appellants' security must be postponed to his.

When Toward's frauds became known, the respondent Russell,

having ascertained the existence of the outstanding mortgage, approached the representatives of Sir F. Legard, and applied to them to release the land in question from the mortgage debt secured by the indenture of November, 1862, and to convey or cause to be conveyed the legal estate in the same to the respondent. Sir F. Legard's representatives, being satisfied that the remainder of the property comprised in the mortgage was sufficient security for the sum due to them, agreed to take this course. It was accordingly arranged that they should convey the legal estate to the Surtees' trustees discharged from their mortgage debt, upon the express condition that they should thereupon convey the legal estate in the premises comprised in the respondent's mortgage to him. The Surtees' trustees assented to this arrangement, which was accordingly carried out by two indentures. By one, of the 21st of November, 1888, the Legard trustees conveyed to the Surtees' trustees, who in turn by an indenture of the 26th of November of the same year conveyed to the respondent.

[*253] *The respondent thus became possessed of the legal estate in the premises comprised in his mortgage, and it is on this (apart from the question of negligence to which I have already alluded) that he bases his claim to priority over the appellants whose equitable interest was prior in point of time to his own. It is not disputed that the doctrine of equity is well settled, "that a man who has *bonâ fide* paid money without notice of any other title, though at the time of the payment he as purchaser gets nothing but an equitable title, may afterwards get in a legal title if he can, and may hold it, though during the interval between the payment and the getting in of the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself." I am using the language of Lord Selborne when delivering the opinion of the Judicial Committee in the case of *Blackwood* v. *London Chartered Bank of Australia*, L. R., 5 P. C. at p. 111. It is said that there is engrafted upon the rule of equity this exception, that the possession of the legal estate cannot be insisted upon as against a prior equitable incumbrancer where it was obtained from one who held it merely as trustee. The language of the late Master of the Rolls in *Harpham* v. *Shacklock*, 19 Ch. D. 207, 214, was strongly relied on in support of this view. His words were: "Nothing is better settled than that you cannot make use of the

doctrine of *tabula in naufragio* by getting in a legal estate from a bare trustee after you have received notice of a prior equitable claim." It is not necessary for your Lordships to determine whether this view is in accordance with the authorities, but I am content to assume it to be well founded. Where the person in whom the legal estate is vested stands in the relation of trustee to the prior incumbrancer, it would certainly be strange if a subsequent incumbrancer with notice of these facts could secure any advantage by obtaining a conveyance of the legal estate to himself.

The appellants put their case in this way: They say that by the indenture of mortgage of February, 1883, the equity of redemption which had passed to Toward by the deed of January, 1883, became vested in them, and that they thus had an equitable estate in fee simple subject to the mortgage to Legard. And *further that Toward, as between himself and the trus- [*254] tees, was entitled to a conveyance of the legal estate of the property freed from the mortgage of November, 1862, and that this right passed to them. These propositions are not open to contest. Their next position is that when the legal estate became vested in the Surtees' trustees by virtue of the conveyance of the 21st of November, 1888, they became trustees of it for the appellants, and that the respondent has thus obtained the legal estate from bare trustees who were bound to convey it to the appellants. But for the circumstances under which that conveyance took place, this might well be so. But it must be taken as proved that the legal estate was conveyed to the trustees of Surtees' will at the request of the respondent Russell, "and only upon the terms and express condition agreed to between them, the said trustees and the successors in title of Sir F. Legard, that they, the said trustees, would immediately thereafter convey the said premises and the legal estate therein" to him. The representatives of Sir F. Legard being under no obligation to convey to the Surtees' trustees, and having made the conveyance only on the condition and for the purpose mentioned, the learned counsel for the appellants were forced to admit that their clients could not successfully have invoked the aid of a Court of Equity to compel a conveyance to themselves. They equally failed to establish that the appellants could have obtained an injunction to prevent the conveyance to the respondent. Whether there was to be a

conveyance to the Surtees' trustees or not was a mere question of the machinery by which the arrangement between the respondent and Sir F. Legard's representatives was to be carried out, and I am of opinion that the matter must be dealt with upon the same footing as if the conveyance had been made directly from those representatives to the respondent.

The controversy therefore resolved itself into this: was there anything in the circumstance that the legal estate was obtained from Legard's representatives which precludes the respondent from claiming the benefit of it as against the appellants? It was contended on their behalf that inasmuch as they were the owners of the property subject to the mortgage, Legard's representatives were trustees for them, and that in conveying to the [*255] *respondent Russell without consideration, they were guilty of a breach of trust to which he was a party, that if they were satisfied with less than the entire property comprised in their security, it was only to the appellants that they could lawfully release any part of it. No authority was cited for the proposition that a mortgagee is, subject to his security, a trustee of the legal estate for the mortgagor. The rights of a mortgagor are no doubt well established in a Court of Equity. He may redeem the mortgage, and no dealings with the property by the mortgagee, save a conveyance under the power of sale, can deprive him of this right. But it is quite a different proposition, and one which I think is wholly untenable, to assert that a mortgagee is trustee for the mortgagor.

It is admitted that a mortgagee may create such estates as he pleases, he may convey, by way of sub-mortgage, to whom and in as many parcels as he pleases. This seems to me to show that Legard's representatives cannot be regarded as holding the legal estate as trustees for the appellants. If the conveyance to the respondent was a breach of trust on the part of Legard's representatives, as against the appellants, they could, I presume, have come to a Court of Equity for an injunction to prevent the conveyance being executed. But had they done so, the answer would surely have been, "Come and redeem; that is the right which you possess, and you are not entitled, whilst abstaining from the exercise of that right, to restrain Legard's representatives from dealing with the legal estate vested in them." I am quite unable to see that Legard's representatives committed, as against the appellants,

any breach of trust or other wrong of which they are in a position to complain. And this being so, the respondent in taking the conveyance was not a party to any breach of trust or other wrong. The case is a novel one. But I do not think that the appellants have brought themselves within any established exception to the rule that a subsequent incumbrancer without notice who has got in the legal estate may hold it as against one whose equitable title is prior in point of time. And I am unable to see any equity in the appellants entitling them to insist that the respondent shall not enjoy the advantage derived from the possession of the legal estate.

*The view which I take renders it unnecessary for me to express an opinion upon the other ground upon which the respondents rely, — viz., the alleged negligence of the appellants. [*256]

I am of opinion that the judgment of the Court below was right, and that this appeal should be dismissed with costs.

The Lord Chancellor, who heard the leading counsel for the appellants and a great part of the argument of the junior counsel, does not take part in the judgment as he did not hear the whole of the argument. He desires me, however, to say that nothing that he heard satisfied him that the judgment of the Court below was otherwise than correct.

Lord Macnaghten: —

My Lords, there are no facts in dispute in this case, though much is left to inference and conjecture, which the apellants might have cleared up if they had thought fit to do so.

The author of the mischief which has given rise to the present controversy was one Thomas Toward, of Shildon, in the county of Durham, a builder by trade, and a man certainly of more ingenuity than honesty.

Toward absconded some time in the year 1888 — the precise date is not given, but it was stated at the bar that it was in the month of August — and thereupon, or shortly afterwards, he was declared bankrupt.

On Toward's disappearance it was discovered that he had contrived to mortgage a small property in the town of Old Shildon twice over for its full value — first, to the appellants, and then to the respondent Russell, a solicitor in York, who is interested in the mortgage on his own account, and on account of his partner, the respondent Mackay.

No. 9. — Taylor v. Russell, 1892, A. C. 256, 257.

The property belonged at one time to a gentleman of the name of Surtees, who died in 1857. Mr. Surtees devised his real estate in strict settlement. The trustees of his will, who were devisees to uses, had under the will powers of sale and mortgage, and, as incidental thereto, power to revoke the uses declared by the will.

On the 30th of January, 1883, the surviving trustee of Surtees' will, with the concurrence of the tenant for life, conveyed the property in question, together with a plot containing 820 [*257] square *yards, making in all 2 A. 2 R. 1 P. to Toward in fee, in consideration of £1060, and the title-deeds of the property, which it seems Mr. Surtees had acquired by purchase, were handed over to him.

In April, 1883, Toward conveyed the 820 square yards to the trustees of a Methodist Chapel. He built some houses on the rest of the property and mortgaged it more than once. Ultimately, on the 20th of October, 1887, he conveyed it to Russell by way of mortgage, for the purpose of securing an advance of £2500, out of which a prior mortgage had been discharged. On the occasion of this mortgage to Russell the title was carefully investigated. On the completion of the transaction, the title-deeds of the property, which had been in the hands of Russell's firm on behalf of the prior mortgagee, were retained and held by him on behalf of himself and Mackay; and in his hands they have remained ever since. Not only had Russell no notice of any prior charge, but it is clear that no skill or diligence on his part could have detected any flaw or defect in the title.

The circumstances attending the mortgage to the appellants are more interesting. On the 27th of April, 1881, Toward who was then represented by a respectable firm of solicitors, mortgaged to the appellants a house in the neighbouring village of New Shildon, which the trustees and the beneficial owner under the will of a Mr. Smithson had conveyed to him by an indenture dated the 21st of August, 1878. It seems that on the occasion of this mortgage, Toward, with an eye to future business, took the precaution of keeping a copy of the conveyance to him. In January, 1883, when he was in treaty with the trustee of Surtees' will, he applied to the appellants without the intervention of a solicitor, for an advance of £2500 on mortgage. The appellants, through their solicitors, asked for an abstract of title. He furnished them with an abstract of a deed purporting to be dated the 3rd of No-

vember, 1882, and to be a conveyance to him from the Smithson trustees and the beneficial owner under Smithson's will in consideration of £1500. The appellants, through their solicitors, then desired to compare the abstract with the deed abstracted, and Toward produced to them a document in the form of a deed, which he had fabricated, by taking everything except the parcels and the date from his copy of the conveyance * of [*258] the 21st of August, 1878, and inserting as the parcels a description more or less accurate of the property which he was purchasing from the trustee of Surtees' will, and forging thereto the names of the Smithson trustees, and the name of the beneficial owner under Smithson's will.

Beyond comparing the abstract with the forged deed the appellants made no investigation of Toward's alleged title; they made no inquiry for the purpose of ascertaining whether the property formed part of the estate devised by Smithson's will; nor did they call for the production of the earlier title-deeds, although the forged deed on the face of it referred to a covenant to be executed by the beneficial owner under Smithson's will for the production of title-deeds. According to their own account they were favourably impressed by the shortness of the title, and they were satisfied that the property which Toward offered them in the town of Old Shildon was part of the Smithson estate, because, as they say, they had been assured by Toward's solicitors on the previous occasion that "the greater part of New Shildon was built upon land sold off by Mr. Smithson."

The mortgage to the appellants was dated the 15th of February, 1883, and it is not disputed that it operated to pass the estate and interest which Toward had acquired on the 30th of January preceding.

The appellants and the respondents each supposed that their own mortgage was a first charge and protected by an assurance of the legal estate. It turned out, however, that the legal estate was outstanding, although the fact had escaped notice until after Toward's disappearance. It seems that on the 19th of November, 1862, by a deed of that date the Surtees trustees, with the concurrence of the then tenant for life, had conveyed the property afterward sold to Toward, together with other property of much greater value, to one Sir Francis Legard in fee by way of mortgage for the purpose of securing £9000, of which £3000 was paid off in 1887.

No. 9. — Taylor v. Russell, 1892, A. C. 258, 259.

By some oversight the title-deeds of the property afterwards comprised in Toward's purchase were not handed over to the mortgagee, and the fact that the property was in mortgage was overlooked when it was sold and conveyed to Toward.

After Toward's disappearance Russell took possession [* 259] of the * property in question in this action, and then finding that the appellants claimed priority under a mortgage of earlier date, he applied to the trustees of Sir Francis Legard's will, in whom the mortgage of 1862 was vested, and induced them to convey the property to the Surtees trustees upon the express condition agreed to between them and the Surtees trustees that the Surtees trustees would immediately thereafter convey the legal estate to him. This arrangement, the terms of which are not in dispute, was carried out by two deeds — a conveyance of the 21st of November, 1888, from the Legard trustees to the Surtees trustees, with the consent of the tenant for life under Surtees' will, and a conveyance of the 26th of November, 1888, from the Surtees trustees to Russell.

It is admitted that by this transaction Russell acquired the legal estate, and it is not disputed that an equitable mortgagee who has advanced his money without notice of a prior equitable mortgage may gain priority by getting in the legal estate unless the circumstances are such as to make it inequitable for him to do so, as would be the case, for example, if the legal estate were held upon express trusts or, according to recent authorities, if it were vested in a satisfied mortgagee.

The mere fact that the subsequent incumbrancer has notice of the prior incumbrance when he gets in the legal estate counts for nothing. "It is," as Lord HARDWICKE says (2 Ves. 574), "the very occasion which shows the necessity of it."

It is therefore incumbent upon the appellants who were the plaintiffs in the action to show that Russell acted inequitably in getting in the legal estate, or that there is some equity which prevents him from availing himself of its protection.

In considering the circumstances under which the legal estate was got in, it would, I think, be a mistake to attribute to the persons concerned in the transaction the knowledge which we now possess, whether the possession of that knowledge would or would not have affected their position.

The first question in my opinion is, what did the Legard trus-

tees know about the facts of the case? It is not alleged in the pleadings or in the evidence, nor has it been suggested at the * bar, that they knew anything about the appellants [*260] or their claim to be mortgagees of the property. Observations were made upon their conduct, as if they had officiously meddled in a quarrel which did not concern them, and had given or had attempted to give some advantage to one of two competing claimants, out of mere caprice or possibly through some misapprehension of the real state of things. That is not, I think, the true view of the case. One has in some degree to guess at the facts, because the appellants on whom the burden of proof lies have not chosen to go into evidence about them. But taking everything most strongly in favour of the appellants, it seems to me that no fault can be found with the action of the Legard trustees. They were applied to by a person who had apparently been misled through the negligence of their predecessor in title, and who had advanced his money without notice on the security of a small portion of the property mortgaged to them. They did not require that portion for the purposes of their own security. Why should they not hand it over to the applicant? He had a mortgage perfect on the face of it, and possession of deeds showing a good title for sixty years. The Surtees trustees consented; so did the tenant for life under Surtees' will, and as far as I can make out, the Legard trustees knew nothing whatever about anybody else in connection with the property. Notwithstanding the very able arguments addressed to us, I cannot see anything in their position as mortgagees to oblige them to play the part of the dog in the manger, and keep what they did not want themselves from a person who seemed to have a very good claim to it.

The next question is what did Russell know? It is conceded that he knew that the appellants claimed priority on the ground of having a mortgage prior in date to his. More than this, he cannot, I think, be taken to have known. There is no reason to suppose that the appellants had explained to him the circumstances which they now contend excused them from obtaining the title-deeds of the property. It would have been strange if they had. They do not appear to have known the circumstances themselves; they did not even take the trouble to make themselves acquainted with the facts when they put in their statement of claim four months afterwards. The case made in * their plead- [*261]

ings was that Russell only obtained possession of the title-deeds to the premises under the conveyance of the 26th November, 1888. In fact the appellants seem to have displayed no greater diligence after Toward absconded than they did when they took their security. Russell certainly knew that there were claimants prior to him in date; but he also knew that those claimants could not have a single title-deed relating to the property except their alleged mortgage. That circumstance unexplained would affect their claim to priority. Why was Russell to assume that it was capable of explanation when the persons interested did not choose to come forward and explain it? So long as it is the settled rule of the Court that a subsequent incumbrancer may gain priority by getting in the legal estate, and that there is nothing in itself inequitable in so disarranging equities, I do not see how it can be contended that there was anything contrary to equity, or anything involving a breach of trust or a breach of duty in the transfer of the legal estate from the Legard trustees to Russell.

But then it is said that the legal estate passed through the hands of the Surtees trustees, and that they were trustees for the appellants in a sense. I am not quite sure that I know what that expression exactly means; but of this I am sure, that it is only when the legal estate has been acquired from a trustee in the proper sense of the term that the acquisition of it has been held of no avail. And certainly the Surtees trustees were never trustees of this property for the appellants; they were only devisees to uses under Surtees' will; they never had the legal estate until it was conveyed to them on a special trust or confidence to hand it over to Russell. In point of fact, I think they may be left out of the question altogether. The case seems to me to be precisely the same as if the legal estate had been conveyed directly by the Legard trustees to Russell. It is not clear why recourse was had to the interposition of the Surtees trustees, or why the conveyance to them took so singular a form. It may be, as suggested in the respondent's case, that that course was adopted with the view of affording protection to the trustees of the Methodist Chapel, whose property was also included in the appellants' mortgage.

[*262] At any rate, it is no part of the appellants' case that the * particular machinery which was made use of was designed to embarrass or defeat their claim.

My Lords, on these simple grounds, without discussing the

doctrine of *Tabula in naufragio*, or attempting to define the limits of its application, which it appears to me would be no easy matter having regard to the current of modern authority, I think the appeal must be dismissed. The appellants have not succeeded in showing that Russell has done anything inequitable or improper in getting in the legal estate.

This view of the case renders it unnecessary to consider what would have been the priority of the parties if the legal estate had not been got in. That question was not fully discussed, and I prefer to leave it undetermined. I will only say that I am satisfied that on the part of the appellants there was an amount of negligence which it is difficult to excuse or understand; and I am not at present convinced of the correctness of the view expressed by the learned Judge who tried the case in the first instance, that negligence necessary to postpone a prior equitable mortgagee in such a case as the present must be so gross as to render him responsible for the fraud committed on the second mortgagee, and that in fact it is immaterial in such cases whether the prior mortgagee has or has not the legal estate.

Lord WATSON: —

My Lords, I have had an opportunity of considering the opinion which has just been delivered by my noble and learned friend opposite (Lord MACNAGHTEN), and I entirely concur in it.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 28th March, 1892.

ENGLISH NOTES.

The decision on the high authority of the House of Lords of this case, in which previous authorities are fully gone into in the very able and careful arguments, makes it almost unnecessary to cite other authorities relating to the advantage of the legal estate.

A fortiori the purchaser is protected who obtains the legal estate at the time of his purchase. *Pilcher* v. *Rawlins*, (1872), L. R. 7 Ch. 259, 41 L. J. Ch. 485, 25 L. T. 921, 20 W. R. 281, is a leading case of this description; and shows that a purchaser is not affected with notice of an equity merely because information sufficient to put him on inquiry is contained in deeds which form part of the chain of legal title, but were in fact concealed from him. *Garnham* v. *Skipper*, (1885), 55 L. J. Ch. 263, 53 L. T. 940, 34 W. R. 135, is another example. There S., who was the equitable owner of

freeholds, charged them in favour of K., at the same time giving K. an undertaking to execute a legal mortgage. S., having subsequently got in the legal estate, granted a mortgage in fee to G., without notice of K.'s incumbrance. North, J. held that G. was entitled to priority.

In *Bailey* v. *Barnes*, (C. A. 1893), 1894, 1 Ch. 25, 63 L. J. Ch. 73, 69 L. T. 542, 42 W. R. 66, the purchaser of an equity of redemption, finding that the title was impeached on the suggestion of an impropriety in a former sale, paid off a mortgage and acquired the legal title from the mortgagee. The Court, affirming the judgment of Stirling, J., held that the purchaser was protected by the legal estate.

Of the authorities for the proposition that an equitable assignee cannot strengthen his title by getting in the legal estate from a bare trustee, *Mumford* v. *Stohwasser*, (1874), L. R. 18 Eq. 556, 43 L. J. Ch. 694, 30 L. T. 859, 22 W. R. 833, is an important case. A builder who was in possession of a plot of ground under a building agreement of the usual kind, stipulating for leases to be granted as houses were from time to time completed according to the agreement, entered into a verbal contract with M., in consideration of £575, to build him a house according to the conditions of the building agreement, and, on obtaining his lease from the estate owner, to grant M. an underlease for the term less 10 days at a rent of £14. The house was completed, the consideration money of £575 and some money for extras paid by M. to the builder, and M. was let into possession. The builder subsequently obtained his lease from the estate owner, and, concealing his agreement with M., deposited his lease with the defendant S., in security of a loan. At this time the house was actually vacant, and it was assumed, as the basis of the judgment, that S. had no means of finding out the title by inquiry from the occupier.

At a later period, when the house was in the actual occupation of a tenant of M., S. took from the builder a legal assignment of his term in security of the advances already made. The Master of the Rolls, (Sir George Jessel), held that S., by reason of M.'s tenant being in occupation of the house, had, at the time of getting the legal estate, constructive notice of the fact that S. was a trustee for M. He was further of opinion, though he considered that the point did not arise, that even if S. had not notice, the builder, who was a trustee and must have known he was a trustee, could not by the conveyance in breach of his trust, alter the rights as between M. and S. It will be observed in this case that the contract between the builder and M. had been completely performed on the part of the latter, so that nothing remained to be done but the grant of the underlease; and the builder on getting his own lease was simply a trustee for this purpose.

AMERICAN NOTES

The doctrine of this Rule is explicitly laid down by Pomeroy (1 Eq. Jur. sect. 417; 2 *ibid.* sect. 682); and *Beach* (1 Eq. Jur. § 11), citing: *Fitzsimmons* v. *Ogden*, 7 Cranch (U. S. Sup. Ct.), 18; *Newton* v. *McLean*, 41 Barbour (New York Sup. Ct.), 285; *Beall* v. *Butler*, 54 Georgia, 43; *Fox* v. *Palmer*, 25 New Jersey Equity, 416; *Straus* v. *Kerngood*, 21 Grattan (Virginia), 584.

"It is a general principle in courts of equity that where both parties claim by an equitable title, the one who is prior in time is deemed the better in right, and that where the equities are equal in point of merit the law prevails." "Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser who has put himself in peril by purchasing a title and paying a valuable consideration, without notice of any defect in it or adverse claim to it; and when in addition he shows a legal title from one seised and possessed of the property purchased, he has a right to demand protection and relief, 9 Ves. 30–34, which a court of equity imparts liberally. Such suitors are its most especial favorites. It will not inquire how he may have obtained a statute, mortgage, incumbrance, or even a satisfied legal term, by which he can defend himself at law, if outstanding; equity will not aid his adversary in taking from him the *tabula in naufragio*, if acquired before a decree." *Boone* v. *Chiles*, 10 Peters (U. S. Sup. Ct.), 210.

"They, or rather their trustees," have got the fruits of their execution, and have obtained the *legal estate* in the land on which the judgment gave them only a lien. Having at least equal equity with the trustees, it was perfectly justifiable in them to obtain a superiority by buying in the legal estate." *Fitzsimmons* v. *Ogden, supra.*

One of the most important and frequent consequences and applications of this principle," says Mr. Pomeroy, "is the doctrine, that when a purchaser of property for a valuable consideration, and without notice of a prior equitable right to or interest in the same subject-matter, obtains the legal estate in addition to his equitable claim, he becomes, in general, entitled to a priority both in law and in equity." *Vattier* v. *Hinde*, 7 Peters (U. S. Sup. Ct.), 252; *Boone* v. *Chiles*, 10 *ibid.* 177; *Rexford* v. *Rexford*, 7 Lansing (N. Y. Sup. Ct.) 6; *Rowan* v. *State Bank*, 45 Vermont, 160; *Hill* v. *Moore*, 62 Texas, 610; *Swepson* v. *Johnston*, 84 North Carolina, 449; *Carlisle* v. *Jumper*, 81 Kentucky, 282; *Hoult* v. *Donahue*, 21 West Virginia, 294; *Warren* v. *Wilder*, 114 New York, 215; *Temples* v. *Temples*, 70 Georgia, 480.

"They were both general creditors of the debtor. As such their equities were equal, and the defendant having obtained title to the property, in good faith and for a valuable consideration, while his equity was the same as the judgment-creditor represented by the receiver, is entitled to the benefit of the universal rule that when the equities are equal the legal title must prevail." *Warren* v. *Wilder, supra.*

"He who buys an equitable title in ignorance of its nature, and under the belief that he is getting a good legal title, may therefore protect himself by getting in the legal title, even where the effect is to exclude equities prior to his own." *Hoult* v. *Donahue, supra*, citing *Baggarly* v. *Gaither*, 2 Jones Equity

(Nor. Car.), 80; *Williamson* v. *Gordon's Exrs.*, 5 Munford (Virginia), 257; *Bayley* v. *Greenleaf*, 7 Wheaton (U. S. Sup. Ct.), 46.

"When the junior equity, without notice of the older equity, acquires the legal title, the senior equity must yield." *Carlisle* v. *Jumper*, *supra*, 284.

"Of two equitable incumbrancers, he that hath the preferable right to call for the legal estate is intitled to preference; though he hath not actually got it in, nor got an assignment, nor even possession of the deed conveying the outstanding legal title, and though his lien is of subsequent date to the other incumbrance." *Williamson* v. *Gordon's Exrs. supra.*

Section IV. — *Equitable execution.*

No. 10. — ANGLO-ITALIAN BANK *v.* DAVIES.

(C. A. 1878.)

No 11. — SMITH *v.* COWELL.

(C. A. 1880.)

RULE.

Before the Judicature Acts, a judgment creditor who had sued out a writ of elegit against his debtor, and who was prevented from having his debtor's land delivered in execution by reason of a legal impediment, was entitled to bring a suit in the Court of Chancery for a sale of his debtor's interest in the land and for a receiver, and the Court had jurisdiction to appoint a receiver on interlocutory application before the hearing. The relief so given was called "equitable execution."

Since the Judicature Acts, a receiver may be appointed on motion in the same action in which the judgment has been given.

Anglo-Italian Bank v. Davies.

9 Ch. D. 275–293 (s. c. 47 L. J. Ch. 833; 39 L. T. 244; 27 W. R. 3.)

Equitable Execution. — Receiver. — Judgment Creditor.

[275] A creditor, who had recovered judgment in an action in the Chancery Division for payment of a sum of money, sued out an elegit against his debtor, whose only interest in land was an equity of redemption in fee. The

No. 10. — Anglo-Italian Bank v. Davies, 9 Ch. D. 275, 276.

creditor then commenced an action in the Chancery Division, claiming to have it declared that he was entitled to a charge on the land, and to have such charge enforced by sale, foreclosure, delivery in execution, or otherwise as the Court might direct, and asking for a receiver. The Plaintiff then moved for a receiver in the new action.

Held, by HALL, V. C., and by the Court of Appeal, that the statute 27 & 28 Vict. c. 112, s. 1, did not take away the old right which a judgment creditor had before the statute 1 & 2 Vict. c. 110, to take proceedings in equity to obtain the benefit of a judgment which there were legal impediments to his enforcing at law, and that the Plaintiff was not obliged to wait till the trial, but might obtain a receiver on interlocutory application in the new action.

On the 8th of January, 1878, the plaintiffs recovered against the defendant judgment in the Chancery Division in an action of the same name [1877. A. 118] for £87,591 and costs. The defendant was entitled to real and personal estate. The plaintiffs recovered a small sum under a *fi fa.*, a return of no further goods being made, and took out writs of elegit against the defendant's real estate. But it turned out that it was subject to legal mortgages and could not be given in execution by the sheriff. No return was made to the writs of elegit. The plaintiffs thereupon commenced this action, claiming to have it declared that under and by virtue of their judgment they were entitled to a charge upon all and every the lands, tenements, and hereditaments whereof the defendant was seised, possessed, or entitled for any estate or interest in equity or at law, whether in possession, reversion, remainder or expectancy, and in particular upon his estate and interest in certain hereditaments mentioned in the writ; to *have such charge enforced by sale, foreclosure, [*276] delivery in execution, or otherwise as the Court might direct; and for a receiver and injunction; and the plaintiffs claimed discovery from the defendant as to the several matters aforesaid, and generally in aid of the writs of elegit issued by them upon their said judgment.

The plaintiffs then moved before Vice Chancellor HALL that a receiver might be appointed of the rents, profits, surplus or other proceeds of sale, and all other moneys, if any, whereunto the defendant then was or might be entitled, or which might be, or but for the order to be made on the motion might be, payable to the defendant or any person or persons on his behalf arising from or in anywise in respect of certain specified estates, and any other lands, tenements, or hereditaments in the city of London

and the counties of Middlesex and Sussex, or any estate or interest of the defendant, whether at law or in equity, in the hereditaments therein before particularly mentioned, and any such other lands, tenements, or hereditaments as aforesaid, with all necessary and proper directions in that behalf; with the usual directions for the delivery of deeds to the receiver, and an injunction to restrain the defendant from receiving such rents, profits, and moneys.

The motion was heard before Vice-Chancellor HALL on the 7th of June, 1878, and was supported by evidence that the defendant was selling various parts of his real estates.

Dickinson, Q. C., and Ingle Joyce, for the motion.

Hastings, Q. C., and Romer, *contrà*.

The arguments before the VICE-CHANCELLOR were the same as the arguments before the Court of Appeal, which are given below; and in addition to the authorities cited to the Court of Appeal the cases of *Wells* v. *Kilpin*, L. R. 18 Eq. 298, and *Beckett* v. *Buckley*, L. R. 17 Eq. 435 were referred to.

HALL, V. C.: —

The question in this case is one which, I think, has never been decided, excepting so far as it was decided in *Tillet* v. *Pearson*, 43 L. J. Ch. 93.

[*277] *The decision in that case appears to be applicable to the present case, but not to have been a decision upon argument.

Considering the case independently of that decision, I will endeavour to state what I consider to be the correct conclusion. I should have wished to be able to give the case more consideration, but from its nature I think it incumbent upon me to dispose of the matter now.

The argument is presented thus on behalf of the applicant. He says: "Apart from the two statutes, 1 & 2 Vict. c. 110, and 27 & 28 Vict. c. 112, I should have had, under the circumstances of this case, a right to come to the Court to have relief by the appointment of a receiver over these particular properties which belonged to the debtor, subject to the rights of any prior incumbrance, so as to protect the property in order that it might be made available for my judgment." The applicant then contends that the right has not been interfered with or taken away by either of those statutes.

As regards the first statute, there is nothing in it which it can be contended takes away the right. That statute gives enlarged rights to the judgment creditor, making the whole of the interest of the debtor, and not merely a moiety of it (which was the Common Law right), liable under an elegit, and it gives him a general charge over other properties than those which were available for the benefit of judgment creditors before the Act.

The Act 27 & 28 Vict. c. 112, is the one which it is most important to consider in this case, and its first section is relied on in answer to this application. That section is, "No judgment, statute or recognisance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute, or recognisance." It is said that the plaintiff in this action is by force of that section not entitled to come to the Court for a receiver until after such time as he shall by means of a decree or order in this action have been declared to have a lien on the land under his judgment. It appears to me that this is not a sound view. In *Hatton* v. *Haywood*, L. R. 9 Ch. 229, 43 L. J. Ch. 372, the question was whether *a judgment, [*278] in respect of which there was no delivery in execution "by virtue of a writ of elegit or other lawful authority," could prevail over a bankruptcy. Before there had been a delivery in execution, the whole of the bankrupt's property passed to the trustee under the bankruptcy, subject only to such judgments as at the time of the bankruptcy were effectual as against bankruptcy. Judgments against real and personal estate were intended by the Act to be placed on the same footing, and if the judgment in any given case would not have been effectual as against personalty, it was not intended that it should be effectual against realty. Therefore, when you come to apply sect. 1 to the case, as the law with respect to real estate is to be assimilated to that relating to personal estate, the result is, that there being no execution, there is no lien, and the property must pass to the trustee free from the judgment. The main purpose and object of the Act was to facilitate the transfer of land by rendering it unnecessary to make searches for judgments on the purchase of land, and the law was altered step by step with a view to giving purchasers a good title as against judgments. But I see no reason, founded on the policy

of the Act, why the law should be changed in a case like that now before the Court. If under the old law the creditor would have been entitled to come to the Court and say, "I have a judgment which I cannot enforce because there is a legal impediment, let me enforce it through the equitable jurisdiction of the Court," I see no reason why the Court should refuse to give the creditor all the advantages which he would have had, independently of the Acts, subject, of course, to any rights which third parties might have acquired by alienation or bankruptcy, or otherwise.

When we read the judgments in that case, I think the learned Judges held that if you get a receiver the provisions of the Act are complied with, for that you get a delivery of the land in execution by virtue of "other lawful authority." This is exactly what the applicant has come for. He has come for a receiver, so that he may be in possession by lawful authority, and Lord SELBORNE in his judgment refers to *Thornton* v. *Finch*, 4 Giff. 515, as showing that, although the land was not specifically [*279] bound until taken *in execution, yet the inchoate right under 1 & 2 Vict. c. 110 might be made the foundation of a suit in equity to remove the legal difficulty in the way of making a perfect charge. Therefore it appears to me that there is nothing whatever in that judgment hostile to the application which is made in the present case.

Then, if the difficulty upon the statute does not exist, as I think it does not, is the applicant entitled, under the practice of the Court, to make this motion under existing circumstances? Considering the nature of the property which the motion seeks to make applicable — a property which, if it remains in the hands of the debtor, may, by means of a sale or disposition, be rendered unavailable for the purpose of the execution — a property which, in the view of this Court must be considered liable to equitable execution, this appears to me a proper case for the exercise of the jurisdiction. I do not consider that any of the cases referred to are hostile to this conclusion. The decision of Vice-Chancellor WOOD in *In re Cowbridge Railway Company*, L. R. 5 Eq. 413, certainly is not, for his view was that it was not intended by the second Act to take away the rights which existed under 1 & 2 Vict. c. 110. The observations of Lord Justice GIFFARD in *Guest* v. *Cowbridge Railway Company*, L. R. 6 Eq. 619, 37 L. J. Ch. 909, do not appear to me to be adverse to my view, but in fact to support it.

It appears to me, therefore, that an order ought to be made for a receiver according to the terms of the notice of motion.

The defendant appealed. The appeal came on to be heard on the 26th of June.

Hastings, Q. C., and Romer, for the appellant: —

Our case is, that until the land has been delivered in execution, or an order made declaring the judgment creditor to have a charge on it, he, by virtue of 27 & 28 Vict. c. 112, s. 1, has no interest in the land and cannot apply for a receiver. The right to a receiver depends on the plaintiffs having a charge, and the statute says that till certain things have been done the judgment shall not affect the land. *Hatton* v. *Haywood*, L. R. 9 Ch. 229, 43 L. J. Ch. 372, decides that a judgment *creditor [*280] to whom the land has not been delivered in execution has no charge as against a trustee in bankruptcy. We do not dispute that at the hearing the plaintiffs might get a declaration that they were entitled to a charge, and then obtain a receiver. *Wells* v. *Kilpin*, L. R. 18 Eq. 298, bears out the view that there is no present charge.

[JESSEL, M. R. : — In that case equitable execution was granted by the appointment of a receiver.]

Yes, but at the hearing.

[JESSEL, M. R. : — The question is, whether it may not be obtained before the hearing.]

Then we say that the receiver cannot be obtained on interlocutory application in this action, because that is giving on motion the whole relief to be obtained in the action.

[JESSEL, M. R. : — In a proper case why may it not be given before the hearing?]

It would be inconsistent with 1 & 2 Vict. c. 110, s. 13, which provides that relief is not to be obtained within the year.

[JESSEL, M. R. : — Does that apply to any relief except the enforcing the equitable charge created by that statute?]

Here is a judgment which at present does not affect the land: how can bringing an action give a right to appoint a receiver on motion? the commencing the action cannot make the judgment affect the land. In *Tillett* v. *Pearson*, 43 L. J. Ch. 93, it was held that a judgment creditor who had sued out an elegit and got a return from the sheriff might file a bill for a receiver. The VICE-CHANCELLOR considered that the only case bearing on the

present, and it is distinguishable, for here there has not been a return. The property, moreover, was a wasting property, and the case was not argued. The return to the writ brought the case within the words of the 1st section.

[JESSEL, M. R. : — The ground on which I went in that case was that it was giving equitable execution.]

The Judicature Act, 1873, s. 25, sub-s. 8, does not warrant the giving the whole relief sought in the action on an interlocutory application.

[*281] *[JESSEL, M. R. : — I do not agree with that view; but it appears to me a question whether it was necessary that there should be a fresh action, and whether the receiver might not have been appointed in the original action.

DICKINSON, Q. C. : — The VICE-CHANCELLOR, on his attention being directed to *In re Cowbridge Railway Company*, L. R. 5 Eq. 413, and *Guest* v. *Cowbridge Railway Company*, L. R. 6 Eq. 619, 37 L. J Ch. 909, had intimated that a fresh action would be necessary.]

Assuming that the relief sought at the hearing can be granted now, the Court will not enforce the judgment within the year: *Smith* v. *Hurst*, 1 Coll. 705; though it can interfere to protect the property: *Partridge* v. *Foster*, 34 Beav. 1; *Watts* v. *Jefferyes*, 3 Mac. & G. 372. We say that even if the plaintiff is entitled the new action is an improper one, for that the relief could have been obtained in the old one.

[JESSEL, M. R. : — Can that be anything more than a question of costs? *Clutton* v. *Lee*, 7 Ch. D. 541.]

If a new action is wanted, the relief should be obtained at the trial. A motion ought to be in the original action, not in the new one.

DICKINSON, Q. C., and Ingle Joyce, *contrà* : —

Our case does not depend on the statutory charge, but on the general right of a judgment creditor: Mitford on Pleading, page 126; *Carling* v. *Marquis Townshend*, 19 Ves. 628, 632; *Lord Dillon* v. *Plaskett*, 2 Bli. (N.S.) 239; *Neate* v. *Duke of Marlborough*, 3 My. & Cr. 407. In *Smith* v. *Hurst*, an elegit not having been issued, the Court could not interfere under the old law, so the case turned on the 1 & 2 Vict. c. 110. The case is a clear one for equitable relief; there are impediments to the judgment being enforced at law. Then, can it be done on interlocutory

application? *Smith* v. *Hurst* is an authority that it can, for a receiver was there granted on motion as to the chattels. *Hatton* v. *Haywood*, L. R. 9 Ch. 229, 43 L. J. Ch. 372, does not affect us. The plaintiff there could only *succeed by [*282] showing that he had an interest in the land at the time of the bankruptcy, at which time possession had not been given. The statute 27 & 28 Vict. c. 112, has not taken away the old right to come into equity to have possession delivered.

Hastings, in reply.

JESSEL, M. R.:—

This is an appeal from the decision of Vice-Chancellor HALL, and it raises an important question, which has been argued at very great length, and which I lament to have been capable of argument. There is an unsatisfied and undisputed judgment against the defendant for many thousand pounds. The defendant is in possession of freehold land in fee simple of which he is receiving the rents. That land happens to be subject to a mortgage, and, the legal estate being outstanding in the mortgagee, the judgment creditor cannot obtain possession of it under the ordinary writ of elegit. It is gravely urged that, notwithstanding the Act of Parliament which applies equitable rules to all matters, the owner of the land can by reason of the outstanding mortgage, remain in possession and receive the rents in defiance of the judgment creditor until the trial of the action, if indeed the argument does not go the length of saying that the judgment creditor has no remedy. I lament, I say, that it was possible to argue such a case, and it is only possible, because the words of the statute 27 & 28 Vict. c. 112, are such as do not fit in with the preamble of the Act or with the ordinary knowledge of judgment law possessed by those acquainted with the subject. The Act was no doubt passed for a very useful purpose, but I think I can safely say it never could have been in the contemplation of the framers that it should be sought to be made use of for such a purpose as this. However, we must deal with the Act as we find it. It says (sect. 1): "No judgment, statute, or recognisance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute, or recognisance."

The first question that arose after the passing of the Act was

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[*283] *what was the meaning of "actually delivered in execution." Everybody knew what "delivered in execution" meant, but "actually delivered in execution" was not so easy to understand. It was decided that it meant the same thing as "delivered in execution," and therefore that difficulty vanished.

The next question was what was the meaning of "other lawful authority?" Those words became the subject of judicial decision, and, as I understand the result of that decision, it was this: that the words referred to the order of a Court having authority to give that which amounted to delivery in execution, although not technically a delivery in execution, in other words, to what was commonly called equitable execution, which was putting the land in the possession of a receiver. That was decided by the full Court of Appeal in *Hatton* v. *Haywood*, L. R. 9 Ch. 229, 43 L. J. Ch. 372.

Then the next question is, how this equitable execution is to be obtained? I will take the two periods, — those before and after the passing of the Judicature Act. Before the passing of the Judicature Act the mode of obtaining equitable execution was by issuing a writ of elegit, and, without obtaining a return, to file a bill in equity alleging that the plaintiff had issued his writ of elegit, and that owing to legal impediments it could not be enforced at law, and asking for payment of the judgment debt by means of a receiver. According to the practice the application for the receiver was made by interlocutory application before the hearing, and in a proper case it was granted. Now, I am not aware that it was ever decided that it should be refused because the defendant was owner in fee simple. It ought to be granted in every proper case.

In dealing with such an application the first point to be considered was whether there was an undisputed judgment. In this case it is quite clear that there is. The next point was: Has the defendant got the land? because he might say, "Do not appoint a receiver of somebody else's land; I am not in possession; I have nothing to do with it." Here there is no dispute about that. When those two points were answered the third point was: "Is the interest of the debtor in the land such that it cannot be reached at law?" If that was answered in the affirmative, as it must be in the case of an equity of redemption (for the [*284] Statute of *Westminster was extended by the Statute of

Frauds only to the case of pure equities, that is, where there was a bare trust and not an estate like an equity of redemption), — if that was answered in the affirmative, it seems to me that the order should be of course. It does not appear to have been necessary to consider any such question as whether the debtor's interest was a life estate, or an estate for years, or a wasting property. The creditor wanted his money, and it would have made a great difference to him whether he got it then or five or ten years later, after the case had come to a hearing. In former days the market value of a fee simple in possession and of a fee simple in reversion after the trial of a Chancery suit would have been very different. Besides that, it must be remembered that now the liability to become bankrupt is universal. In former days most landed proprietors were not subject to the bankruptcy laws, but that is not so now; and it was decided in *Hatton* v. *Haywood* that the title of the trustee in bankruptcy overrides that of the judgment creditor who has not got his execution. It appears to me, therefore, there is no ground for saying that where all the circumstances I have mentioned concurred a Court of Equity would not have granted a receiver before the Judicature Act upon an interlocutory application.

I may mention that every case on the subject with which I am acquainted was a case in which the application was made upon interlocutory motion before the hearing. It was so in the well-known decision of *Lord Dillon* v. *Plaskett*, 2 Bli. (N. S.) 239; and Lord ELDON, in giving judgment, does not refer to the fact which was mentioned, not in the bill, but only incidentally in the course of the argument, that Lord DILLON had only a life interest.

The origin of the right which is established by all the authorities is shown clearly by *Neate* v. *Duke of Marlborough*, 3 My. & Cr. 407. The judgment creditor had no interest in the estate itself, he only had the potentiality of acquiring one. The elegit was, as its name imports, only an option to take the lands. The judgment creditor might issue a *fieri facias* by which he could get the goods, or an elegit, by which he could get both the land and the goods, — originally only half the land, but afterwards, by the statute 1 & 2 Vict. *c. 110, the entirety. [*285] It was held in equity — why I do not understand — that the only way of intimating his desire to exercise his option was

by issuing the writ of elegit. It was argued very strenuously in *Neate* v. *Duke of Marlborough*, 3 My. & Cr. 407, that a man might say, I exercise my option by telling you I want the land, and I cannot get it at law; why go through the form of issuing an elegit which can result in nothing? However, Lord COTTENHAM, in *Neate* v. *Duke of Marlborough*, felt bound by the prior authorities, and decided that that useless and absurd form by which the creditor could not get the estate must be followed, and that the bill failed for not having alleged it. Still the substance of the case was that the judgment creditor had exercised his option to take the defendant's land, and that he could not get at it because the defendant's interest was of an equitable nature, which could not be reached except by the assistance of the Court of Equity; and when he showed that he had properly exercised his option, and was in the position of a man who would have got the land at law if the estate had been legal, he was entitled to the assistance of the Court of Equity by interlocutory application if the estate was equitable.

Now, if that were so, undoubtedly this action and order would have been right before the passing of the Judicature Act, unless we are prepared to hold that this is not a delivery in execution. As I have said before, it is always called equitable execution; it was so called so long ago as the time of Lord THURLOW, by Lord THURLOW himself, and I am at a loss to know what is meant by "other lawful authority," unless it be the order of a Court of Equity which gives equitable execution. I think, therefore, that the order under appeal is a delivery in equitable execution; and even supposing it were not, I still think the order could, prior to the Judicature Act, and after the passing of the Act of the 27 & 28 Vict. c. 112, have been maintained. It is quite true the Act says the land shall not be affected until it is actually delivered in execution, but the province of the Court on interlocutory application was to see that the property did not disappear between the time of making the application and the time of the trial. If the plaintiff had a right to have equitable execution, his right [*286] existed at *the time of filing the bill. That right was established, no doubt, at the trial or hearing of the cause; but what was established was his original right, and it is the province of a Court of Equity to keep the property ready for him when the time of establishing his right arrives. It might hap-

pen, especially in property of a wasting nature, that nothing might be left at the time of the trial, if the debtor was allowed to continue in possession, and it is the duty of the Court to protect the property in the meantime, or, in other words, there is no equity in the defendant to avail himself of the delay, which is a necessary incident of all judicial systems; and I think that the order might have been upheld on that ground, though I prefer the former one.

Now, what has the Judicature Act done? In the first place I think that the Act of 1873, sect. 25, sub-sect. 8, has enlarged very much the powers which Courts of Equity formerly possessed of granting injunctions or receivers. The words are: "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just." Then it goes on: "If an injunction is asked either before or at or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass," it may be granted whether or not certain things have occurred which prior to the passing of the Act would in one alternative have prevented the Court from granting an injunction or receiver.

The first point to be considered on that sub-section is, whether it applies to the case of granting an injunction or receiver after the judgment as well as before. I have no doubt that it applies to both. One reason for saying so is, that the words of the section are general. Considering that injunctions and receivers are asked for after judgment as well as before, and were so asked for at the time of the passing of the Act, I see no reason for cutting down the general words of this section to make it apply merely to applications before the trial of the action. In the next place we have the words (no doubt limited to waste and trespass), "If an injunction is asked either before, or at, or after the hearing." *There a case after hearing is evidently dealt with. [*287] Another reason is, that the Act transfers the existing jurisdictions; it does not alter them until we come to sect. 24. When we come to look at what the jurisdiction of the Common Law Courts was under the the Common Law Procedure Act of 1854, we shall see at once that an injunction could be granted

either before or after judgment. The 79th section of that Act gives the party injured a right to claim a writ of injunction against the repetition or continuance of such wrongful act, and then the 82nd section says this: "It shall be lawful for the plaintiff at any time after the commencement of the action, and whether before or after judgment, to apply *ex parte* to the Court or a Judge for a writ of injunction to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and such writ may be granted or denied by the Court or Judge upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to such Court or Judge shall seem reasonable and just, and in case of disobedience such writ may be enforced by attachment by the Court, or, when such Courts shall not be sitting, by a Judge." Now it is impossible to suppose that if you might apply *ex parte* after judgment you might not apply upon notice. It is a case of *omne majus in se continet minus*. When an injunction might be applied for either before or after judgment, it appears to me impossible to limit the effect of the 8th subsection to a case of applying before judgment. It seems to me, therefore, that there is a larger discretion given by the 8th subsection to the Judges as to when they shall grant an application than they had before. Of course, like every new power, it must be exercised for judicial reasons; but the existence of such power gets rid, as it appears to me, of any decisions, if such decisions there be, limiting the exercise of the discretion as regards the exercising it on an interlocutory application as distinguished from a trial at law.

If that is so, what is the meaning of Order XLII., rule 1? Three of the Courts, the jurisdiction of which was transferred, were the Courts of Common Law at Westminster. Their orders and judgments might have been enforced by the Equity
[*288] Court, and it *does not appear to me to be impossible or difficult to read the words of that rule as including such enforcement by an Equity Court. It is not absolutely necessary to decide that point, because the 23rd rule says, "Nothing in any of the rules of this Order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or

order in any manner or against any person or property whatsoever." Therefore, if the right is not expressly conferred by the 1st rule, it is certainly, as it appears to me, preserved by the 23rd rule. In either way, therefore, the right remains.

There is only one further point to be considered. If the right remains, how is it to be exercised? Can it be exercised by motion in the action itself, or is it necessary to institute a new action? If I were driven to express an opinion upon that point, I should probably prefer the shorter and cheaper process. But I do not intend finally to decide it, because it is not necessary to do so. Even assuming it were open to the plaintiffs in the action to proceed by motion, still the right to proceed by action is not taken away, the 23rd rule is express, and therefore they may proceed by action. If it were clear beyond all question that they ought to proceed in the old action, that might affect the costs of the new action. That point has not been sufficiently discussed for me now to deliver a final opinion upon it, and therefore I prefer saying that the new action is certainly warranted and ought to be entertained.

Under these circumstances it appears to me that the order made by the VICE-CHANCELLOR is right, and that the appeal must be dismissed.

BRETT, L. J. :—

This order is made in an action brought in the Chancery Division, and which before the Judicature Act could only have been brought in the Court of Chancery. The first question, therefore, seems to me to be whether before the Judicature Act this order could have been made at the present stage of such a suit, and I am satisfied that it could. It seems to me that the only conditions necessary to give the Court jurisdiction were that there should have been a judgment obtained in a Court of Common
* Law, that a writ of elegit should have issued, and that [*289]
the interest in the real property of the judgment debtor
should be an equitable interest such as could not be taken in execution at law. The moment those conditions were fulfilled, I think it is made out the Court of Equity had jurisdiction to make such an order. It seems to me that Mr. Dickinson has made out that such an order might have been made and would have been made before the Judicature Act, upon those conditions, and those only, being fulfilled, and therefore that this order could have been

made before the Judicature Act. I do not think the Act of 27 & 28 Vict. c. 112, has prevented the Court of Equity exercising that jurisdiction. It is true that the statute says that no judgment shall affect the land until it is actually delivered in execution. It seems to me that the argument founded on this enactment is based upon phrases which have been used with regard to a judgment or the writ of elegit having charged lands or having given a general lien upon lands. I cannot help thinking that the best phrase was that judgments gave "a sort of general lien." It is difficult to say what the meaning of the term "general lien" here is in this case. It is a term used at law, but the difference there is between a particular lien and a general lien. A particular lien is given upon goods in respect of work done upon those goods, a general lien is given in respect of work which may have been done upon other goods; but if we speak of a judgment giving a general lien upon land, this can only mean that it has something like the same effect upon land that a claim of general lien has upon goods. We may disregard that phrase, for it was not necessary to say that the judgment affected the land, or charged the land, or that the writ of elegit charged the land before the writ of elegit was executed. This jurisdiction was exercised, although before the passing of 27 & 28 Vict. c. 112, it might be said that neither the judgment nor writ charged the land or affected the land at all, and that statute which was passed for another purpose does not affect the jurisdiction.

On this view it seems to me unnecessary to determine in the present case what is the effect of appointing a receiver at this stage of the cause as regards the provisions of the 27 & 28 Vict. c. 112. It is not necessary to determine whether appointing a *receiver at this stage is within the meaning of that Act an actual delivery in execution or not, because, as it seems to me, this jurisdiction can be exercised although neither the judgment nor the writ of elegit can be said to affect the lands at all. I decline, therefore, to give an opinion as to what is the effect of the order for a receiver with regard to the application of that Act.

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It further seems to me that upon this view it is unnecessary to determine what is the proper construction of the Judicature Act, as this case can, in my opinion, be decided without any reference to that Act. The question has been raised whether, under the

Act of 1873, sect. 25, sub-sect. 8, a receiver might not be appointed in the original suit in this case, and as to the time at which, and the circumstances under which, a receiver may be appointed by a Common Law Division in an ordinary action. Those points seem to me to be of the highest practical importance, and as at present advised I decline to give any opinion upon them.'

COTTON, L. J. :—

I am of opinion that the order of the Vice-Chancellor HALL is right. I think that much of the argument has proceeded from a want of due consideration of what the plaintiffs were really asking the Court to do in this case. What the plaintiffs were asking was something for which plaintiffs came to the Court of Chancery long before the Act of 1 & 2 Vict. c. 110. They were not asking the Court to enforce a charge. When a person had before that Act obtained a judgment, the natural course was to take the ordinary legal process by writ of elegit; but there might be difficulties which prevented him from getting the land delivered in execution under the elegit, and when that was so, he came into a Court of Equity on the well-known principle that a Court of Equity would give relief where a legal right existed, and there were legal difficulties which prevented the party from enforcing that right at law. That being so, it was a well-known form of suit before the Act of 1 & 2 Vict. c. 110, that a plaintiff having a judgment which, owing to legal impediments, could not be enforced at law, came into equity, not for the purpose of enforcing such a right by way of charge, as is given by the Act of 1 & 2 Vict. c. 110, but to have what is * called equitable execution; that is [*291] to say, to have the lands delivered in execution to him in equity when he would have got them at law in the ordinary process but for certain difficulties existing. The leading case on the subject is *Neate* v. *Duke of Marlborough*, 3 My. & Cr. 407, where the distinction is well pointed out by Lord COTTENHAM in giving judgment. He says (3 My. & Cr. 416) that "the jurisdiction is not for the purpose of giving effect to a lien which is supposed to be created by the judgment." Then he says (3 My. & Cr. 417), "The effect of the proceeding under the writ is to give to the creditor a legal title which, if no impediment prevent him, he may enforce at law by ejectment. If there be a legal impediment, he then comes into this Court, not to obtain a greater bene-

fit than the law, that is, the Act of Parliament, has given him, but to have the same benefit by the process of this Court, which he would have had at law, if no legal impediment had intervened."

Now the ordinary way by which that relief was given was by granting a receiver, and I take it to be indisputable that in a case like *Neate* v. *Duke of Marlborough* the Court did, on interlocutory application before the hearing, grant a receiver if it thought that under the circumstances it was right to prevent the defendant from remaining until the hearing of the cause in possession of the property, of which, but for the legal impediment which forced the plaintiff to come into equity, the plaintiff would have had execution by the ordinary process.

I think it unnecessary to go through the cases. Cases have been referred to where with reference to an entirely different question, that of enforcing the equitable charge created by 1 & 2 Vict., and which could not be enforced for a year, the Court interfered within the year, grounding its interference on the fact of the subject matter of the charge being a wasting property. If those cases have any application to the present, they assume that the Court had jurisdiction to interfere before the hearing, and only refer to the case of the wasting interest for the purpose of shewing that it was desirable to exercise that power which the Court had; for the mere fact that the property was wasting, and would probably be gone before the hearing of the cause, could not give the [*292] *Court jurisdiction to interfere before the hearing. If the Court had jurisdiction, the wasting nature of the property was a very good reason for interfering; but if it had no jurisdiction, it could not interfere because it would be very desirable to do so.

Thus the cases stand before the Act 27 & 28 Vict. c. 112, and the only question is as to the effect of that statute. The first section says: "No judgment, statute, or recognisance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority." It has been decided that the appointment of a receiver will be actual delivery in execution by lawful authority, and that at the hearing a receiver may properly be granted in order to give delivery by lawful authority. But it is said that this cannot be done on interlocutory motion. I cannot accede to that.

No. 10. — Anglo-Italian Bank v. Davies, 9 Ch. D. 292, 293.

Before the Act was passed it was the practice of the Court to interfere by interlocutory motion to grant a receiver. Why should it not do so now? The case of the plaintiff is this: "I was forced to come into equity because there were legal impediments to prevent my obtaining by ordinary legal process a right which existed at the time when I filed and before I filed the bill, that is, a right to have this land delivered in execution." That being so, why is he not to have that which, independently of the Act, was the relief ordinarily granted if it was a proper case? As the plaintiff had the right at the time when he filed his bill to have delivery in execution if there had been no legal impediment, the Court of Equity ought not, in my opinion, to hesitate, if the circumstances justify it, in at once, on the filing of the bill, acting according to its usual practice, and interposing on interlocutory motion, even if that is to have the effect of giving the plaintiff delivery by lawful authority, as in my opinion it has. But even if it has not, it seems to me equally clear that a Court of Equity ought not to hesitate to act on its own practice, and then the effect would be this, — that the Court interposes because the plaintiff says, "I had a legal right at the time of the filing of the bill, which legal impediments prevented me from exercising. Do not let the delay, which must necessarily ensue before the case can be decided, leave the defendant wrongfully in possession of the property, dealing * with it as he thinks fit. If [*293] you cannot give me the right to the property at once, keep it *in medio* until you can decide the right."

My opinion is, that the appointment of a receiver is now delivery of execution by lawful authority within the meaning of the Act of 27 & 28 Vict. c. 112, and that there is nothing whatever to prevent the Court from interposing on interlocutory motion. If there were any formal difficulty, in my opinion the Judicature Act, 1873, s. 25, sub-s. 8, removes it. Under that sub-section the Court may and does grant receivers when it never could have done so before. Thus, for instance, it has power to grant a receiver under that section where a plaintiff has himself the power of obtaining possession at law.

There is another point which has been raised, — namely, whether or no this relief could have been obtained in the old action. Now, the only way in which that arises here is — Can it be said that the relief is so clearly obtainable in the old action as

to make this application and this suit improper? Even if this relief could have been obtained in the old action, that would not make this suit an improper suit, because there was the right antecedently to institute such a suit as this, and that, as has been pointed out by the MASTER OF THE ROLLS, is not in any way taken away. But I give no opinion whatever on Order XLII., or whether under that Order the plaintiff can obtain a receiver as a means of enforcing a mere money order or money judgment which he has obtained in the action.

Smith v. Cowell.

6 Q. B. D. 75–79 (s. c. 50 L. J. Q. B. 38; 43 L. T. 528; 29 W. R. 227).

Judgment Creditor. — Equitable Execution. — Receiver.

[75] The words "interlocutory order" in s. 25, sub-s. 8 of the Judicature Act, 1873, are not confined in their meaning to an order made between writ and final judgment, but mean an order other than final judgment in an action, whether such order be made before judgment or after.

A creditor who had recovered judgment in an action sued out a writ of elegit, to which writ the sheriff returned that there were no goods or lands of the debtor which he could deliver. It appearing, however, that the debtor was entitled to an equity of redemption of certain land, the creditor, without commencing any fresh action for the purpose, made an application to a judge at chambers for the appointment of a receiver: —

Held, that such application was rightly made in the original action, and that it was unnecessary to commence a new action for the purpose.

This was an action on a bill of exchange brought in the Queen's Bench Division. The plaintiff recovered judgment and sued out a writ of elegit. The defendant had no goods or legal [*76] *estate in lands, but was entitled to an equity of redemption of certain freehold and leasehold property. With the view of obtaining equitable execution of his judgment against such equity of redemption, the plaintiff applied to a judge at chambers under Order LII., rule 4, for the appointment of a receiver. The Judge refused to make the order, on the ground that he had no jurisdiction to make it upon an application in the original action after judgment recovered. An appeal from that refusal to the Queen's Bench Division having been dismissed, the plaintiff appealed to the Court of Appeal.

Willis Bund, for the plaintiff. The question is whether a receiver can be appointed upon an application made in the original

action after judgment, or whether it is necessary to commence a new action for the purpose in accordance with the old practice of the Court of Chancery. The circuitous process of the old Chancery practice is rendered unnecessary by s. 25, sub-s. 8 of the Judicature Act, 1873. The words "interlocutory order" there are wide enough to include an order made after judgment. This point was raised in *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275 (No. 10, p. 570, *ante*), but not decided. JESSEL, M. R., however, expressed a strong opinion that a fresh action was unnecessary.

Robert Williams, for the defendant. Under s. 25 of the Judicature Act, the appointment of a receiver is to be only by "interlocutory order," but an order is interlocutory only if made at some time between writ and final judgment. Here judgment had already been pronounced at the time of the application made; a new action therefore is necessary as a foundation for the order asked. There is nothing in the section giving any new mode of getting execution of an equitable estate by way of receiver.

BAGGALLAY, L. J. This motion raises a question of considerable practical importance, and one which, so far as I am aware, has not been hitherto decided. In this case the plaintiff has recovered judgment and sued out a writ of elegit, but the defendant has no property to which resort can be had to satisfy that judgment, * except an equity of redemption. Now if this case [*77] had arisen before the Judicature Act, the plaintiff's course would have been clear; he would have had to file a bill in Chancery, claiming to have it declared that by virtue of his judgment he was entitled to a charge upon the defendant's equity of redemption to the amount of such judgment; and then, upon an application for a receiver being made in the course of such suit, a receiver would have been appointed. He has here, however, applied to the Queen's Bench Division for a receiver, without commencing any fresh action. The question is whether a fresh action is necessary. Section 25, sub-s. 8 of the Judicature Act, 1873, provides that "a *mandamus* or injunction may be granted, or a receiver appointed by an interlocutory order of the Court," in all cases in which it shall appear just and convenient; and the defendant's contention is that the Court has no power under that section to make an order for a receiver in an action after judgment, for that the words "interlocutory order" mean an order prior to final judgment. But with that contention I cannot agree. The interpretation of the

word "interlocutory," as used in that sub-section, is to be found later on in the sub-section itself, which provides that "if an injunction is asked either before, or at, or after the hearing of a cause," it may be granted, &c. But it is only by an interlocutory order that the Court has power under this section to grant an injunction. In the case of an injunction, therefore, the section clearly contemplates an interlocutory order being made after the hearing of a cause, or in other words, after judgment. But if the word interlocutory is to have that extended meaning in the case of an injunction, why not also in the case of a receiver? In my opinion, the plaintiff was right in making this application to the Queen's Bench Division in the way he did. It is true he might have made it in the course of a second action instituted for the purpose: *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275 (No. 10, p. 570, *ante*), but that is a circuitous process which I consider no longer necessary.

Brett, L. J. This is an application for an order to appoint a receiver made in an action after judgment. The question is whether the Queen's Bench Division has power on such an [*78] *application to make such an order. Now before the Judicature Act, neither the Court of Queen's Bench nor the Court of Chancery could have made the order asked for on such an application as this. Then has the Judicature Act given the Court such a power? The question depends on s. 25, sub-s. 8. (His Lordship read the sub-section.) Those words are very wide, and give to all the divisions a larger power than the Court of Chancery possessed before. The power there given is of the largest kind, unless it is circumscribed in point of time by the words "interlocutory order." But it is said that interlocutory must mean something between action begun and final judgment. I cannot agree. In my opinion "interlocutory order" there means an order other than a final judgment or decree in an action

Cotton, L. J. I am of opinion that the plaintiff is entitled to a receiver. Before the Judicature Act a judgment creditor in a similar position could have enforced his judgment only in the Court of Chancery, and then only by means of an independent proceeding taken for the purpose of enforcing it.

All the common law divisions have now under s. 24 power to give the same relief which the Court of Chancery could have given before. But that is not enough for the purpose of the present case, for here no independent proceeding was taken. Then is there any-

thing in the Act giving the Court a wider power than that which the Court of Chancery possessed?

Section 25, sub-s. 8, provides that "a *mandamus* or an injunction may be granted, or a receiver appointed in all cases in which it shall appear to the Court to be just and convenient." In my opinion it is just and convenient to enforce the plaintiff's judgment, by giving him equitable execution where he cannot by reason of the legal impediment of the outstanding mortgage get legal execution at the hands of the sheriff. But then the defendant argues that the Court, when granting this relief, is entitled to grant it only by means of an interlocutory order, and that the order here asked for is not interlocutory, judgment having already been pronounced. But the section itself shows that the words "interlocutory order" are not there used in that sense. In the earlier part of the section those words are applied equally to the *appointment of a receiver and the granting of an injunction; while the latter part of the section speaks of an injunction being granted after judgment as well as before. I think those words must be taken to mean an order other than an order made by way of final judgment at the hearing of a cause. [*79]

Appeal allowed.

ENGLISH NOTES

The principle of *Anglo-Italian Bank* v. *Davies*, was applied in *Bryant* v. *Bull* (1878), 10 Ch. D. 153, 48 L. J. Ch. 325, 39 L. T. 470, 27 W. R. 246; where Bacon, V. C., appointed a receiver, the plaintiff having failed to obtain a sequestration for costs, in a former action by reason of his not being able to find the defendant's address.

It is further followed in *Ex parte Evans, In re Watkins* (C. A. 1879), 13 Ch. D. 252, 49 L. J. Bk. 7, 41 L. T. 565, 28 W. R. 127 (affirming 11 Ch. D. 691, 48 L. J. Bk. 97, 40 L. T. 526, 27 W. R. 712), where the Court held it unnecessary for a creditor seeking equitable execution, previously to sue out an elegit.

The process of equitable execution under the Judicature Acts is further exemplified by the cases of *In re Pope*, and *Holmes* v. *Millage*, Nos. 12 & 13, p. 592 *et seq.*, *post*.

AMERICAN NOTES.

The first principal case is cited in 3 Pomeroy Eq. Jur. p. 2055; and in 2 Beach Eq. Jur. sects. 894, 980; and in notes 2 N. Y. Chancery Rep. (Lawyers' Co. Op. Ed.), p. 936; and the second in Beach Eq. Jur. sect. 894; and both in High on Receivers, sect. 23. The matter is regulated by statute or codes

in many States. The doctrine finds support in *Gage* v. *Smith*, 79 Illinois, 219; *Kuhl* v. *Martin*, 26 New Jersey Equity, 60; *Osborn* v. *Heyer*, 2 Paige (N. Y. Chancery), 342; *Dollins* v. *Lindsey*, 89 Alabama, 217; *Towne* v. *Campbell*, 35 Minnesota, 231; *Habenicht* v. *Lissak*, 78 California, 351; 12 Am. St. Rep. 63; *Davis* v. *Chapman*, 83 Virginia, 69; 5 Am. St. Rep. 251.

In the latter case the Court said: "In a creditor's suit, especially, it seems fit and proper that the Court should have power to call in the assets from the hands of a personal representative. In such a suit the court in effect becomes the personal representative, has control of the assets, reduces them into possession, and applies them in due course of administration." See note, 60 Am. Dec. 489.

In proceedings supplementary to execution — the substitute in the Code States for creditors' bills — a receiver may be appointed to subject to execution a seat or membership in a stock board. *Habenicht* v. *Lissak*, *supra*.

To reach real estate in another State the court would appoint a receiver and order the debtor to execute to him a conveyance effectual to pass it according to the *lex rei sitæ*. *Mitchell* v. *Bunch*, 2 Paige (N. Y. Chancery), 606; 22 Am. Dec. 669.

No. 12. — In re POPE.

(C. A. 1886.)

No. 13. — HOLMES *v.* MILLAGE.

(C. A. 1893.)

RULE.

Since the Judicature Acts, equitable execution by way of a Receiver may, where it is "just and convenient," be ordered so as to include property capable of being taken by legal execution; but it cannot be granted over property which previously was not either at law or in equity liable to be taken in execution at all.

In re Pope.

17 Q. B. D. 743–755 (s. c. 55 L. J. Q. B. 522; 55 L. T. 369; 34 W. R. 693).

Judgment Creditor. — Receiver. — Equitable Execution. — Registration.

[743] Since 27 & 28 Vict. c. 112, where land has been actually delivered in execution by writ of elegit or other lawful authority, it is unnecessary to register the judgment, writ, or other process of execution except for the purpose of obtaining under s. 4 of the Act a summary order for sale; but before

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any creditor to whom any land of his debtor shall have been actually delivered in execution can obtain such summary order his writ or other process of execution must be duly registered pursuant to s. 3 of the Act.

An order for the appointment of a receiver is a "process of execution" within the meaning of the Act.

Appeal from an order of A. L. SMITH, J., in chambers, made upon the application of M. Pope, and setting aside the appointment of a receiver so far as it related to a piece of unoccupied freehold land near Barnes Terrace, Surrey.

It appeared that the owner of the premises in question, which were subject to an equitable mortgage by deposit of deeds, had sold and conveyed his equity of redemption to Pope. Before the sale, a creditor of the vendor had obtained and registered a judgment against him, and had issued an elegit as upon land in Middlesex. The only lands which the vendor had were in Surrey, but as these lands comprised the premises in question, which were subject to the equitable mortgage, the judgment creditor, instead of issuing an elegit as against land in Surrey, obtained an order for the appointment of a receiver by way of equitable execution. The judgment creditor not having registered the order appointing the receiver, Pope applied at chambers to set aside the appointment so far as regarded the premises in question. A. L. SMITH, J., granted the application upon the ground that the order appointing the receiver ought to have been registered under 23 & 24 Vict. c. 38, and that in default of such registration the subsequent *bonâ fide* purchaser for value of the equity of redemption had the better title.

The judgment creditor appealed.

*June 4. R. O. B. Lane, for the judgment creditor. [*744] The order for a receiver was equivalent to execution, and was a substitute for the more cumbrous proceeding by elegit.

[He referred to 23 & 24 Vict. c. 38; 27 & 28 Vict. c. 112, ss. 1, 3, 4, 6; and to *Hatton* v. *Haywood*, L. R. 9 Ch. 229, 236, 43 L. J. Ch. 372.]

Ingpen, for Pope. The legal estate being in the judgment debtor, it was necessary, in order to give the judgment creditor priority over the purchaser, either that the land should have been extended under an elegit or that the order appointing the receiver should have been registered under the Acts.

Cur. adv. vult.

No. 12. — In re Pope, 17 Q. B. D. 744, 745.

June 11. The judgment of the Court (DAY and WILLS, JJ.) was delivered by

WILLS, J. The question presented to us is of considerable difficulty. In arriving at the conclusion which we have embodied in the following judgment, we have been greatly helped by the arguments addressed to us by Mr. Lane and Mr. Ingpen, to both of whom we desire to express our acknowledgments for the assistance they have rendered us.

The expression "affect land" appears to us to be a synonym for the creation of an equitable charge. It first appears in 1 & 2 Vict. c. 110, s. 19, and a comparison of that section with s. 13 of the same Act makes this proposition clear.

In the Act of 1 & 2 Vict. c. 110, it is the judgment only that is spoken of as "affecting" the land. In the 23 & 24 Vict. c. 38, ss. 1 and 2, the execution is spoken of as capable of "affecting" it. But the word itself does not appear to have undergone any change of meaning either there or in 27 & 28 Vict. c. 112. The provisions of ss. 4 and 6 of the last-mentioned Act show clearly enough that the original meaning of the word was in the mind of the framer of that Act.

The whole of this legislation appears to us to leave untouched the effect of a completed execution, whether by legal or equitable process. It refers only to cases in which the creditor seeks to enforce by the aid of the Court a charge upon the land. [*745] In the * case of legal execution, the return of the writ of elegit vests the legal estate in the creditor, and enables him to maintain ejectment if the debtor's interest be in possession, to sue for the rent if the debtor's interest be in reversion upon the determination of a tenancy: *Hatton* v. *Haywood*, L. R. 9 Ch. 229, 236, 43 L. J. Ch. 372. He would then need no aid from the Court, nor have any occasion to look to his judgment or writ of execution as constituting a charge or "affecting" the land within the meaning of the legislation under discussion; and he would therefore have no occasion to register his judgment or his writ; nor could his failure to do so defeat his legal title, or give priority to a subsequent purchaser, though for value and without notice.

The appointment of a receiver is, in our opinion, the equivalent of the execution of the writ of elegit; it amounts to a "delivery in execution." That it does so within the meaning of 27 & 28

Vict. c. 112, is past discussion, since the decision in *Hatton* v. *Haywood*, L. R. 9 Ch. 229, 236, 43 L. J. Ch. 372, *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275 (No. 10, p. 570, *ante*), and *Ex parte Evans, In re Watkins*, 13 Ch. D. 252, 48 L. J. Bk. 97. The reasoning by which in those cases the proposition is supported, appears to us to show that, apart from the statutes in question, the effect of an order appointing a receiver is not merely to put the execution-creditor in such a position that he may go to the Court for a further order to sell the property in his capacity of a person having a charge, — in which case he would certainly need to register his writ (by virtue of 27 & 28 Vict. c. 112), but also to operate as a completed execution. To the fruits of that execution, so long as they are confined to the unaided effect of the process of execution, the execution-creditor is entitled by the order of the Court already made; and he cannot be deprived of them by the act of the debtor any more than he could if he had the legal estate. The analogy between his position and that of the tenant by elegit is complete, because the tenant by elegit, if he wanted to do more than enjoy the benefit of the land until his debt was paid, would be obliged to treat the judgment or the execution as a charge, and to resort to the Court for help; in which case he would have to register his judgment and writ of elegit just as much as would *the creditor who had obtained his [*746] equitable execution have to register the judgment and the order appointing the receiver. In either case he would have, in order to obtain the benefit of the Acts in question, to register his judgment, to issue execution within three months after such registration (23 & 24 Vict. c. 38, s. 1), and to register his writ of execution, — though no time, as far as we can see, seems to be limited for the registration of the writ; and as the priorities date, not from the registration but from the execution of the writ (27 & 28 Vict. c. 112, s. 6), it is difficult to see that the registration of the writ is more than a formality. It may be effected apparently at any time; and it would seem to be equally available under the 27 & 28 Vict. c. 112, whether made immediately after execution executed, or only an hour before applying to the Court for an order of sale.

It is true that in the cases cited, and in those referred to in the judgments in those cases, the reason why equitable execution was resorted to was that there was a legal impediment in the way of

legal execution which rendered legal execution impossible, whilst in the present case it only renders it highly inconvenient. We cannot think that this circumstance can make the execution of less effect in the one case than in the other; and we are glad to be able to adopt a view which is free from the anomaly of making the order of the Court by which the payment of a debt is enforced of less avail because it is derived from the equitable jurisdiction of the Court than it would have been had it been derived from the jurisdiction at common law.

The distinction between the enforcement of a charge and the operation of an order appointing a receiver as the equivalent to legal execution is stated very clearly in the judgment of COTTON, L. J., in *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275, 290 (No. 10 p. 570, *ante*). In the same case BRETT, L. J., points out that the jurisdiction to appoint a receiver pending legislation is not affected by 27 & 28 Vict. c. 112, which was passed for another purpose. We think it follows by parity of reasoning that the effect of the appointment of a receiver, not as a step to the enforcement of a charge, but as a means of realizing a debt, has not been affected by the statutes in question.

[* 747] * We are therefore of opinion that this appeal must be allowed, and the order rescinding the appointment of a receiver discharged; and that the respondent must pay the costs here and below. *Order accordingly.*

Pope appealed to the Court of Appeal.

Ingpen, for Pope. As the interest of the debtor in the land was a legal interest, the creditor might have got legal execution through the issue of an elegit. This is a case in which, prior to the Judicature Act, the Court would not have appointed a receiver, upon the principle of declining to lend its assistance to a creditor who already has a legal remedy: *Anglo-Italian Bank* v. *Davies*, 9 Ch. D 275, 283, (p. 570, *ante*); *Ex parte Evans, In re Watkins*, 13 Ch. D. 252 48, L. J. Bk. 97; and all that the Judicature Acts did was to enable a creditor to obtain equitable execution without a new action; thus merely giving him a more speedy remedy, and leaving the principles on which the relief is granted exactly the same. Accordingly, although since those Acts the Court may have had the jurisdiction to appoint the receiver, it ought not, under the circumstances of this case, to have exercised it.

No. 12. — In re Pope, 17 Q. B. D. 747, 748.

Secondly, as against a *bonâ fide* purchaser for value, an equitable execution by the appointment of a receiver is, since 23 & 24 Vict. c. 38, no charge upon the land unless the order appointing the receiver is registered.

Under 1 & 2 Vict. c. 110 (an Act for extending the remedies of creditors), s. 11, all the lands of a judgment debtor may be delivered in execution under a writ of elegit. By s. 13 a judgment is to operate as a charge on the real estate of the debtor enforceable in a Court of Equity after one year; and by s. 19 no judgment shall by virtue of that Act affect any lands as to purchasers unless it is registered in the name of the debtor.

Under 2 & 3 Vict. c. 11 (whereby the dockets required by 4 & 5 Wm. & M. c. 20, for the protection of purchasers were closed), s. 4, judgments were to be re-registered every five years, so that search beyond five years became unnecessary; and by s. 5 protection was given to purchasers without notice.

Then by 3 & 4 Vict. c. 82, s. 2, a purchaser with notice was not * to be affected unless the judgment had been [* 748] registered; by 18 & 19 Vict. c. 15, the previous Acts are further explained; and by 23 & 24 Vict. c. 38, a further obligation is imposed upon the judgment creditor, in order to enable purchasers and others to ascertain when execution has issued; for it is enacted by s. 1 that no judgment shall affect any land as against a *bonâ fide* purchaser, unless a writ " or other due process of execution of such judgment" shall have been issued and registered and put in force within three months; and by s. 2 such registration is to be in the name of the creditor. This Act has never been repealed, and as an order appointing a receiver is a due process of equitable execution, it must be registered; for although 27 & 28 Vict. c. 112 required (s. 1) that the land must be actually delivered in execution, and it was held in *Hatton* v. *Haywood*, L. R. 9 Ch. 229, 43 L. J. Ch. 372, that equitable execution by the appointment of a receiver is delivery in execution within that statute, yet as s. 1 of 23 & 24 Vict. c. 38 still remains in force, the creditor must register the order appointing the receiver before the land can be affected.

R. O. B. Lane for the judgment creditor. Upon the first point. — Since the Judicature Acts there is no limit to the power of the Court to appoint a receiver, and the lands being subject to an equitable mortgage, the appointment was the proper course to adopt.

No. 12. — In re Pope, 17 Q. B. D. 748, 749.

Upon the second point, under 27 & 28 Vict. c. 112, a judgment is no longer a charge on land unless the land is actually delivered in execution; so that a legal title by seizure is substituted for the charge by judgment. But there is nothing in the Act to cut down the effect of or to attach any condition precedent to a taking of the land in execution; and a receivership gives possession analogous and tantamount to a completed execution under a writ of elegit. Per COTTON, L. J., in *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 293 (p. 570, *ante*): "The appointment of a receiver is now delivery of execution by lawful authority within the meaning of the Act of 27 & 28 Vict. c. 112." There is no necessity therefore for registering the order appointing a receiver in such a case: *Whitworth* v. *Gaugain*, 1 Ph. 728, 15 L. J. Ch. 433; *Pease* v. *Fletcher*, 1 Ch. D. 273, 275, 45 L. J. Ch. 265.

Ingpen, in reply.

[*749] COTTON,* L. J. This is a question of considerable importance. Two points have been taken. It was said first of all that the Court had no jurisdiction to grant a receiver in a case like this where the judgment creditor might have got an elegit. To say that there was no jurisdiction is hardly a proper expression. The real question is, whether the Court ought under the circumstances in this case to have granted a receiver. Before the Judicature Act a judgment creditor would have had great difficulty in getting a Court of Equity to grant a receiver under circumstances like these; for the Court of Equity always acted on the principle that it would never grant a receiver where the party applying for the receiver had a legal right to the possession. An equitable mortgagee could get a receiver, but a legal mortgagee never did get a receiver until the passing of the Judicature Act.

But then, although a case is required to induce the Court to grant a receiver, yet the practice of the Court as regards granting receivers was greatly altered by the 8th sub-division of the 25th section of the Act of 1873: "A mandamus or an injunction may be granted, or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." Since the passing of that Act, it has been a usual practice for the Chancery Division to grant a receiver at the instance of a legal mortgagee just as it formerly did at the instance of an equitable mortgagee. Because although a legal mortgagee has power to take possession,

and can do so without the assistance of a Court of Equity, yet there are obvious conveniences in granting a receiver, so as to prevent a mortgagee from being in the very unpleasant position of a mortgagee in possession; and that has been constantly done. What the Court of Chancery did up to the time of the Judicature Act was that, when there was difficulty in the way of a judgment creditor getting possession by process of law, and, after he had tried to get possession by legal process, if he failed, then the Court interposed by granting a receiver, which was then considered and was in fact the proper course to adopt. But in my opinion, as this section enables the Court of Equity to depart from its former practice and to grant a receiver, * not only [* 750] where there is no power to take possession at law, but where there is power to interfere, if it is just or convenient that an order for a receiver shall be made, then, in my opinion, if it was just or convenient, the Court in this case had power to grant a receiver, though undoubtedly the judgment creditor could by elegit have got possession. But if he had got possession he would have done so subject to being interfered with by the prior mortgage, and that would have thrown great difficulty in the way of his working out his possession by elegit, and the interest which he could get by elegit.

It is true that as against the debtor the elegit would have been enforceable, and the judgment creditor would have had a right as against him to proceed for the rents and profits; but then there was the equitable mortgagee, at whose instance the Court of Equity would have interfered in order to prevent the elegit from being put in force so as to prejudice the rights of a prior mortgagee. So I think that objection cannot prevail, and we must take it that the Court had the power to grant a receiver and was right in exercising it.

But then it is said that the order appointing the receiver ought to have been registered, and that argument has been pressed upon us very fully and ably. The question turns on the statutes 23 & 24 Vict. c. 38, and 27 & 28 Vict. c. 112, and is whether the registration required by the earlier Act is still necessary in order to give a charge on land to be enforced by a receiver. I think it is not. Up to the 23 & 24 Vict. c. 38, there were provisions that a judgment should not affect lands unless it was registered. The 23 & 24 Vict. c. 38 added the provision that a judgment should

not affect lands until execution had been issued, and the judgment and writ of execution should both be registered. For the 1st section of that Act provides that lands shall not be affected as regards purchasers for value, although a writ or other due process of execution shall have been issued and registered, unless such writ or process of execution shall have been put in force within three calendar months from the time when it was registered.

That was another protection to purchasers. But the provision which rendered registration necessary was not merely in [* 751] order to * prevent land being affected where there was no execution of the judgment or of the writ, but in order that it might not be affected by a judgment or writ where there was no registration.

Then we come to the 27 & 28 Vict. c. 112, upon which the question turns, because it contains something further in favour of the purchaser. That Act says, that no judgment or writ shall affect land until the land has been actually delivered in execution by virtue of a writ of elegit, or other lawful authority. It therefore took away altogether the power to affect land by a judgment or by a writ not executed. But did it require that where a writ had been executed, and where the land had been actually delivered in execution by virtue of the writ, that that writ must be registered in order to affect a purchaser? I think not. The registration was required when there had been no delivery of the land by the writ being executed; but this section does not require that. The registration required by the previous Act was where land was to be affected by judgment or writ not executed. Here the enactment is that that shall never affect land at all, and, judging only by the 1st section, I should say that what this registration was required for in the previous Act does not apply to that which alone was to affect land under this later Act. When the land was delivered by elegit, on the return of the writ, the creditor was in legal possession of the land, and in that case was not intended, in my opinion, to be subject to this further fetter — that the writ must be registered in order that the legal title so acquired in the land should be made effectual. I need not go into the difference between an actual writ of elegit and an order for a receiver, because it was decided in *Hatton* v. *Haywood*, L. R. 9 Ch. 229, 43 L. J. Ch. 372, which has been referred to, that where there has been a receiver appointed under a judgment, that that is

equivalent to, and in law is, delivery of the land under lawful authority, just in the same way and to the same extent as if there had been an elegit, and the creditor had been in legal possession by virtue of the elegit. The view I take of s. 1 is, to my mind, assisted by the words of s. 3, which, reading it shortly, provides — that every writ or other process of execution of any such judgment . . . shall be registered. In my opinion it is hardly possible to suppose *that there was to be any [*752] registration under the Act of 23 & 24 Vict. which was to apply to writs under which land has not been actually delivered in execution, and a registration as regards writs under which land shall have been actually delivered in execution; but this s. 3, on its fair construction, only applies to writs by virtue whereof land shall have been actually delivered in execution, a matter which cannot be ascertained until after there has been actual delivery in execution. I can quite see why this section required registration, — in order that an application for a summary order for sale might be made under s. 4. Undoubtedly no application for sale could be made under s. 4 unless the writ or other process of execution had been registered under s. 3; but why that was so one can hardly see. This s. 3 points to the time when it is necessary to register the writ or other process of execution, — viz., after the land "shall have been actually delivered in execution." In my opinion, therefore, the second objection that the order for the appointment of a receiver does not affect a purchaser unless it has been registered, cannot prevail.

Holding this view, one cannot but feel the difficulty imposed upon purchasers; but it is not for this Court to cure it. It is for the legislature, if it thinks fit to extend these Acts, so to do. I do not think it right to give an unnatural construction to the words of the Act, or to say what would be the better Act to pass. That is a matter for the legislature, with which we ought not to interfere.

Lindley, L. J. I am of the same opinion. No doubt there is a certain amount of obscurity about these Acts, and it is not, I admit, easy to put any construction upon them which is not open to objection or does not give rise to some difficulty; but the question really comes to this, whether first of all it was right to make this order for a receiver at all; and secondly, whether the purchaser is entitled to have it discharged. [The Lord Justice then

stated the facts of the case, and after remarking that it was not necessary for the Court to decide what, if any, good the registration of his judgment had done the judgment creditor, continued.]

Under those circumstances it appeared to the judgment [*753] creditor that it would be better to obtain an order for *a receiver than to issue an elegit, and, considering how excessively difficult it is to work out the rights of a judgment creditor under an elegit when there are prior equitable incumbrances, it appears to be a case of all others for the appointment of a receiver, and it certainly falls distinctly within the section of the Judicature Act, 1873. In fact, one's own experience shows that the quickest course was not to have issued a writ of elegit under those circumstances, but to have obtained a receiver, and therefore the order was right enough both as regards expediency and expedition. Now the order for the appointment of the receiver was not registered.

Whether the receiver did or did not actually take possession of the piece of land before the purchaser bought it from the judgment debtor, the Court is not in a position to say. It is asserted on the one hand that he did, and on the other that he did not. We have not the real facts before us. But on the 18th of July, after the receiver had been appointed, the judgment debtor conveyed this piece of land to Mr. Pope, who claims to be a purchaser for value without notice, and to have the legal estate, and comes to the Court for a discharge of the receiver. He contends that, assuming it to be a case in which a receiver might have been appointed, he is entitled to the order he now asks because the order for the appointment of the receiver has not been registered. Upon this question it is necessary to look closely at and consider the terms of the Acts 23 & 24 Vict. c. 38, and 27 & 28 Vict. c. 112. They certainly do not seem to be very skilfully drawn, and the second Act in particular appears to have been drawn in order to patch up the defects in the first. The 23 & 24 Vict. c. 38 starts with a recital that "it is desirable to place freehold, copyhold, and customary estates on the same footing with leasehold estates in respect of judgments, statutes, and recognisances as against purchasers and mortgagee, and also to enable purchasers and mortgagees of estates, whether freehold, copyhold, or customary, or leasehold, to ascertain when execution has been issued on any judgment, statute, or recognisance, and to protect them

against delay in the execution of the writ." Then with that view it is enacted that "no judgment to be entered up after the passing of this Act shall affect any land as * to a [*754] *bonâ fide* purchaser for valuable consideration, or a mortgagee (whether such purchaser or mortgagee have notice or not of any such judgment) unless a writ or other due process of execution of such judgment shall have been issued and registered as hereinafter is mentioned before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him." One sees from that that the real object was to prevent the issuing of writs and the non-execution of them. It was to protect purchasers from that state of things. Then comes the 27 & 28 Vict. c. 112, another statute passed in the same direction, although it goes further, the preamble of which is as follows: "Whereas it is desirable to assimilate the law affecting freehold, copyhold, and leasehold estates to that affecting purely personal estates in respect of future judgments." Therefore both Acts appear to have for their object the assimilation, more or less, of executions against lands, and executions against chattels, so far as the protection of purchasers is concerned. That throws a little light on the later statute. Then, having stated that as the object, it is enacted that "no judgment . . . to be entered up after the passing of this Act shall affect any land until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority in pursuance of such judgment." Then s. 3 says that "Every writ or other process of execution" (which I agree would include a receiver) "of any such judgment by virtue whereof any land shall have been actually delivered in execution, shall be registered," in the manner provided by the 23 & 24 Vict. c. 38; but then it goes on, "but in the name of the debtor against whom such writ or process is registered instead of as under the said Act in the name of the creditor." Then comes a clause which is extremely important: "And no other or prior registration of such judgment . . . shall be or be deemed necessary for any purpose."

Now, we have to put that language together and see what its effect is on the 1st section. It does not profess in terms to repeal it, but it does seem to make it obsolete in nearly all cases. I have a difficulty in seeing a case in which it would not be so; because it comes to this, — that you do not want any registration

of any judgment at all. All you want is the registration [*755] provided *by s. 3; and s. 1, which says that no judgment and so on, shall affect any land unless such land shall have been actually delivered in execution appears to me to come to this, — that a judgment creditor who has got his land in execution is safe enough. It is contended that the judgment creditor must register his writ. The effect of that must be that he must register not only his writ, but, if he wanted an order for sale under s. 3, he would have to re-register under that section, as has been pointed out by COTTON, L. J. It seems to me that the view taken by the purchaser's counsel is not correct, but that that taken by WILLS, J., is — namely, that when the land has been actually delivered in execution, it is safe so far as these statutes are concerned. That must, I think, be the ultimate termination of the somewhat difficult controversy arising upon these two Acts of Parliament. It seems to me, therefore, that the appeal ought to be dismissed.

Holmes v. Millage.

1893, 1 Q. B. 551–559 (s. c. 62 L. J. Q. B. 386; 68 L. T. 205; 41 W. R. 354).

Equitable Execution. — Receiver. — Future Earnings of Judgment Debtor. — Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.

[551] The Court has not jurisdiction to enforce satisfaction of a judgment debt by appointing a receiver of the future earnings of the judgment debtor.

The Court cannot grant "equitable execution" by the appointment of a receiver in a case where prior to the Judicature Acts no Court could grant such relief.

Appeal from the order of a Divisional Court (DAY and COLLINS, JJ.) for the appointment of a receiver.

The facts were as follows: The plaintiff had obtained judgment against the defendant in an action for money lent for the sum of £500 and costs. The defendant had no assets in this country and was residing in Paris. He acted as the correspondent there of the "Daily Chronicle," and was in receipt of a salary of £8 8*s.* per week from the proprietors of that newspaper, which was paid him weekly through bankers at Paris. The judgment being unsatisfied, the plaintiff applied at chambers for the appointment of a receiver of the defendant's salary by way of equitable execution. The Judge at chambers dismissed the application. The plaintiff

No. 13. — Holmes v. Millage, 1893, 1 Q. B. 551, 552.

appealed to the Divisional Court, who granted an order appointing a receiver "to receive the moneys receivable in respect of the following property, — that is to say, all sums due and payable, or to become due and payable, to the defendant by the proprietors of the 'Daily Chronicle' newspaper." The order provided in the usual way that the appointment of the receiver should be without prejudice to the rights of any prior incumbrancers upon the said premises who might think proper to take possession of or receive the same by virtue of their respective securities, or, if any prior incumbrancer was in possession, then without prejudice to such possession; and directed that the proprietors of the "Daily Chronicle" should pay all sums due and payable, or to become due and payable to the defendant, to such receiver, and that the receiver should have liberty, if he should *think [*552] proper, but not otherwise, to keep down the interest upon any prior incumbrances according to their priorities, and should be allowed such payments, if any, in his accounts; and it provided for the passing of accounts by the receiver and payment by him of the balances appearing due on such accounts towards satisfaction of what should be from time to time due in respect of the plaintiff's judgment. The defendant stated on affidavit that the salary paid him by the proprietors of the "Daily Chronicle" was his sole means, and that he had a wife and family to support.

H. A. Forman for the defendant. The appointment of a receiver in such a case as this is quite unprecedented. All the cases in which receivers have been appointed by way of equitable execution under s. 25, sub-s. 8, of the Judicature Act, 1873, are cases where there has been something in the nature of property to receive. But there is no precedent for such an appointment in relation to future earnings, in order to earn which substantial personal services are necessary. It was pointed out in *Manchester and Liverpool District Banking Co.* v. *Parkinson*, 22 Q. B. D. 173, 58 L. J. Q. B. 262, that in the case of profits of a business an order appointing a receiver is useless, unless he is also appointed manager. In this case the services on which the earnings depend cannot be performed by a deputy. The Court will not make an order which would be futile. They cannot compel the defendant to act as foreign correspondent to the "Daily Chronicle" in order to pay the judgment debt, or compel the proprietors of the newspaper to employ him. The defendant's engagement is

his only means of subsistence, and the effect of the order that his salary shall be receivable by a receiver must be to prevent his earning it in future. Such an order could not have been made by the Court of Chancery before the Judicature Act; and it is submitted that there is nothing in that Act to authorize such an order. Sect. 25, sub-s. 8, of the Judicature Act, 1873, gives power to make an order for a receiver where the Court thinks it "just or convenient" to do so. It was never intended by those words to extend the power of appointing a receiver pre-
[*553] viously exercised *by the Court of Chancery to such a case as this. It has been held that the future salary of a medical officer of health cannot be attached by a garnishee order: *Hall* v. *Pritchett*, 3 Q. B. D. 215, 47 L. J. Q. B. 15. [He also cited *In re Mirams*, [1891] 1 Q. B. 594, 60 L. J. Q. B. 396; *Hamilton* v. *Brogden*, W. N. (1891) p. 36.]

Philbrick, Q. C., and Arnold Herbert for the plaintiff. It is submitted that whatever may be the subject of an assignment can now be reached by way of equitable execution through the appointment of a receiver. *Tailby* v. *Official Receiver*, 13 App. Cas. 523, 58 L. J. Q. B. 75 (No. 4 p. 445, *ante*), shows that there may be an assignment of future earnings, such as the defendant's salary. The Court has power, under the Judicature Act, 1873, s. 25, sub-s. 8, to appoint a receiver where they think it "just or convenient." It is certainly just that the defendant should be compelled to satisfy his debt; and it is convenient, for the difficulties suggested are only theoretical. It is not to be supposed that the defendant will throw up the appointment which constitutes his only means of subsistence, or on the other hand, that the plaintiff would destroy the source from which she hopes to get her money by insisting on the whole of the salary being received by the receiver. Legally, each weekly payment would be subject to attachment by garnishee order when due, though practically it is impossible to attach it before it is paid. That being so, the Court will assist the plaintiff by appointing a receiver. If the order is left standing, the practical effect will be that the judgment debt, or at any rate a portion of it, will be paid.

[They cited *In re Shine*, [1892] 1 Q. B. 522, 61 L. J. Q. B. 253; *Ex parte Benwell*, 14 Q. B. D. 301, 54 L. J. Q. B. 53.]

Forman, in reply, cited *Salt* v. *Cooper*, 16 Ch. D. 544, 50 L. J. Ch. 529.

Cur. adv. vult.

No. 13. — Holmes v. Millage, 1893, 1 Q. B. 553, 554.

March 9. The judgment of the Court (LINDLEY and BOWEN, L. JJ.) was delivered by —

LINDLEY, L. J. This is an appeal from an order appointing a receiver of moneys to become payable to the defendant by third parties in consideration of services to be performed by him for them.

* The action is for money lent, and on June 4, 1889, [* 554] the plaintiff recovered judgment against the defendant for £500 and costs. The defendant has no assets in this country; he lives in Paris. He is the foreign correspondent of a London daily morning newspaper, and under an agreement between him and the proprietors of the newspaper, he receives from them weekly a sum of £8 8*s.*, which is paid to him through a Paris banker.

The plaintiff, being unable to obtain payment of her judgment debt, first applied for a garnishee order; but as no weekly payments were in arrear, no order could be made. It is plain that the defendant's earnings cannot be reached by that process. The plaintiff then applied by summons in chambers for the appointment of a receiver, by way of equitable execution of all sums due and payable, or to become due and payable, to the defendant by the proprietors of the newspaper. The only party to whom the summons was addressed was the defendant. The proprietors of the newspaper were not parties to it. The Judge at chambers dismissed the application with costs. The plaintiff appealed to the Divisional Court, and that Court reversed the order made in chambers, and appointed a receiver in the following terms. [The Lord Justice here read the order.] The present appeal is from this order.

The question raised by the appeal is one of great importance, not only to the parties immediately concerned, but to every wage-earning person in the country. The question involved in the appeal is whether a judgment creditor is entitled to a receiver of the future earnings of his judgment debtor.

Going back to the time before the Judicature Acts, it is clear that a judgment creditor had no such right. The common law writs of execution did not extend to future income. The garnishee process did not reach it; nor was the statutory process of charging orders applicable to wages or other remuneration for personal services. The Courts of common law had no jurisdiction to

appoint a receiver. The Court of Chancery no doubt had; but the jurisdiction was confined to certain classes of cases within which such a case as the present cannot be brought. In considering the jurisdiction of the Court of Chancery to appoint a receiver, we may dismiss from our minds all cases in which the [* 555] * Court interfered to enforce its own decrees against property, the subject-matter of a suit in equity. We have nothing to do here with a suit to enforce a charge created by the debtor. We have simply to deal with a case in which an ordinary judgment creditor sought the aid of a Court of Equity to enforce his judgment against property not capable of being reached by any common law process. The only cases of this kind in which Courts of Equity ever interfered were cases in which the judgment debtor had an equitable interest in property which could have been reached at law, if he had had the legal interest in it, instead of an equitable interest only. This will be found explained by JESSEL, M. R., in *Salt* v. *Cooper*, 16 Ch. D. 544, 50 L. J. Ch. 529, and more recently by CHITTY, J., in *Wills* v. *Luff*, 38 Ch. D. 197, 57 L. J. Ch. 563, and by the Court of Appeal in *In re Shepard*, 43 Ch. D. 131, 59 L. J. Ch. 83. It is an old mistake to suppose that, because there is no effectual remedy at law, there must be one in equity. But the mistake, though old and often pointed out, is sometimes inadvertently made even now. Courts of equity proceeded upon well-known principles capable of great expansion; but the principles themselves must not be lost sight of. The principle on which alone the order in this case could be supported before the Judicature Acts is well explained by COTTON, L. J., in *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275, 47 L. J. Ch. 833 (No. 10, p. 570, *ante*); it is that Courts of Equity gave relief where a legal right existed, and there were legal difficulties which prevented the enforcement of that right at law. But the existence of a legal right is essential to the exercise of this jurisdiction. The judgment creditor here has a legal right to be paid his debt, but not out of the future earnings of his debtor; and the Court of Chancery had no jurisdiction to prevent him from earning his living or from receiving his earnings, unless he had himself assigned or charged them. The Court could not restrain him from receiving them until his creditor could attach them under the process of garnishment; nor did the Court ever presume to enlarge a judgment creditor's rights; nor, under colour

of assisting him to enforce those rights, did the Court of Chancery reach by its process a kind of property which was not liable to execution. Before debts and money were made
*liable to an execution by statute, they could not be [*556]
reached by an ordinary judgment creditor in equity any more than at law. If the earnings could have been reached under a writ of sequestration, a receiver might have been appointed, as in *Willcock* v. *Terrell*, 3 Ex. D. 323, but a writ of sequestration was never issued before the Judicature Acts in order to attach a man's personal earnings.

If, therefore, the defendant were in this country, the plaintiff would have no right upon any principle of equity to a receiver of his earnings. The defendant's absence abroad is not a circumstance on which the plaintiff can rely for assistance. That circumstance might avail her if she had a right to the defendant's earnings, and could not get them by reason of the defendant's absence; but such absence does not create a right to the earnings; and it is the non-existence of that right which prevents the plaintiff from obtaining relief. For these reasons we are of opinion that the present case cannot be brought under any principle applicable to the appointment of receivers by the Court of Chancery before the passing of the Judicature Acts.

We pass now to those Acts. The only section expressly applicable to receivers is s. 25, clause 8, of the Judicature Act, 1873, which says that a receiver may be "appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." The order appealed from was made by the Divisional Court under the authority supposed to be conferred by this section. There is no doubt that since the Judicature Acts receivers by way of equitable execution can be appointed in proper cases by all divisions of the High Court on a motion or summons, without the necessity of a fresh action or suit on the judgment. This is plain from *Salt* v. *Cooper*, 16 Ch. D. 544, 50 L. J. Ch. 529; *Smith* v. *Cowell*, 6 Q. B. D. 75, 50 L. J. Q. B. 38 (No. 11, p. 588, *ante*); *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275, 47 L. J. Ch. 833 (No. 10, p. 570, *ante*), and *In re Peace and Waller*, 24 Ch. D. 405. In *Smith* v. *Cowell* and some other cases the jurisdiction seems to have been rested on s. 25, clause 8, of the Judicature Act, 1873. In
Salt v. *Cooper*, the jurisdiction *was based on those sec- [*557]

tions which abolish the old Courts and transfer their respective jurisdictions to the High Court, and empower every division of that Court to give complete relief in every case which comes before it. But accepting the construction put upon s. 25, clause 8, of the Judicature Act, 1873, in *Smith* v. *Cowell*, and later cases, according to which a receiver can be appointed in a proper case by way of equitable relief at the instance of a judgment creditor against his debtor, the question next arises whether it is "just or convenient" to appoint a receiver in a case of this description. The meaning of this phrase was considered in *North London Railway Co.* v. *Great Northern Railway Co.*, 11 Q. B. D. 30, 52 L. J. Q. B. 380, and it was there decided that the phrase did not justify the granting of an injunction in a case in which no injunction could be granted by any Court before the Judicature Acts came into operation. The same reasoning obviously applies to the appointment of receivers as well as to the grant of injunctions. Although injunctions are granted and receivers are appointed more readily than they were before the passing of the Judicature Acts, and some inconvenient rules formerly observed have been very properly relaxed, yet the principles on which the jurisdiction of the Court of Chancery rested have not been changed. This has been laid down in several cases decided since those Acts came into operation, notably in *Manchester and Liverpool District Banking Co.* v. *Parkinson*, 22 Q. B. D. 173, 58 L. J. Q. B. 262. In *Whittaker* v. *Whittaker*, 7 P. D. 15, 51 L. J. P. D. & A. 80, an order *nisi* was made for the appointment of a receiver to get in a debt which might be attached under the garnishee order; but this case was disapproved in *Manchester and Liverpool District Banking Co.* v. *Parkinson*, and cannot be relied on.

In the last-mentioned case an order for a receiver was discharged, because there was no difficulty in enforcing payment of a judgment by the ordinary legal methods. In this case there is such a difficulty; but it does not arise from any impediment which the old Court of Chancery had jurisdiction to remove. The difficulty arises from the fact that future earnings are not by law attachable by any process of execution direct or indi-
[*558] rect. *In *Westhead* v. *Riley*, 25 Ch. D. 413, 53 L. J. Ch. 1153, and in *In re Coney*, 29 Ch. D. 993, 54 L. J. Ch. 1130, receivers were appointed of a debtor's interest in personal property, but the property there in question was of a kind which

the execution creditor had a right to reach; and those cases fall far short of being authorities for such an order as that now before us.

In a popular sense, almost any mode of making a man pay his debts may be just, and convenient at least to the creditor; and in that sense it may be just and convenient to appoint a receiver in a case like this. But even in a popular sense such an order may be anything but just or convenient to the newspaper affected by it. The appointment of a receiver is a serious interference with its business. We cannot judicially hold the appointment of a receiver in a case in which no Court could grant a receiver before the Act to be just or convenient within the true meaning of s. 25, clause 8, of the Judicature Act, 1873. We cannot come to the conclusion that this section was intended to alter the law of debtor and creditor, and the relation of employer and employed, to such a very serious extent as the order appealed from, if upheld, would alter them.

We have carefully gone through the Judicature Acts and Orders, including Orders XLII. to XLVI., relating to executions and similar matters, and we have examined the cases in the Law Reports in which receivers have been appointed since those Acts came into operation, but we can find no enactment or rule or authority on which the order appealed from can be supported. Order XLII., r. 3, only enables a receiver to be appointed where one could be appointed before the Judicature Acts came into operation. The rules relating to sequestration have never been understood as extending to such a case as this. The Divisional Court did not allude to them; nor did counsel rely on them. We only mention them to show that they have not been overlooked.

Again, we have not to consider whether it would be possible to reach these earnings by proceedings in bankruptcy or under the Judgment Debtors Act; for no such proceedings have been taken.

The conclusion of the whole matter is that the order appealed * from is not warranted either by the Judicature [* 559] Acts and rules, or by any principle by which Courts of law or equity were guided before those Acts were passed. It follows that there was no jurisdiction to make the order.

Unless a man has assigned or charged his future earnings or has made a sum payable out of them, they cannot be prospectively impounded by any of his creditors by any ordinary process of execution, whether legal or equitable. If the law in this respect is

to be altered, it must be done by the legislature. But the law ought not to be altered by stretching what are called equitable executions, or, in other words, by appointing receivers in cases to which the equitable jurisdiction of the Court of Chancery had no application. Fry, L. J., was right when he warned the profession against supposing that the appointment of a receiver is a form of execution which can be obtained "without showing to the Court the existence of the circumstances creating the equity on which alone the jurisdiction arises." See *In re Shephard*, 43 Ch. D. 131, at p. 138, 59 L. J. Ch. 83, at p. 86.

The order appealed from must be discharged.

Appeal allowed.

ENGLISH NOTES.

Although, as pointed out in the judgment of the former of the principal cases (p. 598, *ante*), the Court has construed the power to appoint a receiver where "just and convenient" so as to grant a receiver at the instance of a legal mortgagee, it does not follow that it will in every case supersede the simple and obvious legal remedy. Thus in *Manchester &c Banking Co.*, v. *Parkinson* (C. A. 1888), 22 Q. B. D. 173, 58 L. J. Q. B. 262, 37 W. R. 264; referred to in the judgment of the latter of the principal cases (at p. 610, *ante*), the Court of Appeal rescinded an Order of the Queen's Bench Division for appointing a receiver, — no legal impediment being shown to enforcing the judgment in the ordinary way by *fieri facias*.

The point decided as to the necessity of registration in the former of the principal cases has been altered by Statute 51 & 52 Vict. c. 51, ss. 5, 6. But for this Statute, it was not really practicable (according to the decision *In re Pope*), for a purchaser to discover with certainty the charges by which he might be affected. For, whether the judgment creditor had the land delivered in execution by virtue of a writ of elegit, or obtained the equivalent by the appointment of a receiver, there was, in neither case, any effective means of securing publicity for the protection of purchasers.

A judgment for debt was recovered against a theatre Company. The theatre was subject to a mortgage, and the Company were in possession. Kekewich, J. appointed a receiver, intimating in his judgment that the receiver should take the money paid by the public for entrance to the theatre. The Court of Appeal held that this judgment was wrong so far as it directed the receiver to take the money paid by the public at the doors; but they made an order for the appointment of a receiver of the rents and profits of the Company's

land, and directed the Company to deliver possession to him, without prejudice to the right of prior incumbrancers. *Cadogan* v. *Lyric Theatre* (C. A. 18 July 1894), 1894, 3 Ch. 338, 63 L. J. Ch. 775, 71 L. T. 8. Lord HERSCHELL, L. C. in giving judgment cited passages from the judgments of Lord Justice LINDLEY, in *Holmes* v. *Millage* (p. 607 *et seq.*, *ante*), and from that of Lord Justice JAMES, in *Ex parte Evans* (p. 591, *supra*). LINDLEY, L. J. observed that the order in the case here stated (*Cadogan* v. *Lyric Theatre*) would no doubt be worked out in practice by the receiver fixing an occupation rent to be paid by the Company.

It may be observed that the case last cited differs from the case of *Truman* v. *Redgrave* (1881), 18 Ch. D. 547, 50 L. J. Ch. 830, in which the MASTER of the ROLLS, on the application of a legal mortgagee, appointed a receiver of a Theatre. For in that case the goodwill and licences of the Theatre were expressly included in the mortgage.

In *Tyrrell* v. *Painton* (C. A. 22 Nov. 1894), 1895, 1 Q. B. 202, 64 L. J. P. D. & A. 33, 71 L. T. 687, 43 W. R. 163, the Court of Appeal held that the Court had jurisdiction to appoint, by way of equitable execution, a receiver of an equitable reversionary interest in personal estate — the proceeds of sale of land. LINDLEY, L. J. observed that the appointment of a receiver (in such a case) does not create a charge, but it operates as an injunction to restrain the defendant from himself receiving the proceeds of sale, and may possibly be useful.

AMERICAN NOTES.

Property exempt from execution cannot be reached through a receiver. *Finnin* v. *Mallory*, 35 N. Y. Super. Ct. 382; *Cooney* v. *Cooney*, 65 Barbour (N. Y. Sup. Ct.), 524; *Tillotson* v. *Wolcott*, 48 New York, 188.

So of property over which a superior equitable lien has been acquired: *Swift's I. & S. Works* v. *Johnson*, 26 Federal Reporter, 830. So of a right of action for insurance on exempt property: *Sands* v. *Roberts*, 8 Abbott Practice Rep. (N. Y.) 343.

ESCHEAT.

See also Nos. 1 & 2 of "Crown" and notes, 8 R. C. 150–171; and compare notes to Nos. 1 & 2 of "Alien" 2 R. C. 645.

No. 1. — BURGESS *v.* WHEATE.

(Lord Keeper, Henley, 1759).

No. 2. — GALLARD *v.* HAWKINS.

(1884.)

RULE.

Until the passing of the Intestate's Estate Act, 1884 (47 & 48 Vict. c. 71, s. 4) there was no escheat of equitable estates, but a trustee legally entitled to land, if by reason of the law of escheat there was no person in whose favour the trusts could be executed, might hold the land for his own use.

Burgess v. Wheate.[1]

1 Wm. Black. 123–186 (s. c. 1 Eden 177).

[123] A trust estate is not liable to escheat. In the case of lands held by descent from the paternal ancestor, where the *cestui que trust* dies without heirs *ex parte paternâ*, the trustee shall retain them for his own benefit, as well against the heir *ex parte maternâ*, as against the lord claiming by escheat.

Master of the Rolls.

The matters in question between the parties come before the Court in two several causes: one is set down for further directions, in consequence of a reservation in a decree of the late Lord Chancellor, referring a case and several questions to the Judges of the Court of King's Bench, for their opinion. They have cer-

[1] *Present:* — Lord Keeper Henley; Mansfield; Sir Thomas Clarke, Master of the Rolls. Chief Justice of the King's Bench, Lord

tified their opinion to the Lord Keeper, and he seems inclined to confirm that certificate; and that cause is now set down for further directions.

They come before the Court in another cause, on an information filed by the Attorney-General, on behalf of the Crown. The Attorney was a defendant in the original cause; so that the information here is in the nature of a cross bill.

The case on which the matters arise is this: — Lawrence Bathurst was seised in fee of the manor of Lechlade, &c., *in com.* Glouc. and he having a mind to raise a sum of money out of part of the estate, by deed, 25th March, 22 Car. 2, creates a term of one thousand years, and vests it in trustees, in trust for himself and his heirs, executors, and administrators. * Lawrence Bathurst, in his life-time, as he had created a term [* 124] to raise money, made a mortgage for five hundred years of that part of the premises for securing the payment of £800 and £400, and that mortgage, by several mesne assignments, became vested in John Chandler. Soon after this he died, leaving issue Sir Edward Bathurst, his only son and heir, and two daughters, Ann and Mary; and the premises descended to his son, subject to the mortgage as to part. The widow of Lawrence Bathurst (who was his executrix), after his death, borrowed a sum of money, and assigned over, as a security, the residue of the one thousand years' term. Sir Edward Bathurst died an infant; in consequence of which the estate descended to Ann and Mary Bathurst, his sisters and co-heirs. Ann intermarried with John Greening, and Mary with John Coxeter; and thereupon the husbands and wives (in right of the wives) became entitled to this estate, in undivided moieties.

Greening and his wife made a settlement of their moiety, 21 August, 1686, and covenanted to levy a fine to the use of such persons, &c., as the husband and wife should jointly appoint, by any deed or will duly attested; and for want of such appointment, to themselves for their lives and the life of the survivor; remainder to the heirs of their bodies; remainder to the right heirs of the survivor.

Mich., 1689. Coxeter and his wife filed a bill of partition of the estate; and the usual directions were given on the decree, and also that the incumbrances should be discharged in equal moieties. Afterwards an allotment was made by commission; and

Greening and his wife, being dissatisfied with their allotment, applied to the Court for a new commission but the other sister, agreeing to give up her allotment and to make an [*125] *exchange with her sister, that was accordingly accepted; and the allotments were exchanged and conveyances executed.

March, 1693. Ann Greening died, not having joined with her husband in any appointment. In consequence of which, the husband, by the settlement of 1686, became entitled to the inheritance of her moiety. And in December, 1694, he died *sans* issue, and the moiety descended to Elizabeth Greening, his niece and heir, *ex parte paternâ*, being the only child of Thomas Greening, his eldest brother. She afterwards married with Nicholas Harding; but previous to that marriage a settlement[1] was made on 15th and 16th August, 1695, of this moiety to the use of the husband for life; then the wife for life; remainder to trustees to preserve contingent remainders; remainder to trustees for ninety-nine years, on a trust that never arose; remainder to their first and other sons in tail male successively; remainder to trustees for five hundred years, on trusts that never arose; remainder to the right heirs of Elizabeth Greening.

Michaelmas, 1695. Harding and his wife brought a bill to perfect the partition, and to divide other lands omitted in the former partition. A decree was accordingly made for mutual conveyances, and a commission issued to divide the rest of the premises. And in January, 1698, conveyances were mutually executed. Coxeter died, and his wife survived him, and released her interest, in a moiety of the equity of redemption of the premises mortgaged, to the mortgagee or some person in trust for him. Harding and his wife do not release their right in the mortgaged premises, but agree to convey their moiety in the same way, 22 February, 1713. And the mortgagee agrees that, in consideration of £500 paid *per* Harding, he or his trustee shall convey to Harding, his heirs, executors, and administrators, as he should appoint, the mill and closes with the appurtenances and [*126] the inheritance thereof. *17 February, 1715, Harding and his wife performed their part of the agreement by conveying a moiety of the mortgaged premises in trust for Chand-

[1] This must have been made by fine, though no fine is stated; therefore it must be implied, that there was a fine; and what follows shows it.

ler and his heirs. But the mortgagee does not convey the term and inheritance of the mill and two closes to Harding and his wife and the heirs of the survivor. But there was a special covenant, that till a conveyance should be executed, he was to stand seised to the same uses; and Harding and his wife continued in possession of the premises.

11 January, 1718, There being no issue male of the marriage, an indenture was made, between Harding and his wife of the one part, and Sir Francis Page and Robert Simmons of the other part; reciting the settlement, 16th August, 1695, and covenanting to levy a fine, to assure the premises to the use of the daughters of the marriage, as tenants in common; and in default of such issue, to Page and Simmons and their heirs, in trust for the said Elizabeth Harding, her heirs and assigns, to the intent, that she might at any time during her life, without her husband's concurrence, dispose of the reversion of the moiety aforesaid, to such uses as she should, by her will or other writing, appoint, and for no other use, intent, or purpose whatsoever. A fine was accordingly levied. There was, in fact, no daughter of the marriage; but the wife survived the husband, and died without making any appointment, and without heirs on the part of the father, from whence the land descended. But Burgess, the plaintiff in the original cause, was her heir on the part of the mother.

After the death of Elizabeth Harding, Sir Francis Page got into possession; and in July, 1739, this bill was filed against him by Burgess; and, he dying, it was revived against his personal and real representatives. Bill prayed, that if there was any legal interest in Sir F. Page, he should be compelled to convey to plaintiff, deliver up possession, and account for the rents and profits. Sir F. Page, by his answer, insisted, that he was
* lawfully seised of the inheritance of the estate and en- [* 127]
titled to the rents and profits.

On the 14 July, 1741, the cause came on to be heard, and went off for want of parties. The Attorney-General was made a party, and the cause came on again before Lord Hardwicke, Chancellor, the 11 February, 1744, when a decree was made, that a case should be settled, and questions stated, for the opinion of the Judges in B. R. The case was argued there, and they have certified their opinions to the Lord Keeper.

Qu. 1. Whether by virtue of the indenture of the 11 January,

1718, and the fine therein mentioned, any and what estate in law did pass to Page and Simmons, or either of them?

Answ. That by the indenture of the 11 January, 1718, and fine, the reversion in fee-simple after the death of Harding and his wife without issue male, did pass to Page and Simmons.

Qu. 2. In case no estate passed to Page and Simmons, or either of them, by virtue of that indenture and fine, Whether the inheritance of the premises, or any part thereof, did, on the death of Elizabeth Harding, descend to Burgess, as heir at law, on the part of the mother?

Answ. In case no estate had passed to Page and Simmons, by virtue of the said indenture and fine; we are of opinion, that the inheritance of the premises in question, or any part of them, would not, on the death of the said Elizabeth Harding, have descended to Burgess, as heir at law on the part of the mother.

Qu. 3. In case the said deed of the 11 January, 1718, had not been executed, or the fine levied, but the same were entirely out of the case; Whether the inheritance of the said premises, or any part thereof, would have descended to the said Richard Burgess, as heir at law on the part of the mother?

[*128] *Answ. In case the deed of the 11 January, 1718, had not been executed, or the fine levied, but the same were entirely out of the question; We are of opinion, that, upon the death of Elizabeth Harding, the inheritance of the premises, or any part thereof, would not have descended to Burgess, as heir at law on the part of the mother. But we are of opinion, that if the mill, &c., had been conveyed to Nicholas Harding and Elizabeth, his wife, and the survivor of them, and the heirs of such survivor, according to the covenant in the release of the 22d February, 1713, they would have descended to the said Burgess, as heir at law on the part of the mother.

After this certificate was returned, the Attorney-General, on behalf of the Crown, filed an information, insisting that Sir F. Page, by the deed of 1718, had no beneficial interest in the estate in his own right, but was a mere trustee for the benefit of Mrs. Harding, or her appointee or heir; and in default of such appointment or heir, that he was a trustee for the benefit of his Majesty, who stands in the place of such heir; and that the premises were escheated; and that the representatives of Sir F. Page ought to convey to the use of his Majesty. To this there is an answer put

No. 1. — Burgess v. Wheate, 1 Wm. Black. 128, 129.

in and issue joined; and the information is now at hearing, and the original cause is now set down for farther directions. This is the state of the case, of the cause, and of the several claims of the parties.

I shall now proceed to consider these claims in order.

First, the claim of the plaintiff, Burgess, as heir at law, *ex parte maternâ*, in default of an heir *ex parte paternâ*. — This claim I see no ground for, considering the certificate of the Judges, which Lord Keeper proposes to confirm. The questions stated for B. R. have left the point open to the maternal heir, if there was any ground of right; and * their answers [*129] have effectually precluded him, in case he has no equity. And what ground of equity has he? What has been insisted on is mere matter of law, and would open the questions again which are concluded. For, by the deed of 1718, 't is held he took nothing; — that the trustee thereby took the legal estate, and no new use was created by Mrs. Harding. The only thing suggested by that side, that has the colour of equity, is, — that Mrs. Harding might have prayed and compelled a conveyance from the trustee, while she lived, by which she would have been seised to new uses; which, in default of heirs *ex parte paternâ*, would have gone to the heirs on the part of the mother; and that it is a rule in equity, "that what ought to be done, or is agreed to be done, is looked upon as done." Had such a conveyance been executed, it would have been like a feoffment and re-feoffment, and have made her seised of a new use; but as it was not done, the consequence insisted on will not follow; for nothing is looked upon in equity as done, but what *ought* to have been done; not what *might* have been done. Nor will equity consider things in that light in favour of everybody; but only of those who had a right to pray it might be done. The rule is, that it shall either be between the parties who stipulate what is to be done, or those who stand in their place. Here Mrs. Harding never prayed a conveyance, and one cannot tell whether she ever would; and the maternal heir is not to be considered as a privy in blood, but a mere stranger. This very cause warrants the distinction here taken, — *i. e.*, with regard to the mill, &c., mentioned in the opinion on the last question. It stands thus: Nicholas Harding, after having agreed to release to Chandler the equity of redemption of a moiety in the mortgaged premises agrees to purchase of Chandler the mill, &c.,

and makes Chandler stipulate to convey these premises to him and his heirs, or such person as he should direct. The equity [*130] of redemption was released, and then *Chandler stipulates to convey to Harding and his wife, and the survivor of them, and the heir of the survivor. The consequence is, that Mrs. Harding takes this estate, not as the old use, but by purchase under the appointment of her husband, which enlarges the course of descent beyond that of the old use. And since what is covenanted to be done is considered as done, the mill goes in a course of descent (in default of paternal heirs) to the heir *ex parte maternâ*. In the deed of 1718, there is nothing like such a covenant, nor anything which shows she intended to enlarge the course of descent. Wherefore, under these circumstances, as the opinion of the Judges is proposed to be confirmed, I think there is no ground for the claim of the maternal heir.

Secondly, The next claim is on behalf of the Crown, to which there are two preliminary objections.

1st. That the claim of the Crown is premature; there being no office found, or inquisition taken, to find a title in the Crown. There are cases where such previous step is necessary, — where the Crown wants to make a seizure, and to take possession of the freehold and inheritance; there its title must appear by matter of record, whether judicial or ministerial, or whether the conveyance itself be matter of record, or matter of fact founded on rec- [131] ord. . . . But the Crown may have recourse to equity, if the Crown has any equity. *Holland's Case*, Aleyn, 14. . . . Therefore the objection for want of office is groundless, and a bill or information is the only proper remedy.

Objection 2. This is not the proper Court for the Crown to institute a suit in, but it should have been a Court of Revenue. This is a strange objection to be made in any case. And, as the circumstances are, it is still stranger to be made in this; because, though the Crown may insist on being sued in [*132] its own *proper Court, yet it may sue in what Court it pleases: Finch, 84 . . . .

The great question is, whether the Crown has a right to a conveyance of the legal estate from Mrs. Harding's trustee, as an equitable escheat, by the death of Mrs. Harding without heirs on the part of the father, from whom the estate descended to her.

I shall consider the right of escheat in three lights.

First, In what situation it stood in respect to conveyance at common law before the invention of uses.

Secondly, In what situation it stood with respect to conveyance to uses before the statute of uses was made.

Thirdly, How it stands since that statute, and now, with regard to trusts.

The result and application of the whole will decide the question, how far the Crown is, or is not, in equity entitled to a conveyance from a trustee or those in his place. *In treating these points, one might expatiate into a curious field of learning, from the writers on allodial and feodal property; but as the doctrine of tenures was never wholly adopted into our constitution, the different periods of our laws cannot be accounted for from a strict notion of feuds. So that it would be perplexing the case to go into the general learning. I shall therefore only have recourse to it occasionally, so far as I find, by our own writers, it is now adopted into our constitution. In other respects, that law is of no more use than the Roman law; it serves for ornament and illustration. [*133]

1. Consider how escheats stood at common law before uses were invented. An escheat was, in its nature, feodal. A feud was the right which a tenant had to enjoy lands, &c., rendering to the lord the duties and services reserved to him by contract. On the other hand, a right remained in the lord (after a grant made) called a seignory, consisting of services to be performed by the tenant, and a right to have the land returned, on the expiration of the grant, as a reversion: a right afterwards called an escheat. And as the grant was more or less extensive, the reversion was more or less remote; for the feuds were sometimes temporary, sometimes hereditary; and a temporary one ended on the grantee's death. Sir Henry Spelman takes notice only of hereditary feuds, nor do our own laws. And though it may seem a paradox to modern ears, a feoffment to A. and his heirs did not pass a fee-simple originally, in the sense we now use it; but only an estate to be enjoyed as a *merum beneficium*, without power of alienation, in prejudice of the heir or the lord. And the heirs took it successively as an usufructuary interest; and in default of heirs, the land escheated or reverted strictly speaking. If there was an heir, and by legal impediment he could not take; the land

escheated. Bracton fo. 23 a; 46 Edw. III., pl. 4; Bro. Escheat, pl. 2. In short, the reverter took place, when the grant expired naturally, and the heirs failed in length of time. In case [* 134] of *escheat, it was cut off by civil law impediment, and was an accidental determination of it. The heir took by purchase, and independent of the ancestor. He could not alien; nor could the lord alien the seignory, without the consent of the tenant. Afterwards the right of the lord gradually underwent several variations, which tended to diminish the interest of the heir and the lord, and to increase that of the tenant: so is Spelman, c. 1. The first variation was, when the power of alienation, with leave of the lord, was introduced, then the heir no longer took independent of the ancestor; but, what the ancestor pleased to leave him, and by descent from him. In Bracton's time a doubt arose how the heir took. Some thought he was co-infeoffed with the ancestor, and that he took by purchase from the donor.

Others held (which opinion prevailed in Bracton's time) that he took by descent. This accounts for what is said in 2 Inst. 336, that a formedon in descender did not lie at common law of an estate-tail, because the issue took by descent; but though he lays down the law, he don't give the reason. Therefore, if the ancestor aliened, the heir was defeated; and the effect to the lord was only in the chance of the escheat, from the change of the tenant, viz., from grantee to alienee.

The next step in favour of the tenant was, to alien without licence; for which purpose, a larger grant was necessary, *i. e.*, to him, his heirs, and assigns. This gave the standing right of alienations. Bracton, l. 2, c. 6, s. 1, fol. 17. So the tenant could alien and change the escheat, and the lord was obliged to warrant such alienee. The only restriction on the tenant was, that he could not prejudice the lord by lessening the services reserved. Bract. fo. 23 b.

The next privilege to the tenant was, that he might alien, where the grant was only to him and his heirs. 2 Inst. 66 gives the reason, that such a tenant was not to be restrained from alienation. It was against the nature and purity of an estate infeoffed at common law. This was in effect only a right of alienation *sans* notice.

The next step effected the right of escheat, which was not only to lien, but to charge or incumber the feud. And the lord

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*was to take it, subject to such incumbrance. Wright's Ten. 117; Spelm. 21, 23; Bract. 382, § 8. This power of incumbering was more prejudicial to the right of escheat than the power of alienation was. That only changed the chance; but by the incumbrances, more or less, the escheat was in proportion defeated. However, it was still only subject to the acts of the tenant. [*135]

The lord's right was still farther affected by acts of Parliament and judicial determinations, which subjected the land, not only to acts of the tenant, but of the law on the tenant's account. Stat. Westm. 2, subjected the moiety of the tenant's land to elegit; statutes Merchant and Staple (13 Ed. I., and 27 Ed. III.), affected the whole feud for the tenant's debt, even in the hands of the heir. Bro. Dower, pl. 64: It became also subject to the dower of the wife. The books have omitted the title of original reverter; but the escheat is said to be a compensation to the lord for the loss of services: *Quia homagium et servitium amisit.* So is F. N. B. tit. Escheat, A. The right of reverter is quite omitted out of the definition. — This, before the invention of uses.

2. How escheats stood after the introduction of uses, when the tenant might sever the legal from the beneficial interest. Then the two interests were considered as two distinct sorts of property, in different persons. The *cestuy que use* was no longer tenant at law, nor was the land liable to be subjected to his incumbrances, as dower, executions, &c. *Chudleigh's Case*, 1 Co. Rep. 120 a. But though the land was not liable at law on account of the *cestuy que use*, yet it was still liable on account of the feoffee to uses. Bro. Feoffment to Uses, pl. 10. Poph., P. 3, *Earl of Bedford* v. *Russell*; see also Hardr. 469; 2 Ves. Sen. 633–4. This defeated the creditors of *cestuy que use*, and was found inconvenient. Persons having actions against him were defeated. Tenancy in dower and by curtesy was gone; and therefore several statutes in favour of creditors were made to restore all the claims against *cestuy que use*. Bacon, vol. 2, of Uses. Thus 4 H. VII., 19 H. VII., c. 15 and others were made to restore the fruits of tenure to the lord against *cestuy que use* *as wardship heriot, relief. Yet none were made to restore the loss of escheat, which, as Spelman observes, is not only the fruit of tenure, but the very tree itself. — Thus it was, till the making of statute of uses. [*136]

3. That statute united them, but they still continued under the

name of trusts as a divided interest. It was done by limiting the use to the feoffee, who was declared a trustee. There was one use which the statute did execute, and another which it did not. So trusts succeeded uses. *Aliusque et idem nascitur.* And as a use could not be on a use, it took the name of a trust; and as the law would not meddle with a use on a use, equity therefore does. This brings me to consider the nature of this use, with respect to an escheat. It has been contended on the part of the Crown, that equity is to be considered as a thing of yesterday; that trusts were not come to any maturity, nor governed by any settled principles, even in 1718; that it was left to the Judge in equity whether to observe the rules of law with respect to uses, or to depart from them; that, as to tenancy by curtesy and tenancy in dower, equity differed from itself. All this is to be considered; and part of it is a melancholy representation of a Court of Equity. As to its pedigree, one may with pleasure observe, that equity is as old as Bracton, who, fo. 23 b, distinguishes how it would be *secundum æquitatem,* and how *secundum rigorem juris.* When once it existed, it must have its rules and principles, like other artificial systems. It was not a perfect system. New cases begat new, but not contradictory rules to the old ones. When once a trust became the object of equity, the same governing principles were observed in trusts, as before in uses. The analogy as to the outlines of each is apparent. Bacon, Law of Uses, 57. Uses took place from a reasonable cause, to give men power to dispose of their own; so did trusts from the convenience of families. [*137] This, the only motive that made mankind endure *uses and trusts: Bacon, 80. A conveyance with consideration without notice bars a trust; so it did an use: 2 Roll. Rep. But it is not barred in trustee's hands, or in the hands of purchasers with notice, or without consideration. As to the construction of trusts, the intention of a person creating a trust chiefly governs, where not against good policy in its construction: Hardr. 494; Bacon, 79. So it was as to uses, — trusts and uses not only agree in these particulars, but in the different construction of deeds in law and equity. At law the legal operation controls the intent, but in equity the intent controls the legal operation of the deed. It is not sufficient to single out a few instances and exceptions, which no rule is without, and which, besides, in this case I think are sufficiently accounted for otherwise. But it is said the rule of

uses was narrow and inconvenient, and that equity adapts to trusts, not so much the rule of uses, as the consequences of law: — That trusts are alienable, will descend *ab intestato*, and be liable to, and capable of, the same limitations and successions; are valid and void on the same principles (except the case of dower, which proves the rule); and that in tenancy by curtesy equity agrees with the system of law.

These are objections all founded on one principle. The analogy must be confined, both in uses and trusts, to those cases, where they are considered as distinct from the legal estate. In other cases, both uses and trusts will fall within the rules of law. This is reasonable, because there is no necessity of departing from them. It is said they are both alienable by like conveyances, &c. But this don't prove equity in construction of trusts to go by a different rule from the law in construction of uses; for uses went by this rule, and equity would not vary from the law unnecessarily. Anderson says, in *Chudleigh's Case* (Bacon, 78), there may be a *possessio fratris* of an use.[1] It is no more than saying, the Chancellor held consultation with the rules of law, where [there was] no reason to go against them. The instances prove the agreement *between uses and trusts; they agree [*138] with the legal system. And the case of tenant by curtesy is an exception to this rule. Equity does allow a tenant by the curtesy of a trust contrary to the rules of law. Perkins 69, § 349, and 499, § 457. *Watts* v. *Ball*, 1 P. Wms. 108; *Hearle* v. *Greenbank*, 1 Ves. Sen. 298; 3 Atk. 695, 716; Harg. Co. Lit. 29 a, [n. 165]. But this instance of deviation is not to be argued upon to consequences. It seems to have prevailed unaccountably, and against the opinion of the Judges themselves. It seems to have taken its rise in Lord SOMERS' time, Pr. Chanc. 67; in *Snell* against *Clay*, 2 Vern, 324, tenancy *per* curtesy was allowed of a trust, though there was an outstanding term. *Brown* against *Gibbs*, 97, Pr. Chanc. In *Banks* against *Sutton*, 2 Wms., P. 700; see also *Forder* v. *Wade*, 4 Bro. C. C. 521; Harg. Co. Lit. 31 b, Sir Joseph Jekyll makes an observation on Lord SOMERS avoiding the authority of his own determination, and that he intimated a disapprobation of his own distinction between a use and a trust.

[1] Mr. Eden observes, that this is a mistake; "that ANDERSON, C. J., did truly and profoundly contest the vulgar opinion that there might be a *possessio fratris* of a use;" Bac. on Uses, 11.

Sweetapple against *Bindon*, 2 Vern. 536, was the next. Taken for granted, there should be no tenancy *per* curtesy or in dower of a trust. It is true Lord Keeper WRIGHT held otherwise, and allowed a tenancy *per* curtesy of money to be laid out in lands. I think this precedent does n't seem fit to be allowed; because the will, on which that determination was, admitted a doubt whether the wife was tenant in tail. It is mentioned in Pr. Ch. 536. This has a correlate to the time of her dying, the brothers and sisters then living. In *Banks* against *Sutton*, Sir Joseph Jekyll does n't approve anywhere of *Sweetapple* against *Bindon*. And though he held the wife dowable there of an equitable estate, yet he did it on particular reasons; because it was a trust created by the ancestor of the husband, and not the husband himself. This is too precarious reasoning to go upon. The husband found the estate subject to the trust created by the ancestor. Who can say that he intended the wife not to be dowable? Who can say that, if he had not found the estate under a trust, he might not have created such a trust? The next endeavour was to bring the husband down to a par with the wife. But this was denied in *Chaplin* against *Horner*, 3 P. Wms. 229; *Attorney-General* against *Scott*, Forest. 138, and in *Goodwin* against *Winsmore*, 2 Atk. 525, *per* Lord HARDWICKE, 1742–3. *Casborn* against *Inglis*[1]; husband denied to be tenant *per* curtesy, by Sir J. Jekyll, but that was reversed. It is, I own, almost a reproach to a Court of [*139] *equity; but shall not equity therefore follow the rule of uses? shall it make another rule deviating from that? I think that there ought to be a conformity in trusts and uses, and that this case of tenancy *per* curtesy, which is different, ought to be the only one, and that there the bounds are fixed. Hardr. 494; *Attorney-General* against *Scot; Lord Coventry's Case.* Equity, in determining trusts, has observed the rules of law touching uses, unless there was a reason to the contrary. And the instance of tenant *per* curtesy does not furnish any reason.

Having considered the right of escheat, and how affected at common law by conveyances to uses, and since upon trust; I shall now apply the rules and principles collected from the foregoing considerations to the case in question, and see what conclusion

[1] 1 Atk. 603, 7 Vin. Abr. *Curtesy* (E), pl. 23, very fully reported. It was the case of an equity of redemption; and Lord HARDWICKE decreed the husband to be tenant by curtesy of it, overruling the decision of Sir J. JEKYLL.

arises from thence, and how far the conclusion I shall draw is warranted by law and reason. And under this head I will consider what arguments have been urged against it. Suppose Mrs. Harding, feoffee at common law of a trust estate, had aliened to Sir F. Page, she would have substituted him [as] an alienee instead of herself for services and escheat. If an escheat had fallen, which depended not on her delinquency, would the lord have been entitled? This is clear. Suppose Mrs. Harding attainted of treason or felony, the lord would not have been entitled. But the Crown says she had reserved to herself the equitable interest. It will be necessary, then, to consider how the Crown would be affected by a use, supposing it had been a feoffment to use made to Sir F. Page. Would the lord's condition with respect to an escheat have been bettered by such a conveyance at common law? I think it would have been worse. He would not have been entitled to an escheat on Mrs. Harding's felony. 5 Ed. IV., pl. 18, fo. 7 b; authority in point against the lord's claim, and questions who should have it. If the lord is at law entitled to escheat, on death without heirs, or attainder of feoffee to uses, and not on death, &c., of *cestuy que use*, it strengthens the authority of the case; that if it had been determined otherwise, in favour of the lord, it would have given him a double chance for his escheat. * Brooke pl. [* 140] 34, agrees the lord shall not have it, nor the heir (by reason of corruption of blood) and that feoffee shall retain it to his own use. And though this is introduced by an *ideo videtur* in a modest manner, yet many of his opinions are so introduced, and have generally been thought of very great authority. Lord Bacon, 79, confirms it; for he says the lord shall not have it, because he has a tenant by title: and then differs from Brooke, who gives it to the feoffee for his own use, and says feoffee shall retain it either *in pios usus*, or the will of the feoffor. This seems to arise from an old notion, that a man's estate should be disposed of *in pios usus* (when there was no owner) in like manner as the ordinary used to take an intestate's effects *pro salute animæ*. But Brooke's notion is not so strange, even by Lord Bacon's own account. From these authorities it is clear, that if Mrs. Harding had been *cestuy que use* and attainted, the lord would not have been entitled to the escheat. How, then, does the case stand as a trust? It is clear that the Crown at law is not entitled in

case of a use; then if trusts in equity are analogous to uses at law, (and I think they are) neither will the Crown be entitled in case of a trust in equity. Yet the question will not depend merely on that analogy, but on other arguments and authorities in point.

Sir George Sandys's Case, Hardr. 488, 2 Freem. 129, 1 Sid. 403, 1 Hale H. P. C. 249; cited also in *A. G.* v. *Duplessis,* Parker, 156, is in point, and that and the 5 Ed. IV. mutually strengthen each other. Freeman is rather more accurate than Hardres. As Lord HALE had an analytical head, it will give a clearer idea of the strength of his argument to give an analysis of it. He first states several cases where trusts are forfeited, as for treason, by statute; — for alienage, by prerogative; for a debt to the Crown, partly by statute, partly by prerogative, and partly by *cursus scaccharii,* or the course of revenue. Then he distinguishes these cases from an escheat, as founded on a different ground, for want of tenant. Then he goes to a term, and gives reasons why a trust of a term cannot be forfeited. Then comes to his conclusion: if not a chattel, then not forfeitable; if a chattel, Freeman never had it to forfeit. I think this good sense, as well as good law.

[* 141] * As to the inheritance, the lord is entitled to services, while tenant has the land; when no tenant to perform the one, or hold the other, the lord shall have it. Here is a tenant *de jure* to perform them; and so no forfeiture. *Trinity College* against *Brown,* 1 Vern. 441, goes on the same principle; the legal tenant [was] then living, therefore the best beast of *cestuy que trust* not liable.

Some objections were made to *Sandys's Case.* It was said to be a compassionate case. Much may be said of the charity of Lord HALE. He was obliged to mention the relations of the person murdered. But I meet with it only once; so far is he from including anything to conciliate the passions of mankind, as an ingredient to his determination. 'T was said he was a young Judge. — He had at that time a great deal of experience, and his abilities were very great. I have seen determinations of the commissioners, during the interregnum, that do him great honour. The Case of *Sir George Sandys's* was depending a great many years; — argued by very great men: P. 17 Car. 2, & M. 20 Car. 2; and this adds great weight to the authority. 21 Car. 2, HALE

and TREVOR gave their opinions. It is said, that only two Judges gave opinions; — but no one can suppose that there were but two Judges during four years in that Court. If they differed, HALE would never have given his opinion without mentioning it. In his Pleas of the Crown, Vol i. p. 250, he says that it was *unâ voce* resolved, so no doubt but all the Judges of the Court concurred. It plainly appears it underwent his serious consideration on second thoughts, by the manner he ranges his argument, in his Pleas of the Crown, different from what he did before. 'T is said, HALE goes on wrong principles; for right of escheat is not founded on want of a tenant but of an heir, and as an heir was wanting, the estate should have escheated. But I think escheat not founded on want of heir, but of tenant to perform the services. Fitzherbert, F. N. B. 337, 4to ed., who is most accurate, expressly puts it upon that footing. Some books may use the expression, "for want of heirs;" but I believe its promiscuous use is owing to this, — that before power of alienation want of tenant and heir was the same thing, *for at the death of the [*142] ancestor none but the heir could be tenant. Another objection is, that HALE supposes the land subject to trust will, on the trustee's attainder, or death *sans* heir, escheat to the Crown discharged of the trust; whereas in equity it will be liable to the trust. And so said, if the lord takes the estate subject to the trust, he ought to have, in return, a reciprocal benefit on the death of *cestuy que trust* without heir. I think this position and inference not warranted by any judicial determination. *Pawlett* against *Attorney-General*, Hardr. 465, and Carter 67, *Geary* v. *Bearcroft*, and Pr. Ch. 200, *Eales* v. *England:* see 2 Fonbl. Eq. 170, n. (5th ed.), are cited to support it. The first I shall consider by and by; the others are mere dictums of Judges, collateral and foreign to the matter in question. In Carter 67, the question was, who should be considered as occupants. As to what BRIDGMAN says in *Geary* against *Bearcroft*, the whole must be taken together. The other three Judges had urged the argument *ab inconvenienti*, and BRIDGMAN answers them. They said, a man conveys lands to trustees, and they commit felony, his lands shall be forfeited, though he may have relief in equity. BRIDGMAN says, though equity may relieve, yet we must not take prejudice from equity against arguments at law. The equitable part is not the opinion of Lord BRIDGMAN, 't is only anticipating an equitable

objection that might be made against it. Whoever looks into *Geary* against *Bearcroft* will, nine out of ten, be of opinion with the three Judges against BRIDGMAN. Now if he was mistaken in his legal point, more likely he should in equity, being recently brought into that Court from being a chamber conveyancer; and on a writ of error in B. R. brought on BRIDGMAN'S opinion, the Court affirmed the judgment of the three. As to Pr. Chan. 200, *Eales* against *England*, the same expression is not in Vernon, S. C. 2 Vern. 466, and this was a very extraordinary medium of proof, of which no precedent had ever been before him; 't is proving *incertum per æque incertum*, if not *multo incertius*. Both the sayings of BRIDGMAN aforesaid, and of TREVOR here, have not the least relation to the matter in question. In this [*143] *last case, the question arose upon the death of a trustee for £300 in the life of the testator, whether the £300 legacy was lapsed. Lord TREVOR might have used many more similar and certain instances. *Pitt* against *Pelham*, 1 Ch. Ca. 177, 1 Ch. R. 283, must have occurred to him, where held, that death of trustee would make no alteration in respect of the beneficial interest. Instances where trustees for payment of legacies have died in testator's life, the estate has descended to their heirs, and been considered as a trust; and many much more similar; — none more difficult to prove; and had he been called upon to prove his medium, I believe he could not have done it. On the contrary, I believe, on the death of feoffee to uses (*sans* heir) the books say the lord shall take the fruits This accidental accruer of a benefit comes in lieu of another benefit, and *cestuy que trust* seems no more relievable in this case than on a sale without notice by the trustee. I think the contrary notion has been introduced by considering an escheat on the foot of a forfeiture. But they differ materially, not only in the manner of the Crown's taking, but in respect of the consequences. The Crown takes an estate by forfeiture, subject to the engagements and incumbrances of the person forfeiting, *Duke of Bedford* v. *Coke*, 2 Ves. Sen. 116. The Crown holds in this case as a royal trustee (for a forfeiture itself is sometimes called a royal escheat), but in general I apprehend an escheat is taken free from any equitable claim. If a forfeiture is regranted by the King, the grantee is a tenant *in capite* and all mesne tenure is extinct. If land escheated be regranted, he shall hold in honour. Therefore the position, that the lord takes the

escheat subject to the trust, seems not warranted; though 't is not necessary, I think, to give an opinion upon it.[1]

But supposing the position alleged to be true; why ought the lord to have a reciprocal equity on the death of *cestuy que trust* without heirs? What was cited out of Lord NOTTINGHAM was the argument of counsel, who throughout confound forfeitures and escheats, and speak of attainders in general without distinguishing, whether of felony, which would create an escheat, or of treason, which would create a forfeiture. It has been said, the King may be subject when in the *post*, as *when [*144] mortgagee is attainted, and shall have equity of redemption, when mortgagor is attainted, for the trust charges the land, when *non egreditur personâ*; *Sir Salathiel Lovel's Case*, Salk. 85, where there was a saving of blood, it was contended forfeiture did not take place; but held that in treason it would, though in case of escheat it would not. 'T is not every argument in law or logic that holds *e converso*. It fails here, that the lord has as good a right as the other had against the lord. On a conveyance of land at common law, if tenant contracted a debt, and the land was extended, the lord took it subject to the debt. But did that give the lord any other right upon that account? The lord in the one case may lose; therefore in his turn, 't is said, he ought to gain. But there should be a reciprocal right to have a reciprocal equity, and this would be allowing a reciprocal equity without a reciprocal right. Therefore I think the inference drawn is not warranted by the cases.

Several cases have been mentioned to encounter *Sandy's Case*. *Attorney-General* against *Holland* (in Aleyn, 14, &c.) was cited to show the King shall have the benefit of a trust, as well as of a legal estate. That was not determined upon the merits; but Aleyn, 14, and also Stiles, pp. 20, 40, 75, 90, 94, *R. v. Holland*, suppose a trust for an alien did go to the Crown; — that the Crown takes by prerogative. At common law, if an alien purchased and took a conveyance, he took it for the benefit of the Crown, by prerogative. After uses invented, 't was necessary to settle where the use should go, purchased for the benefit of an alien. There-

[1] By 39 & 40 Geo. 3, c. 88, s. 12, the King is empowered to direct the execution of any trusts or purposes, to which any escheated manners, &c. shall have been liable at the time of their escheat, and to make grants to trustees for the execution of such trusts: by which it appears, that it was thought, that the Crown had not that power without the interference of the Legislature.

fore stat. 3 R. II., c. 5, and 7 R. II., were made to enforce the common law prerogative, which else had been evaded by the introduction of uses. The ground of it was originally a common law right; and if a trust had been created, the King would have been entitled to the trust the same as to the land. But does it hold therefore that a trustee takes for the Crown on death of *cestuy que trust?* The difference between taking by prerogative and escheat is material, and Lord HALE makes the distinction.

As to *Pawlett* against *Attorney-General*, Hardr. 465 — it never came on upon the merits. It was a demurrer only to a [*145] bill brought by *mortgagor. The mortgage was made to Edmund Ludlow's father, and descended from him to Edmund the secretary, and in consequence of his attainder, was seised to the use of the Crown. The executors of the father were entitled to the mortgage money, and they put in suit a recognisance entered into as a collateral security for paying the money. The Crown seized the lands, and mortgagor filed a bill, and made the Attorney-General and Ludlow parties. The Attorney demurred; said the remedy taken was improper; it should have been by petition of grace and favour, as they call it, but meant of right. HALE said, equity of redemption lay against the Crown, but as to the remedy or manner of suing, that was a matter of high nature; but he held the executor, and not the heir, entitled to the mortgage money. These are the circumstances of the case. What says Lord HALE in *Pawlett's Case?* That though by the attainder of treason the estate was forfeited, yet it was liable to redemption in the hands of the Crown. What does he hold in *Sandy's Case?* that a trust estate did not escheat on the attainder of *cestuy que trust* for felony. The consequence is, that if the trustee is attainted for felony, or die *sans* heir, the estate would escheat to the Crown.

There is a distinction between the cases, a double difference between this and *Sandy's Case.* One is escheat for felony, the other forfeiture for treason; the one a trust only, the other an equity of redemption. The distinction between an escheat and a forfeiture can't be disputed. The other distinction between a mere trust and an equity of redemption is rationally taken, by HALE, in *Pawlett's Case*, Hardr. 467. I conceive a mortgage is not a mere trust, but a title in equity. — Id. 469, he says, a trust is collateral to the land, and created by contract of the party; and

therefore one that comes in *en le post* shall not be liable to it. But the power of redemption is an equitable right inherent in the land, and binds all persons in the *post* or otherwise. In this Lord HALE is not singular. Lord NOTTINGHAM (MS.) says, an equity of redemption charges the land, not a trust; therefore, though for this particular purpose (as to allowing husband to be tenant *per* curtesy) there is no difference between a trust and an equity of redemption; yet it does not follow that they run *quatuor pedibus.* * It hath been hinted, that Lord NOTTINGHAM [* 146] seemed to think it deserved further consideration. But I think he rather approves the case. His words are (MS.), "In *Sir George Sandy's Case* (whose son being *cestuy que trust* of a term, and attainted of felony) 't was resolved that the term was not forfeited, because inheritance not forfeited. *Unde sequitur*, where inheritance is forfeited term is forfeited. I therefore think *Sir George Sandy's Case* is unimpeached."

But then 't is endeavoured to bring the lord within the trusts of the deed of 1718. There 's no trust expressed or declared for him. Is there any implied or resulting to him? The trust of the legal estate can only be co-extensive with that legal estate. So that I think Mrs. Harding had not power to create a trust to give the lord a right after her heirs. Her interest ends where his begins. She could not create a trust that could not be executed by a legal limitation. If there had been a limitation to the lord in default of her heirs, it would have been void, and the lord would have taken by his own title, which is paramount to that, and not by her title.

The intent is to prevail, it is said; could Mrs. Harding be supposed to have the lord in view? The legal estate may be extended to answer the purposes of the trust declared. There can be no trust where there is not a legal estate created co-extensive with it; and a trust can't be executed where no intent appears to create it, save by operation of law; and a trust can't result by operation of law, but for those for whom the trust might have been declared by the party creating the trust. The deed expresses no trust for the lord, therefore the Court can't execute one. But 't is said, the limitation to trustees is in trust for her and her heirs, and subject to her appointment. She making none, the lord is to be considered as heir or appointee. That before the power of alienation, the lord had a strict reversion; but since, 't is become

[*147] a kind of heirship or assignment. *This is inverting the law itself for he claims in the *post*, not in the *per;* it makes the lord hold of the tenant, not the tenant of the lord. Can the power of alienation give the lord a greater power than he had before? Before the power of alienation, tenant or heir took by purchase, as a mere usufructuary, and the lord took what the ancestor left. Before, as well as after the power, the lord and tenant had the whole interest, and as the tenant's power over the feud increased, the lord's diminished. I admit the lord by escheat is called in some places *quasi hæres*, but 't is always to his prejudice where he is so said to take, and never to his benefit. Bract. 23 a. " Item cum revertitur terra, non pro defectu hæredis, sed propter impedimentum perpetuum, habebitur loco hæredis ad warrantizandum, &c.;" which shows, that before the power of alienation the tenant could not demise, but the lord was obliged to warrant to the lessee as much as the heir. Bro. Esch. 33 is a very obscure case, and not to be found in the Year-book. Where the Crown made a grant to A. for life, or to the heirs of his body, the King, on death of tenant for life, or in tail, shall be in without office, and whether he enters or not, as being heir of the person who died seised. So far is the lord from being entitled to a benefit as heir or assignee, that he is on the contrary excluded from privileges that the heir or assignee is entitled to. At common law only feoffor or his heirs could enter for breach of condition, grantee or assignee could not; therefore the stat. Henry VIII., 32 H. VIII., c. 34: [see *Webb* v. *Russell*, 3 T. R. 393 (1 R. R. 725); *Vernon* v. *Smith*, 5 B. & A. 10 (24 R. R. 257)], was made to cure that defect, and give the grantee a right of entry, Co. Litt. 215 b; yet the lord could not claim that benefit under the statute. So that so far from the lord's taking benefit as heir or assignee, he is distinguished from both, and excluded from the privilege which the heir had by common law and the assignee by statute. Yet 't is said, the lord by escheat may distrain for rent reserved to A. and his heirs, Co. Litt. sect. 348, as in the place of heir, and so has privileges equal with the heir. I can't admit this right of distraining is a privilege, for his right of
[*148] distraining is not as heir, but as incident to his *reversion; and the same book says, the lord can't enter, because he is not heir. And this answers another observation, that the lord may take the benefit of a term limited to the owner and

No. 1. — Burgess v. Wheate, 1 Wm. Black. 148, 149.

his heirs; but the answer is, he doesn't take it as heir; but where he takes the inheritance as escheated, he takes the term as attendant upon, and following the fate of the inheritance; according to *Sandy's Case, Pawlett's Case*, and Lord JEFFRIES's determination.

But if the lord is not within the reach of the deed of 1718, yet it is said, that this is but a mode of conveyance for a particular purpose, to give a *feme covert* a power to dispose of her estate if she pleased; and as it has never answered that purpose, 't is to be considered as if it had never existed; and if so, then the estate would have escheated on her death *sans* heir. This is contrary to what the heirs on the part of the mother insisted on. The maternal heir is for having another deed, — *i. e.*, a supposed reconveyance from the trustee to Mrs. Harding. The Court can do neither; but 't is begging the question to say, that the deed of 1718 shall be laid out of the case. Voidable deeds shall not be laid out of the case, but shall bind the escheat: 2 Roll. R. 403; 7 Co. Rep. 7 b. An infant's deed shall bind against the lord; and that in Rolle was a lease by the husband of the wife's land, without her joining. She died *sans* heir. Question, whether it should bind the lord's escheat; and it was held that it did. So for the purpose of binding the lord in escheat, deeds have been held good against him, that would have been void in other respects. The deed can't be laid out of the case. The effect of it is such as legally to exclude the lord while there is a tenant.

If the escheat is legally gone, where is the equity to revive or restore it? Is it such a right as should induce the Court to go out of its way in its support? Escheats are become notional and positive, and the reason a good deal ceased, since the tenant's power of alienation, and the heir's becoming dependent on the ancestor; why should not a rent escheat as well as a trust? The first lies in tenure as well as the last. At least, why should not the lord have the rent in equity? *Everybody [*149] knows the land shall be discharged of the rent, rather than the lord shall have it.[1] The equity is as good in one case as in the other.

[1] If a man seised in fee of a fair, market, common, rent-charge, rent-seck, warren, corrody, or any other inheritance, that is not holden, and is attainted of felony, the King shall have the profits of them during his life: but after his decease, seeing the blood is corrupted, they cannot descend to the heir, nor can they escheat, because they be not holden; they perish and are extinct by act of law; 3 Inst. 21; Hardr. 496.

No. 1. — Burgess v. Wheate, 1 Wm. Black. 149, 150.

I admit most of our law as to its foundation is positive; the rules of descent are positive. The instances put from the feodal law deserve no favour in perferring the uncle to the father as heir to the son, and preferring the lord by escheat rather than one of the half blood. If the uncle in the one case, and the lord in the other, has a legal right, equity will not take it away. But when any of these rights are gone at law, I think a Court of Equity can't interpose to restore them.

Arguments are used *ab inconvenienti.* They say the consequences will be mischievous; as if one is convicted of felony, whose estate is in trustees, the *cestuy que trust* forfeits for felony and is restored by pardon; see *Toomes* v. *Etherington,* 1 Wms. Saund. 361: 2 Hawk. P. C. c. 37, s. 54. Shall the trustee hold both against the Crown and the *cestuy que trust?* Whether he can keep it against the Crown is the case in question. But the detaining it from the Crown, where the *cestuy que trust* has no relation, is different from detaining it against the *cestuy que trust* himself. If trustee should set up such a title, 't is a case that never yet happened. If it did, I should think Courts of Equity would go as far as they could, and I think trustee estopped against setting up that claim.

Then it was said, suppose mortgagor die without heir, shall the mortgagee hold the estate absolutely? And if he demands his money too against the personal representative, shall he have both land and money? If the mortgagor dies without heir or creditor, I see no inconvenience if the mortgagee held it absolutely. In the case of a forfeiture for treason, 't is certain the Crown might redeem, as in *Sir Salathiel Lovel's Case.* And as to the supposition, that the mortgagee may demand his money too; that must be where the mortgagor dies without heir; therefore the demand must be against the personal representatives by virtue of some bond or covenant for payment of the money. And if the mortgagee took his remedy against the personal representative, I think the Court would compel the mortgagee to reconvey; not to the lord by escheat, but to the personal representative, and if [* 150] necessary would consider the estate * reconveyed as coming in lieu of the personalty, and as assets to answer even simple contract creditors. Under these circumstances, where is the great inconvenience?

Another case is put of a purchase, and the money paid by the

purchaser, who dies without heir before any conveyance. Here 't is said, if the lord could not claim the estate, and pray a conveyance, the vendor would hold the estate he has been paid for and keep the money too. I think the lord could not pray a conveyance; to say he could is begging the question. And as to the vendor's keeping both the estate and the money, 't is analogous to what equity does in another case; as where conveyance is made prematurely, before money paid; the money is considered as a lien on that estate in the hands of the vendee. So where money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor for the personal representatives of the purchaser, which would leave things *in statu quo*.

But now, what are the inconveniences on the other side? This interposition prayed would change the law, and that too in the case of a legal tenant. It would give the lord a double chance. For this determination would be a precedent for an equitable escheat on the death of *cestuy que trust*, and there are other cases to warrant escheat on the death of trustees, unless the Court should interpose. And that lets in another objection, — that 't is bringing both into a Court of Equity. If the inconveniences were greater than they are, and not overbalanced by those on the other side, yet I think arguments *ab inconvenienti* ought not to prevail, but where the case is doubtful. In *Pawlett's Case*, inconveniences appeared to Lord HALE, that the tenure would be destroyed by the estate's accruing to the Crown by the forfeiture; but did he object to the right of redemption on that account, or that any recompense should be made to the Crown in lieu of it? In the present case, I don't think the balance so near. The lord takes escheat subject to particular incumbrances, and even to the devise of the tenant. If she had contracted debts to the value, and the estate had been extended, or if tenant devised it, the lord *could [*151] not complain. Here she has put an end to her own tenancy to prevent the estate from escheating by her death without heir.

I am for following the analogy of the legal escheat, as well as of the legal descent, and for pursuing legal principles; because the law gives the escheat only for want of a tenant, equity must do the same. If it did [not], " 't would be making law instead of administering equity. I give no opinion on the right of the trustee; I give my opinion, that neither the maternal heir nor the

Crown has any right. If the trustee came into a Court of Equity, I might be of opinion that he had no right; but have no occasion now to enter into the merits of defendant's defence. In bills of interpleader 't is necessary to decide the right, because the money is brought into Court. So where trustee disclaims or desires to be discharged, and 't is a contest between volunteers for trust money or trust estate, there the Court frequently determines the right of the defendant, to see to whom the estate is to be conveyed, where the plaintiff is not entitled. But even in that case they sometimes will not do it, but order a conveyance to a six clerk not to prejudice the cause. If plaintiff has no right, defendant may hold till a better right appears; the possibility of that happening shows the impropriety of entering into consideration of the right of the trustee. I am clearly of opinion that the invidiousness imputed to his defence ought not to give the plaintiff a better right.

Many other cases might be taken notice of. As the Mortmain Act; where use was given to a corporation aggregate, the stat. 15 R. II., gave the lord a right to enter. So where given to a body not corporate, it is void, but don't say for whose benefit it is void. The lord could not claim it, nor the party against his own act. So purchases by Papists by st. 11 & 12 W. III., c. 4, s. 4; now repealed by 18 G. III., c. 60. See *The Papists' Case*, 2 P. Wms. IV; *Carrick* v. *Errington*, *id.* 361. So a lease by one joint-tenant to A. reserving rent, lessor dies, the surviving joint-tenant cannot have the rent, it enures to the benefit of the lessee. So the case of tenants before the late act, 11 G. II., c. 19, s. 15; see *Jenner* v. *Morgan*, 1 P. Wms. 392, where rent could not be recov- [*152] ered, &c. So *Cowper* against *Cowper*, 2 Wms. *753. In all these cases it is to the last degree invidious, yet equity never interposed in any of them, though they lay under the highest temptation to do it before the late act; for the man held the land, and, but for an accident, must have paid the rent. There cannot be a stronger instance than *Cowper* against *Cowper* before Sir J. Jekyll. That was a demand set up by Mr. S. Cowper in a Court of Equity, and as unfavourable a one as could come before a Court. Sir J. Jekyll says, " I own I cannot forbear declaring, that were I to consider the matter not sitting in a judicial capacity, but taking in all considerations, honour, gratitude, a man's private conscience, &c., I must think that this claim ought never

to have been set up." But did this invidiousness prevent the success of the claim? So far from it, that this declaration of his is only a prelude to the determination he made. I shall conclude with what he concludes with there, concerning the province of a Court of Equity and the boundaries of its jurisdiction. "Upon the whole matter my opinion is, this title should not have been set up; but now it is so, it appears a plain and a subsisting one; the law is clear, and Courts of Equity ought to follow it in their judgment concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue. And though proceedings in equity are said to be *secundum discretionem boni viri;* yet when it is asked *Vir bonus est quis?* the answer is, *Qui consulta patrum, qui leges juraque servat.* And as it is said in *Rooke's Case,* 5 Co. Rep. 99 b, that discretion is a science, not to act arbitrarily according to men's wills and private affections. So the discretion which is to be executed here is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other. This discretion in some cases follows the law implicitly; in others, assists it and advances the remedy; in others again it relieves against the abuse or allays the rigour of it; but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the Constitution entrusted with." This description is full and judicious, and what ought to be deeply imprinted on the mind of every judge, see 1 Fonbl. Eq. 24 (5th ed.).

* These are my sentiments, my Lord; and as such they [* 153] are submitted to your Lordship's judgment.

Lord MANSFIELD. — On the ground of the case on the certificate, the whole turns on the effect and operation of the deed of 1718, in a Court of Equity. The first question that arose was between the heir and the trustee only. Sir F. Page entered 1738; and July, 1739, Burgess, as heir of Elizabeth Harding, brought his original bill against the trustee. On the 14th of July, 1741, the cause came on to be heard. On the pleadings being opened, and the nature of the question appearing, LORD CHANCELLOR himself objected to the Attorney-General's not being a party, in respect of the King's right by escheat. Both parties were extremely desirous that there should be no question on the escheat, and the

Attorney-General did not insist upon it; but the CHANCELLOR asking him if he waived any right the Crown might have, and would consent it might be so entered, the cause stood over. The Attorney-General was then made a party, and the information was filed on behalf of the Crown.

There are three competitors before the Court. Two claiming as plaintiffs, and praying relief; the third a defendant, objecting to any relief.

The heir on the part of the mother claims by an alteration having been made by the deed of 1718, in this Court as well as at law. And had the trustee conveyed to Mrs. Harding after her husband's death (the only purposes for which the trust was created being then ended), the heir on the part of the mother had undoubtedly been entitled.

The King claims, as the deed of 1718 is a conveyance only of legal form, and has in this Court made no alteration in the beneficial estate; but has left it to go in this Court, as it would have gone before at law, and as if the deed of 1718 had never been made.

[*154] * The trustee objects to the heir's claim, because he says the deed of 1718 has made no alteration as to the beneficial estate of which Mrs. Harding died seised *ex parte paternâ;* and opposes the King's right, because it has changed the right of escheat both at law and in equity; and upon a general objection that the plaintiffs must recover upon their own strength to entitle them to relief: for it is not enough for the plaintiffs to show that the defendant has no right, but that they have a better upon equitable grounds; and, in the case of a trust, must show a better right within the terms of the creation of the trusts.

It seems agreed in this case, that the heir *ex parte maternâ* can not inherit the trust, because the trust ensues the nature of the land; which, before the deed of 1718, could not have descended in the maternal line; and I am at present of that opinion. The doubtful question is, whether the King is entitled to this trust? And that will depend on arguments drawn from the nature and effect of a conveyance in trust, and from the nature of the right of escheat.

I will follow the method that was used at the bar, under the four following heads. 1st, The nature of trusts of land, and the rules that govern them. 2dly, The nature of that right by which

the King claims in the present case. 3dly, Whether if the trustee had died *sans* heir, the King must not in that case have taken the land in a Court of Equity subject to the trust. 4thly, Apply the result of this enquiry, as between the King and the trustee, to the particular point immediately in judgment.

I. As to the nature of trusts of land and the rules by which they are governed. By an enquiry into the nature of an use or trust of lands, no more is or can be meant, than (as to uses) to find out historically on what principles Courts of Equity, before 27 H. VIII., received jurisdiction in modifying or giving relief in rights or interests in lands which could not be come at, but by suing a *subpœna;* as to trusts, what the Court does in modifying, directing, and giving relief in the *said rights [*155] and interests in cases where there is no remedy but by bill in a Court of Equity. Whoever shows, that the relief given now is more extensive, that it is considered by different or opposite rules, that the right is considered in different or opposite lights, will show the difference and contrast between uses and trusts. The opposition is not from any metaphysical difference in the essence of the things themselves. An use and a trust may essentially be looked upon as two names for the same thing; but the opposition consists in the difference of the practice of the Court of Chancery. If uses, before the statute of Hen. VIII., were considered as a pernancy of the profits, as a personal confidence, as a *chose in action;* and now trusts are considered as real estates, as the real ownership of the land; so far they may be said to differ from the old uses, though the change may be not so much in the nature of the thing, as in the system of law made use of upon it.

Having defined the terms, I will first show negatively what is not the law and nature of trusts. I apprehend the old law of uses does not conclude trusts now; where the practice is founded on the same reason and grounds, the practice is now followed. Its positive authority don't bind where the reason is defective; more especially that part of the old law of uses, which did not allow any relief to be given for or against estates in the *post*, does not now bind by its authority in the case of trusts. The law of uses, before the statute, is the doctrine that gave rise to trusts after the statute, the struggle afterwards; — all that is present to our view is a series of things, that gives us perhaps a history of facts, and

why they were; but gives us no plan consistently deduced from any system of natural justice, or public policy. Trusts, from the nature of the thing, may be left to the honour and faith of the trustee. In that case they are not the objects of law otherwise than as they may be fraudulent and void in respect of
[* 156] third persons. Or a Court of Justice may take *conusance and compel the execution of them. In that case trusts retain only the name of trusts; in substantial ownership the disposition in trust becomes the mere form of a legal conveyance. Trusts in England, under the name of uses, began, as they did in Rome, under no other security than the trustee's faith. They were founded in fraud, to avoid the statute of mortmain. Lord Bacon thinks them little known before Richard the Second's time. Though the first hint of uses was probably to avoid the mortmain act, yet they were innocently applied, soon after, to other purposes. A benefit to issue out of lands could only be made by the interposition of uses. Wills of land could only be made that way.

Natural justice said, "He who breaks his trust does wrong." So *cestuy que use* was drove to chancery by breach of faith. There were not six cases of uses before Edw. IV.'s time. The Court first interposed on very narrow grounds; so far as a personal confidence was placed in the trustee, they decreed him to perform the trust; but the heir of trustee or grantee was not liable; Kelw. 49. *Subpœna* lay only against trustee himself till Hen. VI., and then Fortescue changed it: 22 Edw. IV., fo. 6, pl. 18. This was against the heir, but upon a reason that equally holds with respect to the grantee. The Chancellor afterwards extended his remedy, unless the alienee purchased for valuable consideration without notice.

While heir or alienee were not liable, the plan, though narrow, was consistent, and was adhered to through all its consequences. But when these two exceptions were made, it was absurd not to give remedy in all other cases within the same reason. Till Hen. VIII.'s time, the widow of trustee held her dower, the husband his curtesy, the lord his escheat, and the King his forfeiture, free from the trust. Yet their title was not in reason better than the heir's.

In the time of Richard III., the King, though trusted as a private man, and coming in the place of trustee who was a

No. 1. — Burgess v. Wheate, 1 Wm. Black. 157, 158.

*villein, alien, or traitor, might keep the estate, or give it [*157] away free from the use. Corporations, though expressly trusted, might keep the estate themselves. Thus stood the jurisdiction of Chancery with respect to those against whom it was to give relief.

The jurisdiction was as narrow in respect of the persons to whom relief was to be given. The widow, the husband, the creditor by real lien, the lord, the King, could not sue as standing in the place of *cestuy que use*, or being owner of the estate. Where the confidence was to an intent that could not be executed, it never was settled what should be done with the estate; 5 Ed. IV., f. 7, pl. 18. Because the lord there could not have it, as he claimed in the *post;* query, Who shall have it? Bro. says, the heir shall not have it, because of the corruption of blood and *ideo videtur*, &c. Bacon says, it should go to the will, or *in pios usus.*

If a man appointed an use by his will to one for life, remainder in fee to another, and the *cestuy que use* for life refused; because there was no confidence for the heir, nor for him in reversion, the appointee or feoffee should hold the estate for life, some way or other, for the benefit of the feoffee, and not of the feoffor; 37 H. VI. cited there.

Great inconveniences arose from so narrow and contracted a system, that the *cestuy que use* should enjoy and dispose, and yet not be owner to all purposes; and that the feoffee, who really had nothing, should be deemed owner, so as to convey estates out of his seisin, by legal conveyance, not subject to the trusts. Bacon's Use of the Law sums it up very emphatically.[1]

* Many acts were made to cure these mischiefs in part; [*158] and all looking on *cestuy que use* as the true owner in the cases provided for, in respect to demanders, creditors, lords, and

[1] The passage cited, which is incorrectly given in Blackstone's report, is as follows: "By this course of putting lands into use there were many inconveniences, (as the use which first grew from a reasonable cause,) viz. to give men power to dispose of their own, was turned to deceive many of their just and reasonable rights; as namely, a man that had cause to sue for his land knew not against whom to bring his action, nor who was owner of it. The wife was defrauded of her thirds; the husband of being tenant by the curtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt; the poor tenant of his lease; for these rights were given by law from him that was owner of the land, and none other; which was now the feoffee of trust." — [Yet, as the passage goes on to show, the estate of the feoffee was not subject to dower, escheat, &c.]

cestuy que use's alienees of all kinds. On the same plan at last the 27 H. VIII. was made, that the use should be the universal legal ownership. Lord BACON says, 't is plain the statute meant to remedy the matter, because Use, Trust, Confidence, are used as descriptions of the beneficial interest, throughout the Act. 33 H. VIII. ascertains the forfeiture for treason, not with a view to trusts unexecuted; for 27 H. VIII. has the word *trust* as synonymous to *use;* this statute only mentions *use*. Lord HALE says, on a case put after the statute, that the *use*, &c. By 33 H. VIII. C. 20, s. 2: see 1 Hale, H. P. C. 248, *cestuy que use* forfeited for his own treason, and not for the treason of his trustee. In Bro. 340, held, on a sale an use could not be declared to the vendor; but from the nature of the transaction, and the price paid, the use must be to the vendee. And, in Dyer, 155, on a bargain and sale inrolled, no estate could be declared out of the use of the bargainee. From hence it grew to be a maxim, that an use could not be on an use. When this was established, there was no idea that a second use could have any existence or effect: but if it was an use, trust, or confidence, it was executed; if it could not be executed, it was nothing. Terms for years were not within the stat. 27 Hen. VIII. Trusts might be declared of them, to be executed in Chancery. By the advice of the Judges, in Dyer, 369, such trusts were held not assignable, were as a right of action, and nothing at law, but were merely to be executed in Chancery. This notion arose from the practice of limited terms in trust; and 't is strange, after a trust was considered in Chancery as an interest, the Judges did not say it should be executed as an use, a confidence, within the statute, or distinguished between trusts executed and executory. But because the whole trust could not be limited different ways, the real use should not be raised [* 159] out of the nominal one. *After this was forced into Chancery, trusts long fluctuated under great uncertainty; 4 Inst. 85. In 43 Eliz., a trust was decreed in Chancery to be a mere right of action, and therefore not assignable. In Jac. 1st's time (*Abingdon's Case*); but see 1 Hale, H. P. C. 248–9; *Reeve* v. *A. G.* 2 Atk. 223, all the Judges held the trust of a freehold estate was not forfeitable for treason: they must therefore consider it as a mere *chose in action*, 2 Roll. Abr. (C) pl. 1, fol. 780; trustee of a term for years is attainted of treason; the term is forfeit to the King, free of the trust, because the King comes in the

post, and cannot be seised of an use. 11 Jac. 1, Cro. Jac. 513: trust of a term held forfeited, trust of a freehold not; and they argued, that the King should not have the trust too, as it was forfeitable by the trustee. The argument which gives the forfeiture in treason, holds not in the case of a trust. If it was the same as an use, the statute would have extended to it. After the Restoration, Hale, on the subject of trusts, followed, to a degree, the errors of the time, and applied to trusts what had made uses intolerable. 1 Ch. Cas. 12, circ. 14 Car. II. he held a trust of a fee descended to the heir should not be liable in Chancery to specialty debts of the ancestor, so that it descended free from debts. In 15 Car. II. *Colt* against *Colt*, 1 Ch. Rep. 254, it was held the widow should not have dower of a trust in this Court. 21 Car. 2, Freem. 139, Ch. Cas. 128, *Pratt* against *Colt*, held that the trust of a fee descended should not be liable to judgment creditors. So the heir took it free from all incumbrances.[1]

This, to 22 Car. II. may show how they reasoned in Westminster Hall upon trusts; *Pitt* against *Pelham*, 2 Freem. 134, 1 Ch. R. 283, 1 Ch. Ca. 176; the testator appointed his land to be sold, and the purchase-money to be divided among four persons, one of whom was his heir at law; but he did not devise his lands to any body, he did not give any body power to sell, he placed no express confidence in the heir to sell. The MASTER OF THE ROLLS made a case to be heard before LORD KEEPER. Diligent search was made for precedents, then a trial was ordered in Common Pleas, to see *whether the executrix of the testator, or her ex- [*160] ecutor, she being dead, had a legal power to sell by implication. Upon a special verdict being found, the Judges negatived any such power. The cause came back into equity; and, after all, the LORD KEEPER held the heir not liable as a trustee to perform the devise, or make any conveyance to a purchaser, and so dismissed the bill.[2]

In my apprehension, trusts were not on a true foundation, till Lord NOTTINGHAM held the great seal. By steadily pursuing, from plain principles, trusts in all their consequences, and by some assistance from the Legislature, a noble, rational, and uniform system of law has been since raised. Trusts are made to answer

[1] This is remedied by the Statute of Frauds, 29 C. 2, c. 3, s. 10.

[2] But his decision was reversed in Dom. Proc. and it was decreed, that the heir should sell: S. C. 1 Lev. 304, T. Jon. 25.

the exigences of families and all purposes, without producing one inconvenience, fraud, or private mischief, which the statute Hen. VIII. meant to avoid.

The *forum*, where it is adjudged, is the only difference between trusts and legal estates. Trusts here are considered as between the *cestuy que trust* and trustee (and all claiming by, through, or under them, or in consequence of their estates) as the ownership and as legal estates, except when it can be pleaded in bar of the exercise of this right of jurisdiction. Whatever would be the rule of law, if it was a legal estate, is applied in equity to a trust estate. The statute of frauds speaks of devises only of lands and tenements; yet the trust, being considered in this Court as the land and tenement, can only be devised as lands and tenements may pursuant to that statute. How different is it from an use! That is neither land nor tenement. This act gives sanction to trusts divided from the estate, and guards them from danger of parol proof.

It would be endless and unnecessary to enumerate the various consequences through which the principle has been pursued, that a trust in Chancery is the estate at law, since 22 Car. II. Among others, it has been declared, that the husband should be tenant *per* curtesy of a trust; the case of dower is the only exception, and not on law and reason; but because that wrong determination had misled in too many instances to be now altered and set right.

Radnor against *Vandebendy*, 1 Vern. 179, 356, Show. P. [*161] C. 69, was determined * on that principle only in the House of Lords. In *Banks* against *Sutton*, the argument of Sir J. JEKYLL proves, there ought to have been dower of a trust, and he stretches there to make a distinction. In *Attorney-General* against *Scott*, Forest. 138, that was not followed, because it would shake so many settlements. In *Casborn* against *Inglis*, or *Scarfe*, 1 Atk. 603 (see *Dixon* v. *Savile*, 1 Bro. C. C. 326), Lord HARDWICKE says: "How it came to be so settled at first, is a different consideration, and difficult to find out a sound reason for: but now we must adhere to it as established." The dissatisfaction has not been from allowing the tenancy *per* curtesy, but from denying the tenancy in dower, of a trust. And, if an alteration was to be introduced, the best way to set it right would be to allow the wife dower of the trust estate. Twenty years ago I imbibed this principle, that the trust is the estate at law in this Court, and

governed by the same rules in general, as all real property is, by imitation. Every thing I have heard, read or thought of it since, has confirmed that principle in my mind.

In *Banks* and *Sutton*, 2 P. Wms. 700, Sir J. JEKYLL boggled at imitating the legal right (which depends upon an actual seisin of the freehold during the coverture) and of applying it to an equity of redemption. In the eye of this Court Lord HARDWICKE thought, the equity of redemption is the fee-simple of the land. It will descend, may be granted, devised, entailed, and that equitable entail be barred by a common recovery. This proves it is considered as such an estate, whereof in consideration of this Court there may be a seisin; for without such a seisin, a devise could not be good of a trust. He who has the equity of redemption is considered as the owner of the land. He says. 't is a settled right in equity, which a man can't come at, but by *subpœna*; — That the husband and wife being in perception of the rents and profits during the coverture, were seised of a freehold by imitation of the law. The allowing tenancy *per* curtesy of a trust is founded on the maxim, that equity follows the law; which is a safe as well as fixed principle; for it makes the substantial rules of property certain and uniform, be the mode of following it what it will.

So that I take it by the great authority of this determination, on clear law and reason, *cestuy que trust* is actually and absolutely * seised of the freehold in consideration of this [* 162] Court: and therefore that the legal consequences of an actual seisin of a freehold, shall in this Court follow for the benefit of one in the *post*.

To conclude this head. An use or trust heretofore was (while it was an use) understood to be merely as an agreement, by which the trustee and all claiming from him in privity were personally liable to the *cestuy que trust*, and all claiming under him in like privity. Nobody in the *post* was entitled under, or bound by the agreement. But now the trust in this Court is the same as the land, and the trustee is considered merely as an instrument of conveyance; therefore is in no event to take a benefit; and the trust must be co-extensive with the legal estate of the land, and where it is not declared, it results by necessary implication; because the trustee is excluded, except where the trust is barred in the case of a purchaser for valuable consideration without notice. The trustee can transmit no benefit; his duty is to hold

for the benefit of all who would have been entitled, if the limitation had not been by way of trust. There is no distinction now between those in the *per* and *post*, except in that case of dower, which is founded not upon reason but practice. As the trust is the land in this Court, so the declaration of trust is the disposition of the land. Therefore an essential omission in the legal disposition shall not destroy the trust. As where trustee dies before testator, or is incapable; upon the old notion of an agreement, a *subpœna* could not lie against the heir, where the legal limitation was void. The grounds why the lord by escheat neither took, nor was subject to, an use don't now subsist: the principles upon which the question must now be argued have no relation to it, whichever way it ought to be determined. Or rather, none of those principles were made or could ever be considered in the law of uses; for this Court never interposed in cases, where [* 163] * the claim was in the *post;* and there in Edw. IV.'s time, 't is taken for granted that the lord shall not have it. 'T is a fixt principle that he shall not, because he is in the *post.*

II. This brings me to consider the nature of this right by escheat.

It has been truly said; in the beginning of feodal tenure this right was a strict reversion. The grant determined by failure of heirs; the land returned as it did upon the expiration of any less temporary interest. 'T was no fruit, but the extinction of tenure (as Mr. Justice Wright says), 't was the fee returned. This definition holds equally, whether the investiture was to special or general heirs; for originally, by feodal law, tenant could not alien in any case without the lord's concurrence. The reversion took effect in possession for want of an heir, unless the lord had done or permitted what in point of law amounted to a consent to a new investiture or change of his vassal. This is the meaning of the distinction taken in the books, which mentions that nothing escheats where the tenant is in by title. Any man in possession by being tenant to the lord could not strip him of the reversion. Hence it followed, that the land returned in the state, in which it was granted, free from incumbrances. As soon as a liberty of alienation was allowed, without the lord's consent, this right changed its name. It became a sort of caducary succession. Thence the lord called *tanquam hæres*, Craig, 1. 2, c. 2, § 12–15. Lord takes as *ultimus hæres*, &c. The resemblance of the lord's

right by escheat to the heir's by descent does not hold throughout; and therefore the lord by escheat is (in Co. Litt. 215 b) with accuracy considered as assign in law. He took no possibility, or condition, or right of action, which could not be granted. He could not elect to avoid voidable acts, as feoffment of an infant with livery. But every right preserved to the heirs, which could be granted, goes to the lord by escheat. As if tenant makes lease for life, * reserving rent to him and his heirs, [* 164] the rent will go to the lord as well as the inheritance. *Thruxton* against *Attorney-General*, 1 Vern. 340; the benefit of a trust term in an estate was decreed to the King by escheat; for, says the Court, the term goes with the inheritance by express limitation of the parties. The inheritance is escheated in the same manner, as if it had descended or been granted. Where the former owner has made no disposition, or left no heirs by blood, it must go somewhere. 'T is arbitrary, before settled; when settled, 'tis as favourable as any other positive rule. From the original nature of the tenure, the lord took it. In personal estates, which are allodial by law, the King is last heir where no kin; and the King is as well entitled to that, as to any other personal estate. This brings me to the third head.

III. Whether, failing heirs of the trustee, the King must not, in this case, have taken the estate in a Court of equity, subject to the trust.

This seems, in the present case, to be a very material consideration. For, if the King is not to be subject to the trust, there is no colour that he should claim the trust by escheat, though barely being in the *post* seems no objection now. That land escheated should be subject to the trust, seems to me most consistent with the King's right; whether the escheat be considered as a reversion as it once was, or a caducary possession *ab intestato* as it now substantially is. Considering it as a reversion. The King, as a reversioner, could not claim it in this case, but under the deed of 1718, as the investiture under which his tenant died seised. There is no other way of showing the trustee to have been his tenant at all: The possession was with Mrs. Harding to the time of her death. Every alienation of a fee has some investiture. The land descends in the alienee's blood, and when that fails, the lord takes. But the lord can't claim against his own * grant: He is bound by the terms of the aliena- [* 165]

tion. If Mrs. Harding had made a will, how could the King claim against the deed made by the grantee to empower her to make a will? The King could set up no right by escheat to defeat the execution of that power. But one case, in which a possibility of reverter could remain after a fee granted: And that is, where lands are granted to a corporation; if corporation dissolved, the lands return to donor or his heirs, 6 Vin. Abr. Corporations (H. III.), pl. 9. The King can't claim by escheat contrary to the terms or conditions, which the tenant held under. Two things; — 1. That there is equity against the King. 2. That the lord is bound as much in a Court of equity by the equitable terms of his tenant's investiture, as he is in a Court of law by the legal terms.

Taking the estate as a caducary possession, the lord can only take it *ab intestato* absolutely. So far as the tenant has not disposed of the estate, he can take, and no farther. The tenant's power of disposing is absolute, without the lord's privity, without any determined form of conveyance. The trustee has by his declaration of trust in 1718 made a valid conveyance of his trust in equity; and therefore a Court of equity cannot, I apprehend, suffer the land to go as undisposed of by the tenant, because, in the consideration of this Court, there is a valid disposition made by him. But even at law the escheat could not be free from the trust. The statute of frauds makes a trust estate assets in the hands of the heir of *cestuy que trust* (see n. (1) *ante*, 645); consequently, for that purpose the estate descends to the heir. In 18 Car. II. before trusts were put on the rational footing they now are, the apprehension of the Judges was, that the lord by escheat ought to be subject to the trust: Lord BRIDGMAN thought so.[1] In 1702, Sir J. TREVOR, upon the same principle thought so, in *Eales* against *England*, Prec. Ch. 202. Yet Sir J. TREVOR, certainly knew there could be no escheat of an use. If it was not to be subject to the trust, I think the inconvenience would be very great; and where we are not tied down by any erroneous opinions, which have prevailed so far in practice, that pro-
[*166] perty would be shook by an alteration of *them, argu-

[1] In *Geary* v. *Bearcroft*, Carter, 67: but it appears that that report is erroneous; see 1 Eden, 230, n. (*a*), 2 Fonbl. Eq. 170, n. (5th ed.). See also *Stevens* v. *Bailey*, Nels. 107, and 3 Cruise Dig. *tit.* xxx, s. 39, p. 476; 1 Cruise Dig. *tit.* xi, c. ii, s. 15, p. 365, and n. (1), *ante*, 631.

ments of convenience and inconvenience are always to be taken into consideration. All the great estates of this kingdom almost are now limited in trust. The trustees are men of business probably concerned for the family, and at a little distance of time their pedigrees are not to be traced. And if the surviving trustee was to die without heir, 't would be thought very hard, if that should lose the estate. But I rest upon this: It seems to me a contradiction in terms, that he who has no claim but *ab intestato*, where the owner has not disposed of his property, should take contrary to and in prejudice of his disposition. The heir of blood might as well claim the estate in contradiction to the equitable charge. An escheat is now as much a title under the former owner, by consequence of his former seisin, as the heir. Why else shall the lord be deemed the assignee or heir of the tenant? I think the lord may be considered as much his heir, as his heir by blood, and is as much liable to all the dispositions. Suppose a devise ineffectual in law, but good in equity; would the estate escheat free from the trust? Suppose a devise to a trustee, in trust to pay debts and legacies, and trustee dies without heir, *Reeve* v. *A. G.* 2 Atk. 223; are all these charges to be gone, and not carried into execution, and the estate to escheat free from 'em? To bind the lord, there is no distinction between voluntary and meritorious limitations. The lord by escheat must, in consequence of the tenant's disposition, be a trustee for all or none.

But objections have been taken to subjecting the escheat to trusts.

Objection 1. From copyholds and the customs of manors. There the lord can't be subject to trusts, but takes the estate on the death of the tenant without heir. *This [* 167] objection proceeds from not distinguishing between freehold and copyhold manors. In all manors, where admission is necessary to alienation, the escheat is absolute, the lord's consent being still necessary. In those copyholds, the lord is not bound by debts, alienation, or trusts; they are all void against him. But if he consents to a condition or trust on the Court-roll, then he is bound by it, for he can't claim against his own act. But in freeholds, the form of his concurrence not being necessary, he is always considered as much bound, as if he was a party to the deed of alienation which makes the trust; because the power which the tenant now has by law, is equivalent to the lord's consent to the grant, when it was a strict reversion.

Objection 2. If the trustee is not to be considered as tenant without regard to the trust, in the case of escheat; then the lord can't be permitted to consider him as tenant, in case of heriot and relief. *Brown's Case*, 1 Vern. 441. If the objection is applied to copyhold manors, it receives the same answer. The roll shows the tenure. If applied to freeholds held of the King or mesne lords, the case of heriots and reliefs is of no great consequence; but however [the lord] can't be hurt; for a conveyance in trust would be void, and fraudulent against the lord, in respect to them. The *cestuy que trust* is the visible possessor. And I should think in the present case, if a heriot was due from the tenant, the deed of 1718 is void against the lord; in respect of heriots and reliefs. See how it stands. Mrs. Harding kept possession till her death. The lord could not know of this secret deed made by her in trust for herself, or where the deed was. And she would be considered as his tenant. But suppose he knew it, and chose to consider the trustee as his tenant at law: I think he may do it in all cases, where the trustee is party to the conveyance, and has accepted the estate; and then no colour for Court of equity to interpose. The trustee can't object, because by his own agreement he has made himself liable to the burdens annexed to the estate; and he can't be prejudiced, as the estate is a pledge in his hands [*168] to reimburse him. And where *trustee is the visible tenant, the lord can only consider him as tenant. The mortgagee in fee would be tenant to the lord in respect of his heriots and reliefs, and he could not come on the mortgagor for 'em, while the estate remained unredeemed. But where an escheat happens, it does not follow but that the Court may interpose to substantiate the agreement of the parties, though they do not when there is no agreement.

Object. 3. 'T was said, a mesne lord, by death of mortgagee without heirs, can take the escheat in preference to the personal representatives, who are entitled to the money, and in opposition to the mortgagor, who is entitled to the redemption. This would be glaring injustice. *Pawlett's Case* (*ante*, p. 632) seems settled on a true foundation, and this precise objection was in terms overruled. Lord Hale says the tenure is extinguished, but it is overruled. Another answer that occurs, that the lord may continue the tenure by accepting the *cestuy que trust* as tenant. If the lord admits his title, there will be no escheat. The King and the lord together may revive the

tenure. Another answer that occurs is, that if the tenure was destroyed, any benefit arising from it to the lord might be secured by a decree to hold and enjoy. The last answer is, that if it should extinguish the tenure, the law never thought that sufficient to abridge the tenant's absolute right of alienation. So in the case of a grant in mortmain. It is said, that the King must take it free from the trust, because the King can't re-convey it; but this would hold equally in the case of mortgages, and the purpose might be answered another way, — there might be a decree to hold and enjoy. If it was so, 't is strange to say that therefore he shall lose the whole estate, and have no relief at all.

IV. If what I 've said be right, little is left for me to say upon this head. If lord takes an escheat as heir or assignee in law, then the King is within the express declaration of trust, which is to Elizabeth Harding, her heirs and assigns. If [the] King would take it subject to trusts, he must of course be *en- [* 169] titled to an equitable estate by escheat. He can be subject to the trust on no other ground, than that *cestuy que trust* (the true owner in the consideration of a Court of equity) dying *sans* heir, the escheat is to arise; for else, 't would be a fee on a fee. It would be to *cestuy que trust* and his heirs, and for want of such heirs, to the trustee and his heirs, which is void in law, because of the lord's escheat. If the trust be the land, Mrs. Harding died seised of the old use of that land. The King's right by escheat stands on the same ground, as every other legal right; it arises out of the seisin. And Lord Bacon says, they who come in by justice and consideration of law, are of all others most favoured. On that principle stands the forfeiture by escheat, the tenancy by curtesy, and in dower. 27 Hen. VIII. expressly recites this grievance, and a wise plan in equity is established by considering the trust as the lands, to avoid every inconvenience that arose from an use.

As to *Sir George Sandys's Case* (*ante*, p. 628) it has great weight; but I can't agree, when a trust descended to the heir, that the heir should take the land free from the specialty debts of the ancestor; there the trustees, the heirs of blood to the felon, and Sir R. Freeman, were all in the same interest. If they had been adverse, perhaps it might have been argued, that it resulted to Lady Sandys, the daughter of the heir of Sir Ralph. The trustee could take nothing to himself against the former owner, and his heirs. The circumstances of that case were compassionate. If the King had

restored the estate to the family, and the trustee had insisted on keeping it, 't would have undergone a different examination from what it did.

The principal reason is, that escheat is for want of a tenant. A trust is like a rent-charge: when it fails, it extinguishes in the estate, for the benefit of the owner. [That] there can be no escheat of an use (the second reason) seems incorrect; the escheat is for want of a tenant; the lord being assignee here is a tenant at law. It does not prove but that there may be an estate in the trustee.

[* 170] * It is said, the escheat is in lieu of services. True, but it does not conclude but the tenant may be a trustee. There is a declaration, that trust does not extinguish for the benefit of the trustee, but of the true owner; which is clearly settled. The reasoning, with regard to those who claim in the *post*, does not conclude one way or other; but, in fact, the true foundation of trusts was not then laid. Lord HALE himself had held, a trust descended to the heir was not liable to debts; he went on a principle that failed, and whatever is built upon it, fails with it.

It is a matter of importance, to settle on what principles the present determination is made; because many consequences may hereafter be drawn from it. If mortgagee in fee dies without heir, 't is now settled the estate escheats, subject to the mortgage, and the money must be paid to the personal representative. But suppose mortgagor dies *sans* heir, shall the mortgagee hold the land absolutely; if he demands the money of the personal representative, shall he have the money and the lands too? If not, to whom shall he convey it? If to the King, then a right of escheat followed in equity by analogy. I don't say on any ground established, what the determination must be in that case. It must be upon reasoning, not upon principles yet settled. Whether it may not be reasonable under particular circumstances, can't be questioned. This Court does not act arbitrarily, but by a system of equity, which is as much the law, as that on the other side of the Hall.

In case of felony, shall trustee hold against the felon, if pardoned, or against the heir of the ancestor executed, although the King would restore it? I can't answer it upon principles: I can find no clear and certain rule to go by; and yet I think equity should follow the law throughout. Yet I am satisfied it must

shock common sense, that the heirs of an attorney or the trustee should take the estate from the family of the owner, the King, and every body else. The least analogy to any legal right ought to be preferred to the trustee, who is the mere form and instrument of conveyance. * *Thruxton* against *Attorney-* [* 171] *General*, 1 Vern. 340, shows a right by escheat is a ground to come into equity against a trustee, to pray conveyance. *Palmer* against *Attorney-General* before Lord NOTTINGHAM; after stating the case, he concludes — "Note, if a forfeited mortgage in fee escheat to the King, yet mortgagor's equity of redemption is not lost, though the King comes in the *post.* If then there be equity against the King's escheat, why should [there] not be equity for it?" — And so he orders a case to be made and argued, and decreed, that there was an equity for the King's escheat. The exclusion of the trustee from all benefit was surely in the contemplation of the parties. To determine otherwise would be to contradict the intent of the deed of 1718. The death of *cestuy que trust sans* heir was not at all thought of. They have declared the trusts, and that there should be no other: Whatever results necessarily from the agreement, was the intent of it. The holding to other purpose than on the trusts, could never be intended; he is to hold to no other purpose.

It has been said, the declaration and agreement can't extend to the lord, for that the trustee holds it subject only to the trust created by or arising from the deed: And if so, here the lord takes an interest, which could [not][1] have been even given by express limitation; for 't is said that the trust could not be limited to the lord on failure of heirs to Mrs. Harding, because it would be a fee on a fee, and therefore void; *Gardner* v. *Sheldon*, Vaugh. 270. But I apprehend, that the limitation of a trust to the lord, failing heirs of Mrs. Harding, would have been good, because such a limitation would have been good in law, and is implied in the conveyance of every legal fee.

Upon the whole, I think the King is entitled to a decree. But if I am wrong in the principles I go upon, or (as is possible) in the application of them — if the deed of 1718 has conveyed a new fee, and changed the line of heirs, upon which the escheat was to arise in this Court as well as at law; then * as [* 172]

[1] The word *not* is in 1 Eden, 237, and in Serjeant Hill's MS., and the sense requires it.

between the heir *ex parte paterna* and the trustee, I think the heir is entitled to a preference and a decree.

Before 27 Hen. VIII. if a man conveyed to use of himself and his heirs, the Chancery thought, that no change of the seisin was intended by such conveyance. And they decreed the estate to go as the old use would. The Court never decreed against estates in the *post*. The trust should ensue the nature of the use executed. But if settled, that the lord shall not be entitled by escheat, as if the old estate continued, and then a new question arises between the heirs of the old purchase and the trustee: Elizabeth Harding was seised *ex parte paternâ;* and whether she has acquired a new fee, can only be disputed by the lord of the fee. Co. Litt. 12. The feoffee can't restrain the rent or condition to the paternal line, see *ante*, p. 619, and *post*, p. 661. Suppose trustee covenanted to convey to Mrs. Harding or her heirs, he can't say that it is restrained to her heirs *ex parte paternâ*. If he had reconveyed to her in this case, it would have descended to the heirs of purchase, and consequently, in the event that has happened, to the maternal heir. And there 's no instance where a trustee can, by delaying a conveyance, create a benefit to himself, though he is never called upon so to do. When the blood of the grantee fails, the lord is entitled. In justice to the maternal heir entitled under the old investiture, it was, before stat. H. VIII. and is now presumed in equity, that the owner meant no alteration of the old seisin by the conveyance in trust, which left the estate and ownership as it was. So that the conveyance leaves the estate just as it was. I think the reason should not be confined to the heirs under the old investiture, but should be extended to the lord. But if the lord is out of the case, there seems no reason to confine it to the paternal line. As between the heir and the trustee, as between Mrs. Harding and her trustee, the deed of 1718 is an original act, and the trustee's title is wholly derived under this deed. And every reciprocal engagement on his part to Mrs. Harding and her heirs, is confined to that deed.

[*173] Both lines are of her blood, and within the term heirs in the *agreement, and within the express terms of his undertaking, and not only by necessary implication. But the trustee is intended to take no benefit himself, from the natural affection which Mrs. Harding may be supposed to have for all the heirs of her blood. There is no case, that the feoffee

shall exclude the heirs by purchase, for his own benefit. No saying in the books before or since 27 H. VIII. to this purpose; and in my apprehension, it is as much against conscience as law, upon the reciprocal agreement. To establish a trust for his own benefit and to restrain his engagements made to Elizabeth Harding and her heirs to the paternal line, seems unreasonable.

With regard to the preliminary points, they are so clear, I shall say nothing upon them.

I am sorry to have taken up so much time. I thought it necessary to do it, as I differ from so great authority.

Lord KEEPER. — There is one objection, and two claims, upon which I am now to give my opinion. I agree with the Lord Chief Justice and his Honour, as to the objection.

As to the other points, I think myself very much obliged to Lord Chief Justice and his Honour, and return them my thanks for their learned assistance, and their free and unreserved communication of their sentiments to me, during all the time that this matter has been under consideration.

I. First, I shall take notice of the claim of the Crown, because several of the arguments I shall make use of on that, will tend to support the opinion I shall give on the other claims. The question on the information is, whether the *cestuy que trust* dying without heirs, the trust is escheated to the Crown, so that the lands may be recovered in a Court of equity by the Crown, or whether the trustee shall hold them for his own benefit.

(States the case). * On 11 January, 1718, Mrs. Harding [* 174] conveys to trustees (of whom Sir. F. PAGE was the survivor) the lands in question, in trust for Mrs. Harding, her heirs and assigns, to the intent that she should appoint such estates thereout, and to such [persons], as she should think proper. Mrs. Harding dies without making any appointment, and without heirs *ex parte paternâ*. The information charges, that the trustee took no benefit, but only for Elizabeth Harding, and to be subject to her appointment; and that she being dead *sans* heirs on the father's side, and having made no disposition of the estate, that Sir. F. PAGE could take no estate for his own benefit by the deed or the fine, but takes it for the benefit of his Majesty, who stands in the place of the heir, and that the premises are escheated to his Majesty. The question therefore is entirely a question of tenure, and not of forfeiture.

No. 1. — Burgess v. Wheate, 1 Wm. Black. 174, 175.

I shall consider, first. The right of lords to escheat at law. Secondly. Whether they have received a different modification in a Court of equity. Thirdly. The arguments used in support of the information; and from the whole draw this conclusion, that the Crown has in this case no equity.

1. I shall consider the law of escheat, as settled by the municipal writers in the law, and reporters: and shall not regard what the law was in other countries; as they seem founded and calculated for empire and vassalage, to which I hope in this country we shall never be subject. I will just give a specimen of the feodal law. Craig, 504. *Causæ Amissionis Feudi:* These causes are, incestuous marriages, parricide, fratricide, friendship contracted with the lord's enemies, revealing the lord's secrets, if they affect his life or reputation, outlawry not reversed, and all other causes in the discretion of the *prætor.* — I cite this, to relieve me from the doctrine of the feudists. The legal right of escheat with us arises from the law of infeoffment to the tenant and [* 175] his heirs, and then it returned * to the lord, if the tenant died without heirs. The extension of the feoffment from the person of the tenant to the heirs special of his body, and then to his heirs and assigns, is accurately traced in a treatise of tenures by a learned hand;[1] — this reduces the condition of the reversion to this single event, viz., *Ob defectum tenentis de jure.* F. N. B. 338; A writ of escheat lies where tenant in fee of any lands or tenements holds them of another, and the tenant dies seised[2] without heirs general or special, the lord shall have the land: because he shall have it in lieu of his services. The books are uniform, that in the case only of tenant's dying without heir, the escheat took place. As long as tenant or his heir, or, by his implied assent, another continued in possession by title, that prevented escheat. The law had no regard to the tenant's right to the land, but in right of his seisin. All these instances show that

[1] Sir M. Wright.

[2] "The words of F. N. B. are so: but *vid.* F. N. B. 338 (C), in these words: — 'And if the tenant be disseised, and afterwards dieth without heir, &c., it seemeth the lord shall have a writ of escheat, because his tenant died in the homage.' Contra, 32 H. VI. 27 a, pl. 16, and so cited in Com. Dig. Escheat (B. 2); and the distinction there is, that if the tenant be disseised, the lord may enter, but not have a writ of escheat: but if the disseisor had died seised, the lord could neither enter nor have a writ of escheat, *ib.*: and it seems, by the reasoning of the Court, 32 H. VI. 27 a, that the lord can in no case have a writ of escheat, except where his entry was lawful; *ibid.*" MS. Serj. Hill.

where there was a tenant actually seised, though he had no right to the tenements, and though the person who had the right died without heirs, yet the escheat was prevented. For if the lord has a tenant to perform the services, the land cannot revert in demesne. Roll. Abr. 816. *Whittingham's Case*, 8 Co. Rep. 42 b. 7 Hen. IV. Heir of Disseisor. 1 Inst. 268 b, Feoffee of Disseisor. Upon these cases I would observe, that the lord's consent had nothing to do with establishing the right of the tenant's being duly seised, because in every one of these cases they all come in without the lord's consent; unless it may be said, that the lord is a virtual assenter, as well to the disseisins as the legal conveyances. And then, if that be so, it would operate to the establishing the right of the trustee here, who would say he is entitled under a conveyance in law, by the very consent of the lord; which is a stronger case than a disseisin. From these cases and authorities it must be allowed to be settled, that the law did not regard the tenant's want of title, as giving the lord right to escheat.

*2. The next consideration is, whether a Court of [*176] equity can consider it in a different light. Now when the tenant did not die seised, and a proper legal tenant by title continued, and consequently, the lord's seignory and services continued; can this Court say to the lord, Your seignory is extinguished, and to the tenant, Your tenancy is so too, though both are legal rights now subsisting at law? In consideration of uses with regard to escheats, equity has proceeded on the same principle as the law, where there was a tenant of the land that performed the services. And I don't find this Court had any regard to the *merum jus* of the tenant. Now the reason why there was no escheat on the death of *cestuy que use* in equity seems to be this, (and it is a reason equally applicable to uses and trusts), that the Court had nothing to issue a *subpœna* upon, no equity, nothing to decree upon; and every person must bring an equity with him for the Court to found its jurisdiction upon. It seems to me he could have no equity in the case of an use, or as owner of a trust, for this plain reason: an use before the statute could not be extended farther than the interest in the estate which the creator of the use could have enjoyed: as if the creator of the use had a fee-simple in the land, he could take back no more interest in the use, either declared or resulting, than he had in the land: if he makes a feoffment, and declares no uses, it results to him in fee, which

is to him, his heirs and assigns. The consequence is, that the moment he dies without heirs or assigns, there was no use remaining. How then can you come here for a *subpœna* (whether he took back the same or a different use) to execute an use or trust which was absolutely extinct? That seems to me the plain and substantial reason, why in this case (whether you call it an use or a trust) there was no basis on which to found a *subpœna*. Lord Chief Justice's system is very great and noble, and very equitably intentioned. Such a system as I should readily lay hold of upon every occasion, if I thought I could do it consistently with the rules of law. . . .

[179] A difference was attempted to be made between uses and trusts. But to try if there is or is not any difference between them, the best way is to define both: as, in order to show the difference between one thing and another, 't is usual to define the [*180] one and the other, and by comparing * the definitions find the difference. Finch, 1 2, c. 22, fo. 22 b, says, an use is, where a man has any thing to the use of another upon confidence, that the other shall take the profits. He who has the profits, has an use. The other books say an use is neither *jus in re* nor *ad rem*, &c. Now what is a trust? A confidence for which the party is without remedy, but in a Court of equity. Lord Chief Justice does not state any difference in the metaphysical essence between an use and a trust, but that there was a difference in the law by which the one and the other was directed; and I think there is no difference in the principles, but there is a wide difference in the exercise of them. It was as much a principle of this Court, that the use should be considered as the land, or as imitating the land, formerly as now; though the rules were not carried formerly so far, nor the reasoning nor directions (when they were less understood) as at present. To give a [familiar] instance: the elements and principles of geometry were the same in Euclid's time as in Sir Isaac Newton's, though in the latter's time the use of them was much enlarged. It was said, the difference consists in this: that equity has shaped them much more into real estates, than before when they were uses. As now, there is tenancy *per* curtesy of a trust; they may be entailed; and those intails barred by a recovery. But why? Not from any new essence they have obtained, but from carrying the principle farther, *quia æquitas sequitur legem:* for, as between the trustee and the *cestuy que trusi*

this Court had jurisdiction; and I think they should have equally extended in this Court the rules and principles of uses, as well as trusts. This therefore was the effect of the equitable jurisdictions growing to maturity. Lord BACON says, they grew to credit and strength by degrees. He says, an use is nothing but a general trust, where a man will trust to the conscience of another, rather than to his own estate and possession. . . .

'T was said, if a mortgagor die without heir, shall the [184] mortgagee hold the land free? (I answer, shall it escheat to the Crown?) No, because in that case the lord has a tenant to do his services, and that is the whole he is entitled to in law and equity. What the justice might be between the mortgagee and executor, I shall not trouble myself about. I think the Crown has not an equity on which to sue a *subpœna*.

As to the claim of the heir *ex parte maternâ*, the estate is conveyed and the use executed in Page and Simons, and their heirs. A declared trust upon it to Mrs. Harding, her heirs and assigns, with a general declaration, which in my opinion operates no more than this, that, as between the *cestuy que trust* and trustees, they shall have the trust to no other use or purpose. Upon this, I concur with the Judge's certificate; that if no estate had passed to the trustee, or if that deed had never existed, the inheritance could not have descended to the heirs on the part of the mother. . . .

The consequence is, that the heir *ex parte maternâ* can- [186] not be entitled to any part of the estate, except the mill and closes under the deed of 1713.

Original bill dismissed as to all the rest, and the information on the part of the Crown dismissed totally.

Gallard v. Hawkins.

27 Ch. D. 298–308 (s. c. 53 L. J. Ch. 834; 51 L. T. 689; 33 W. R. 31).

Copyholds. — Trustees. — Customary Heiress of Devisee of Surviving [298] *Trustee. — Escheat. — Mandamus.*

A testatrix who died in 1851 devised her copyhold property to a trustee in trust to pay the rents and profits to J. King for life, and after her death to certain charitable purposes which were void under the *Mortmain Acts*. The testatrix died without heirs. The trustee named in the will refused the trust, and two trustees were appointed by order of the Court in 1853, who were admitted upon the court rolls to hold upon the trusts of the will. One trustee died in

No. 2. — Gallard v. Hawkins, 27 Ch. D. 298, 299.

1873, and the surviving trustee, who died in 1887, devised his trust estate to two trustees, neither of whom was admitted to the copyholds. The survivor of these trustees made no devise of his trust estates, and died leaving his youngest daughter, Janet Hawkins, his customary heiress according to the custom of this manor. The tenant for life under the will died in 1883 : —

Held, that Janet Hawkins who claimed by escheat and under a resulting trust, was entitled to be admitted as tenant to the copyhold property for her own benefit as against the lord of the manor.

This was a special case.

Catherine Parkes, late of Brighton, was on the 30th of April, 1833, admitted tenant to certain copyhold property known as "Dial House," and holden of the manor of "*Hova Villa et Hova Ecclesia*," to hold the same to her and her heirs and assigns for ever by copy of Court roll. The said Catherine Parkes by her will, dated the 5th of May, 1851, gave and devised to Thomas Hatchard all her copyhold messuage or tenement, garden, and premises situate in Hove, to hold the same unto the said Thomas Hatchard, his heirs and assigns for ever, according to the custom of the said manor, but upon trust out of the rents and profits thereof to keep the premises in repair, and to pay other incidental expenses, and to pay the residue of the rents and profits to Jane King for her life, and after her death then upon trust to pay the rents and profits to Catherine Callander for life or until her marriage, and after her marriage or decease the testatrix gave the rents and profits of the said messuage or tenement to certain charitable purposes, which were admitted to be void under the Statute of Mortmain.

[* 299] * The testatrix died in July, 1851, being then seised of the said copyhold premises for a customary fee simple estate therein for her own benefit absolutely.

By an order of the Court of Chancery, dated the 27th of June, 1853, made on the petition of Jane King, to which the lords of the manor were parties respondents, Edmund King and Henry King were appointed trustees of the will in substitution of Thomas Hatchard, who had refused to accept the trusts thereof, and in pursuance of the said order, on the 3rd of March, 1863, the copyhold premises were surrendered to the lords of the manor to the use of Edmund King and Henry King, their heirs and assigns, upon the trusts declared by the will, and on the 5th of March, 1863, the said Edmund King and Henry King were admitted tenants of the manor according to the custom and effect of the sur-

render. Edmund King died in February, 1873, and Henry King died on the 30th of April, 1877, leaving his son Charles King his customary heir him surviving. Henry King by his will appointed his brother Charles King and William Hawkins his executors and trustees, and he devised all estates of which he was possessed as trustee or mortgagee unto and to the use of his said trustees, their heirs, executors, and administrators respectively, and to be disposed of so far as he was beneficially interested as part of his personal estate for the purposes of his will.

Neither of the trustees, Charles King or William Hawkins, was admitted tenant to the copyhold premises, nor was Charles King, the son and customary heir, ever admitted.

Charles King the brother died in January, 1880, and William Hawkins died in March, 1880.

William Hawkins made a will, but it contained no devise of trust estates. He left Ann Hawkins his widow surviving him, and she was a defendant in this action in respect of any claim she might have for dower or freebench out of the premises. He also left six daughters and no other children. The defendant Janet Eliza Hawkins was the youngest of such children, and as such she would be the customary heiress of William Hawkins as regards any copyhold estates of his, held by him of the said manor at the time of his death. Catherine Callander, the second
* tenant for life under the will, died in the lifetime of the [* 300]
testatrix, and Jane King, who in April, 1853, married Henry Barnard, survived her husband, and died on the 22nd of March, 1883. Catherine Parkes, the testatrix, left no heirs whatever who were entitled to succeed to the said copyhold property.

The plaintiffs, George Gallard and William Williams, were the lords of the manor; the defendant, Janet Eliza Hawkins, as such customary heiress, claimed now to be admitted to the copyhold tenements for her own benefit; the plaintiffs as such lords of the manor refused to grant such admittance.

The question for the opinion of the Court was, whether under the circumstances Janet Hawkins as such customary heiress was entitled to be admitted for her own benefit as against the plaintiffs, the lords of the manor, to the said copyhold premises.

Cookson, Q. C., and A. Brown, for the plaintiffs: —

We claim as lords of the manor of Hova to be entitled by escheat to the property which belonged to the testatrix, Catherine Parkes,

who died without heirs, and without having made any valid disposition of her copyhold estate. The principles upon which the question turns are laid down very clearly in Watkins on Copyholds, Vol. i. p. 277, n. It is there stated: "In case the lord consents to a condition or trust on the court rolls, then he will be bound by it if the tenement falls in; for he cannot claim against persons whose title he has in effect admitted (1 Eden, 177). On the other hand, if the *cestui que trust* of copyholds die without heirs, it is not clearly settled whether the estate shall escheat to the lord, or enure to the benefit of the trustee discharged of the trust. The Judges differed in opinion very materially on this point in *Burgess* v. *Wheate*, 1 Eden, 177, and the decision itself seems disapproved by subsequent writers (see 1 Belt's Sup. 368). Thus much, however, has been determined against the trustee, that if A. devise copyhold land (duly surrendered) to B. and his heirs, in trust for C. and his heirs; upon the death of C. without heirs, the heir of the trustee has no equity to compel the lord to admit him." And in [* 301] support of this proposition the case of *Williams* v. * *Lord Lonsdale*, 3 Ves. 752 (4 R. R. 149), is cited. Then at p. 342 of Watkins there is this note: "It may be worthy of observation, that admittance alone will not operate to confer any estate or a title, if the surrender and custom do not combine." Where a person has a *primâ facie* legal title which is disputed, then the Court of Law will not grant a *mandamus* to the lord and steward of a manor to admit him, in order to enable the right to be tried, though equity has refused to compel the lord to admit him for want of his showing an equitable title to the property: *Rex* v. *Coggan*, 6 East, 431 (8 R. R. 509). If more than one person should claim then they will all be admitted, so that they may try the rights as between themselves, but if only one comes, he is admitted, and he so far has a right as against the lord till the others come and claim against him, and where the lord of a manor admits a tenant on the trusts of an indenture referred to in the surrender he is to be considered as consenting to those trusts, and is bound by them upon the death of the trustee without an heir. The lord cannot refuse to admit any number of adverse claimants, he having no business with their rights as between themselves. This is established by the cases of *Rex* v. *Hexham*, 5 Ad. & E. 559; *Garland* v. *Mead*, L. R. 6 Q. B. 441; *Reg.* v. *Garland*, L. R. 5 Q. B. 269; and *Attorney-General* v. *Duke of Leeds*, 2 My. & K. 343.

No. 2. — Gallard v. Hawkins, 27 Ch. D. 301, 302.

In this case there is no trustee upon the court rolls, and there is no *cestui que trust* who has a right to claim; the estate therefore escheats to the lord.

[They also cited *Weaver* v. *Maule*, 2 Russ. & My. 97; *Paterson* v. *Paterson*, L. R. 2 Eq. 31; *Doe* v. *Vernon*, 7 East, 8; Scriven on Copyholds, 6th ed. p. 127.]

Elton, and Raven, for Janet Eliza Hawkins: —

We submit that the defendant being the customary heir of the devisee of the last surviving trustee is the person who is entitled to be admitted as the copyhold tenant, and that she is entitled to hold for her own benefit. When the trustees were appointed by the Court, and were admitted, the person appointed surrendered upon the trusts of the will, and the rights of the trustees under *the will could not be diminished. They were ad- [*302] mitted to all the benefits they would have under the will. If when the tenant for life under the will died, there had then been trustees on the rolls of the manor they could not have been disturbed, and the lord would have had no right of escheat. The only power the lord could have had would have been to inquire into the legal rights of the persons on the rolls, he had nothing to do with the trusts upon which they held the property. While the tenant for life was in existence she might have required the admission of other persons as trustees for her. The decision in *Rex* v. *Coggan*, 6 East, 431 (8 R. R. 509), shows that a *mandamus* will lie to compel the lord to admit a person to a copyhold tenement who has a *primâ facie* legal title; and in *Attorney-General* v. *Sands*, 3 Ch. Rep. 36, it was held that the lord could not claim by equitable escheat. The lord could only claim by escheat *propter defectum tenentis*, although a Court of Equity would not interpose as between the lord and the heir of a trustee claiming to be admitted when the *cestui que trust* died without an heir, as in *Williams* v. *Lord Lonsdale*, 3 Ves. 752 (4 R. R. 149), yet a Court of Law would in such a case compel the lord to admit the heir of a trustee to enable him to try his title, and when so admitted the lord could have no equity paramount to such heir.

[They also cited Cope's Cop. Sect. 41; *Onslow* v. *Wallace*, 1 Mac. & G. 506.]

Wolstenholme, and Ralph Griffin, for the widow of William Hawkins, who was made a party in respect of any rights which she might have to dower or freebench.

No. 2. — Gallard v. Hawkins, 27 Ch. D. 302, 303.

Pearson, J.: —

This case is said to be a new case in the year 1884, and I am told that a writer whom we all respect, in the year 1826 said it was then an open question. The writers who have followed since that time perpetuate the remark, and say that it is still an open question. It seems to me that upon the same ground every case which has not been pointedly decided, either in this Court or in some other [* 303] Court, must be held to be an open question; but it * seems to me really the question is not an open question, but has been decided nearly 100 years ago.

The case is shortly this: A lady named Parkes left this copyhold property to a trustee who never accepted the trust, and never was admitted, upon trust for Mrs. Barnard for life, and upon the death of Mrs. Barnard she devised the property upon trusts which infringed the law of what is commonly called in this Court the law of mortmain, and which being void carried the property to her heirs if she had any; but she died without heirs. The special case is framed entirely upon the supposition that at the death of Mrs. Parkes she had no heirs, and that she has no heir now. After the death of Mrs. Parkes, and during the lifetimes of Mrs. Barnard, this Court, in 1853, appointed Edmund King and Henry King to be trustees, and those trustees were admitted. A copy of the admission is appended to the special case, and Aldbury, the person appointed to surrender by the order of the Court, does accordingly surrender "to the use of Edmund King and Henry King, their heirs and assigns, to the will of the lords and ladies of the manor, by and under the accustomed rents, suits, and services, upon the trusts, and for the intents and purposes declared and contained in the will of Catherine Parkes, dated the 5th of May, 1851, or such of the same trusts, intents, and purposes as were capable of taking effect," and thereupon they are admitted, "to have and to hold the same premises until the said Edmund King and Henry King, their heirs and assigns forever, by copy of the court roll, to the will of the lords and ladies of the manor by the customs of the said manor."

That reference to the will of Catherine Parkes was put in in consequence of the trustees having been appointed by the order of the Court, and if it was a surrender to the use of those persons as trustees of that will, I am at a loss to understand how it would in any way diminish any rights that might accrue to them as trustees of the will. Whatever right they would get under the will, and as

being trustees of the will, whether it is the right that is now claimed on behalf of the representative of one of those trustees or not, it seems to me that they were admitted to the full benefit of all the rights that accrued to them, whether they came * to them upon the express trusts of the will, or whether [* 304] they came to them by virtue of the law upon the failure of those trusts. The question here raised, if this were freehold property, would be beyond all dispute. However, these trustees died, Henry King being the survivor of them; and by a codicil to his will he devised all the trust estates to his brother, Charles King, and his friend William Hawkins.

That codicil was dated in 1877. Charles King died in January, 1880, William Hawkins died in March of the same year, and neither of them were admitted. William Hawkins made a will, but there was no devise whatever of trust estate, and he left his daughter Janet Eliza Hawkins, who was his customary heiress according to the custom of the manor of which these copyhold premises are held.

At the time when William Hawkins died in March, 1880, Mrs. Barnard was still alive; she survived until 1883, and it is perfectly plain that between the death of William Hawkins in 1880, and the death of Mrs. Barnard in 1883, the trust in her favour was subsisting, and that she had a right to have some person admitted to those copyholds to act as trustee or trustees for her, though it became immaterial during her life whether any person should be admitted or not. The lord of the manor might, if he pleased, during the interval between the death of Henry King and the present time, have required some person to come in and be admitted, but he did not do so. The first point that is raised, and which I will dispose of, if I have not already done so, is that if any person has the right to be admitted at the present moment it is the heir of Henry King, who was the last of the two trustees appointed by the Court, and the survivor, therefore, of those persons who were admitted. But inasmuch as Henry King actually devised his trust estates to somebody else, that is, to his brother and William Hawkins, I am at a loss to see what possible right there can be in the heir of Henry King to have anything whatever to do with these trust estates, and I have really only to say whether or not Janet Hawkins, the customary heiress of William Hawkins is at the present moment entitled to be admitted, because

it is perfectly plain that, sitting here, I cannot order a writ of *mandamus* to issue to the lord to admit her. The parties [*305] * have chosen to come here to have their rights determined on the special case, and they have brought it in this division which would not issue a *mandamus* to compel the lord to admit. The only thing I can determine is whether or not, according to my conception and understanding of the law, Janet Hawkins is at the present moment entitled to be admitted? I cannot go further than that. Having determined that, I must leave the parties to act upon my opinion in the special case, or not, as they please. I have no jurisdiction beyond that of answering the question.

The question is raised in two ways. First of all has Janet Hawkins a right or not at law to be admitted; and, secondly, if she were admitted would she have any right to receive the profits of these copyhold hereditaments?

What is said is this; even assuming according to law she might have a legal right to claim admittance, that is a bare legal right which never could be enforced against the lord of the manor, because if she were admitted she would have no right to profits as against the lord, and she would be, as suggested, a trustee for the lord, and if that were so it would be a piece of folly to order the lord to admit her. It is said, therefore, that this Court, or any Court, would never on any consideration order the lord to admit her, coming to the conclusion that if she were admitted she must be a trustee for the lord, and, as I understand the argument, that if she was not a trustee for the lord the lord would have the right to eject her.

Now a question, which I put very early in the case to Mr. Cookson, seems to me still, after hearing the argument on both sides, to be practically conclusive in this case; I asked if in a case of this kind, there were trustees upon the court rolls at the time when the trusts came to an end, whether the lord of the manor could disturb them. Certainly I have received no very confident answer to that question; and to my mind the only possible answer would be, that the lord could not disturb them.

The Lord Keeper, who gave his judgment in that case of *Burgess* v. *Wheate*, 1 Eden, 244, as to the law of which there is [*306] no doubt now, says, * in the year 1759, "I think from these authorities it is as well founded as any position in

law, that the law does not regard the tenant's want of title as giving the lord any claim by escheat," and if that be so, I cannot understand what possible right the lord has to inquire into anything but the legal right of the person who applies to him for admittance, to be admitted. As I understand the law of escheat as laid down here by Lord Keeper Henley — and as I understand the law which has always been laid down — the right of escheat depends upon the want of a tenant, and as long as there is a tenant, or a person who of course has a right to be admitted as tenant, the right of escheat does not arise. If I were to say that the right of escheat arose because the trusts upon which the person admitted would have to hold had come to an end, I must then go further still, and say that in all cases it is the business and duty and privilege of the lord of the manor to inquire into the equitable title of the person claiming admittance before admitting him, and if he found the equitable title of the person so claiming to be admitted insufficient, to say, under these circumstances you have no right to be admitted and I have the right to prevent your being admitted. Certainly there never has been any law of this Court laid down to that effect; and to my mind the cases are directly opposed to anything of the sort.

That very question, as I understand the controversy, arose in the case of *Rex* v. *Coggan*, 6 East, 431 (8 R. R. 509), which was decided unfavourably to the plaintiff in this case. The case of *Rex* v. *Coggan* is very properly said to have been a case supplementary to the case of *Williams* v. *Lord Lonsdale*, 3 Ves. 752 (4 R. R. 149). It arose with regard to the same will, it arose, so far as I can collect, with regard to the same premises with which the question had been concerned in the case of *Williams* v. *Lord Lonsdale*. In the case of *Williams* v. *Lord Lonsdale* the tenant who had the legal right to be admitted to the copyholds, came and asked the Court of Equity to order the lord to admit him. The Court said, "We have nothing to do with it, you say you have a legal title; go to the Court of law and get your legal title enforced as you best may, there can be no equity whatever * in your case, and we [* 307] decline to interfere at all in the matter." In the other case the tenant came to the Court of Law and asked for a *mandamus*, and the answer made by counsel for the lord was this, "there is no equity whatever on behalf of this person to be admitted, because he is coming really in his right as a trustee when

all the trusts have failed, and asking to be admitted for his own benefit." Upon which Lord ELLENBOROUGH said, "We have nothing whatever to do with the trusts here, he has got the legal right, and having the legal right he ought to be admitted."

Well, then, it is said that inasmuch as the law in the case of *Attorney-General* v. *Duke of Leeds*, 2 My. & K. 343, was decided before the Act had been passed, and passed no doubt to remedy the grievance inflicted upon the *cestuis que trust* in that case by the narrow legal decision to which the Court felt itself bound to come, and by which the Court decided that where the trustee died without heirs the lord was entitled to escheat, it must rule this case; and that I must therefore follow that case and say that inasmuch as where the trustee died without heirs the lord had the right to the escheat, so on the same parallel reasoning here, where the trustee who has been admitted outlives his trust, and all the *cestuis que trust* vanish, the lord has the same right to an escheat there. It seems to me to be reasoning which I cannot follow, and I draw a contrary conclusion from the case, and say that if, where the trustee died without heirs, the lord had a right at law to escheat because he knew nothing of the trusts, so in the same way here where the *cestuis que trust* vanish and the trustee is still a tenant upon the Court rolls, the trustee has a right to hold as against the lord because the lord cannot interfere with the trusts or inquire about the trusts in any way whatever. To my mind the rule of law is a very plain and simple one. The rule was laid down in 1759 by the Lord Keeper. The law does not regard the tenant's want of equitable title as giving the lord any claim by escheat. The person who comes here to ask to be admitted as the tenant on the court rolls is the customary heir of the devisee of the last surviving trustee. At law I apprehend that person has a perfectly good right to be admitted, and I can certainly [*308] see no *equity whatever on the lord's side why I should interfere in his favour, as under other circumstances there would have been no equity on which I could interfere on behalf of the *cestui que trust*. I simply follow, therefore, what I conceive to be the rule of law in this case, and I decline to deprive the customary heir the devisee of the surviving trustee of the benefit which by the chapter of accidents has devolved upon her.

I must therefore declare in this case that Miss Janet Hawkins, as customary heiress of William Hawkins, who was the devisee of

Henry King, is entitled to be admitted to these copyhold premises and to hold them for her own benefit. That, as I understand, will give Mr. Wolstenholme's client, the widow of William Hawkins, the right to freebench.

Cookson, Q. C.: —

The better way will be for me to move for judgment on that point, the cause being set down for the purpose. The costs are arranged.

Pearson, J.: —

Very well. Let that be so.

ENGLISH NOTES.

The Intestates Estates Act 1884 (47 & 48 Vict. c. 71), s. 4, is as follows: — "From and after the passing of this Act (14 August, 1884), where a person dies without an heir and intestate in respect of any real estate consisting of any estate or interest whether legal or equitable in any incorporeal hereditament, or of any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments."

Mr. Challis (Real Property Law p. 33), observes that the meaning of this section does not seem to be so clear, as to render superfluous all statement of the previous law.

Under the old law, hereditaments which are not strictly subjects of tenure, such as fairs, markets, commons in gross, rents-charge, rents seck and the like, do not escheat, but become extinct upon a failure of heirs of the tenant (3 Inst. 21, Challis 33). Mr. Challis further observes (at p. 35): — "A corporeal hereditament, when it is the subject of escheat, escheats to the lord of whom it is holden. But in relation to the incorporeal hereditaments contemplated by the enactment, there exists no such person; and therefore the hereditaments in question cannot escheat to him. The law of escheat, therefore, cannot 'apply in the same manner;' and the question must arise in what other manner, if any, it shall apply. In the case of incorporeal hereditaments, such as a rent-charge, which may issue out of lands holden of a mesne lord, a contest may not improbably arise between the mesne lord, if any, and the crown. The enactment seems to be founded upon a very superficial view of the law of escheat."

The former of the principal cases has been selected as containing a full and learned discussion as to the nature of the right.

See "Deed," Nos. 3 and 4, and Notes, 8 R. C.

The *Attorney General* v. *Leeds*, referred to in the judgment of the latter of the principal cases (p. 670, *ante*), decided that, although the tenant of copyholds was a trustee or mortgagee — the trusts not appearing on the Court-rolls — the lord was entitled by escheat upon his death intestate and without heirs. The same was formerly the rule where a trustee or mortgagee in fee of real estate died intestate and without heirs. The injustice caused by this rule was partially cured by the Act 39 & 40 Geo. III. c. 88. s 12, which gave the Crown power in such a case to make a grant to trustees for the purpose of executing the trusts. A more effectual remedy was given by the clause in the Trustee Acts now embodied in the Trustee Act 1893 (56 & 57 Vict. c. 53), s. 26 (V.), empowering the Court to make a vesting order in such a case. The beneficial interests in the estate are thus fully protected.

Undisposed of residue of sale moneys of realty devised upon trust for sale is "an equitable interest in a corporeal hereditament" within s. 4 of the Act, and on an intestacy in respect thereof, under s. 7 of the Act, such undisposed of residue will, if there be no heir, escheat to the Crown. *In re Wood, Att.-Gen.* v. *Anderson* (14 July, 1896), 1896, 2 Ch. 596, 65 L. J. Ch. 814.

In the Dominion of Canada it has been decided, under the British North American Act 1867 (30 Vict. c. 3), that lands in Canada, for defect of heirs, escheat to the provinces in which they are situate, and not to the Dominion of Canada. *Att.-Gen.* v. *Mercer* (Judl. Comm. 1883), 8 App. Cas. 767, 52 L. J. P. C. 84.

AMERICAN NOTES.

Mr. Pomeroy, citing the first principal case (2 Eq. Jur. sect. 990), says: "It is doubtful whether this particular rule prevails in the United States; it should not, upon principle, since with us the doctrine of escheat to the State is not in the least founded upon the notion of tenure: See *Matthews* v. *Ward*, 10 Gill & Johnson (Maryland), 454; *Johnston* v. *Spicer*, 107 New York, 198."

ESCROW.

See "Deed," Nos. 3 & 4, and Notes, 8 R. C. 598 *et seq.*

ESTATE.

No. 1. — FLETCHER *v.* SMITON.

(K. B. 1788.)

RULE.

THE word "estate" in a will (independently of the Wills Act 1837) will carry the fee of realty, unless restricted by words expressing a different intention.

Fletcher v. Smiton.

2 Term Reports, 656–660 (1 R. R. 575).

Will.— Devise.— Construction.— Land.— Estate in fee.

The word "estates" in a will, will carry the fee, unless coupled with [656] other words which show a different intention.

Case for money had and received. At the trial after last Easter Term, at Guildhall, before BULLER, J. a verdict was found for the plaintiff, with £14 damages, subject to the opinion of this Court on the following case: Matthew Woodward, being seized in fee of four undivided eightieth parts or shares of buildings and premises, called the Corn-market, in the city of London, and of divers other freehold and personal estates, made his will on the 29th of March 1766, duly executed, &c.; which, after directing all his debts to be paid, contained the following clauses: "Then I give to Mary Woodward, my wife, all my household goods, plate, linen, and jewels, at my houses at Romford and London, with £500 at her own disposal, as she shall think fit. I give one annuity to be paid to Mary Woodward my wife, of £100 a year, by William Morley, out of the profits of the corn trade, as by our articles specified, and £1000 to be left in the trade during her life, for this use and purpose; and also I give the said Mary Woodward the profit of my four shares in the Corn-market during her life; also the income and profits of my estates, as follows, during her

life: my lands lying [here followed a particular enumeration of his several estates], as also the residue of my personal estates, to be laid out in bank annuities; and Mary Woodward, my wife to have the income during her life only of this and the estates before-mentioned; and after her decease, as follows: I give to Matthew Weatherley, my nephew, the income of my four shares in the Corn-market, for his natural life; and all the rest of my estates, with all monies in stocks, and in William Morley's hands, or any other securities, to be divided in equal shares to Elizabeth Snow, Elizabeth Mailard, Judith Weatherley, Joseph Weatherley, and William Weatherley, share and share alike; and out of my wife's income she to pay to Ann Audain £30 yearly during her life." And he appointed his wife executrix. The testator afterwards died, without issue, leaving his widow Mary Woodward, and Matthew Weatherley, and Ann Audain (the sister of the testator), his co-heirs, alive at the time of his death. The widow afterwards died; on which Matthew Weatherley became seized of and enjoyed the said four shares during his life, till the 5th [* 657] day of October, 1787, when he died, having devised * his real and personal estates to the plaintiff. The defendant is treasurer and paymaster to the proprietors of the Corn-market. He has received half a year's dividend on the four shares, and has the same still in his hands. This action was brought by the consent of all parties, to try whether the reversionary interest in the four shares passed under the devise to Elizabeth Snow and the four other devisees. The question for the opinion of the Court is, Whether the reversionary interest in the said four shares passed under the devise to Elizabeth Snow, Elizabeth Mailard, Judith Weatherley, Joseph Weatherley, and William Weatherley? If it did not pass, the verdict to stand; otherwise, for the defendant.

Shepherd, for the plaintiff. It is apparent on reading this will, that the devisor used the word "estates" as applying specifically to the things therein particularly enumerated, and which immediately follow the word "estates" in the first clause. In that place he clearly could not intend that a fee should not pass by it, for those estates are given to his wife for life, and the word is there used as a particular description of the lands which she was to have for her life. Then if he did not use it in a technical sense in one part of the will, it cannot be contended that he so used

it in another part. The word then in the latter clause not being used technically. First, it does not apply to the shares in the Corn-market; but, secondly, if it do, it cannot apply to his interest in them. As to the first, the word "estates" could not have been meant to apply to the Corn-market; for in the preceding clause the devisor gave to his nephew the income of his four shares in the Corn-market during his life, adding immediately afterwards, "all the rest of my estates to Elizabeth Snow and the four other devisees, share and share alike;" so that in this latter devise the Corn-market is expressly excluded, and the word "estates" in the last clause must have the same signification with the same word in the first clause, where it cannot by possibility extend to the Corn-market. If it be contended that the devisor could only intend that his nephew should take an estate for life only in the Corn-market, and that the reversion should pass by the subsequent clause to the other devisees, otherwise it was nugatory to mention his nephew at all, as he would have been entitled to a still greater interest as heir; the answer is, that it was necessary that the devisor should give him the whole profits during his life, because he was only co-heir with another, and * as such would [* 658] only have been entitled to a moiety, which is consistent with the intention contended for, namely, that the reversion should descend upon him in his character of heir. And as the devisor has not expressed any intention of parting with the reversion, the Court will not give it away from the heir by implication.[1] Secondly, Though the word "estate" will, generally speaking, carry not only the thing described, but also the interest which the testator had in it at the time of making his will, yet the word "estates" has not the same legal operation. In the only cases in which the word "estates" has been held to pass a fee, it has been coupled with other words, such as "all my effects," &c.; which showed the devisor's intention of disposing of all his property: but in this case no such words are used, and it is apparent that the devisor did not mean to pass the reversionary interest in his shares in the Corn-market. In *Wilkinson* v. *Maryland*, Cro. Car. 447, where the devisor, being seised of lands in A. and B. which

[1] Although the plaintiff claimed under one of the co-heirs alone, it was understood that no objection should be made on the ground against the plaintiff's recovering, this action having been brought by the consent of all parties, to try the question arising on the will.

he devised to several persons, and of lands in C. by way of mortgage and forfeited, devised all his goods, estates, and mortgages, to his wife, it was held that the lands in C. did not pass; though the Court said, if he had devised all his estate in such land, or had mentioned that he had such land mortgaged in fee, and devised his mortgage, the fee had passed. And in *Goodwyn* v. *Goodwyn*, 1 Ves. Sen. 229, Lord CHANCELLOR HARDWICKE doubted whether a fee could be passed by the words "all my estates," which he said, in common parlance, means a description of the lands. Indeed, all the cases on this subject show that if those words, which when technically used will carry the fee, are not so used, there must be something in the will to show that they were intended to pass the fee. But the reverse of that intention is to be collected from this will.

Wood, contra, was stopped by the Court.

Lord KENYON, Ch. J. The question is, Whether the last clause in the will comprehends the reversion of the shares in the Cornmarket, and carries the absolute inheritance in them to the devisees therein mentioned as tenants in common. There are cases in which nice distinctions have been taken between a [* 659] * devise of an estate at such a place, and a devise of an estate in a particular place; and Lord HARDWICKE alluded to it in the case cited in Vesey (1 Ves. Sen. 228); but he added, that there is no case in which it was held that a fee passed by the devise of an estate, if the testator added to it, "in the occupation of any particular tenant." And I admit that the word "estate" may be so coupled with other words as to explain the general sense in which it would otherwise be taken, and to confine it to mean farms and tenements. But that is not the present case; no such words are here superadded to "estates." It is admitted, that if the word "estate" had been used, there could have been no doubt but that the reversionary interest in the shares in the Cornmarket would have passed; and I think that must have been the testator's intention. For his first object was, that all his debts should be paid; now that intention might be defeated, unless the will were to operate on the whole inheritance, for the debts could not perhaps be paid out of the particular estate carved out of it. However, this case does not depend on general observation. For the word "estates" has been held equivalent to "estate," unless other words be added to express a different inten-

tion. In the case of *Tilley* v. *Simpson*,[1] in the Court of *Chancery, E. 1746, the question was, Whether by the [*660] words there used the fee should pass? Lord HARDWICKE said, it would be productive of bad consequences to confine the devise to a chattel interest, unless there were other words to show that it was intended to be so restrained; and he put this case: "If a testator devise all his personal estate and estates whatsoever, the inheritance shall pass by the latter words." That is strong to show that the word "estates" would of itself carry a fee. Therefore on the authority of this case and many others, such as *Chester* v. *Chester*, 3 P. Wms. 56, I am of opinion that this devise conveyed the absolute inheritance in the shares in the Corn-market, and that the testator did not intend that anything should remain undisposed of by the general residuary clause.

ASHHURST, J. of the same opinion.

BULLER, J. This is a question merely on the intention of the testator; and I think it is apparent, on reading the whole will, that it was his intention that everything which he had should pass by it. For, after making particular bequests of part of his personalty, he directed that the residue of his personal

[1] *Tilley* v. *Simpson*. In Chancery, Easter 1746.

The testator, after declaring that he intended to dispose of all his worldly estate, and making several devises to different persons, gave and bequeathed all the rest and residue of his money, goods, chattels, and estate whatsoever to his nephew A. B. The question was, Whether a beneficial interest in a real estate, not before disposed of, would pass to the nephew by his devise.

Lord HARDWICKE, Chancellor, was of opinion that it would. He said, where the Court had restrained the word *estate* to carry personal estate only, hath been where it hath appeared that it was the intention of the testator it should be so understood: as where it hath stood coupled with particular descriptions of part of the personal estate, as a bequest of all my mortgages, household goods and estate, in which the preceding words are not a full description of the personal estate: he did not know any of those cases where the preceding words were sufficient to pass the whole personal estate. If the testator had said, "all the rest and residue of my personal estate and estates whatsoever," a real estate would have passed. This bequest amounts to the same, for the word *chattels* is as full a description of the personal estate as the word *personal*. Therefore when he hath used words comprehending all his personal estate, and then makes use of the word *estate*, that word will carry a real estate. The word *whatsoever* is used here, which is the same as if he had said, of whatever kind it be; and if that had been the case, it would most certainly have carried the real estate. The case of *Tirrel* v. *Page*, 1 Ch. Cas. 262, is very material to the present question, and I think cannot be distinguished: there the gift was of "all the rest and residue of my money, goods, and chattels, and other estates whatsoever, I give to J. L." The only difference in the case is, that there is the word *other*, which I do not think can distinguish it. If it had been all the rest and residue of my household goods and mortgages, and all other estate, I do not think that would have carried the real

estate should be laid out in the funds; then, after giving his real estate for lives, he devised all the rest of his estates, with all monies in the funds to the five devisees. Then, as it appears that he had first disposed of all his personal estate by other words, he must have intended to pass his real estate by the subsequent words, for there was no other property on which they could attach.

Grose, J. Where the devisor intended to confine the operation of the word "estates," he added "for life:" but in the latter clause there are no words of restraint added.

Postea to the defendant.

ENGLISH NOTES.

The rule is summed up by Sir W. Grant, M. R. in *Barnes* v. *Patch* (1803), 8 Ves. 604, 7 R. R. 127. "As Lord Holt said in *Countess of Bridgewater* v. *Duke of Bolton* (1 Salk. 236), the word 'estate' is *genus generalissimum;* and includes all things real and personal. I admit that has been so qualified by the context as to bear a narrower signification, as in *Doe d. Spearing* v. *Buckner;* where the words were held insufficient to carry the real estate; not as being of themselves insufficient to pass land, but upon the context of the will personal estate only being in contemplation of the testator. . . . But the doctrine of modern cases is, that, where there is nothing to qualify the word 'estate' it will carry real as well as personal estate; and the contrary intention ought to appear, to induce the Court to put upon that word a less extensive signification than it naturally bears."

In the case of *Doe d. Spearing* v. *Buckner* (1796) 6 T. R. 610, 3 R. R. 278, which is referred to in the above passage, the residuary clause was in the following terms: "As to all the rest, residue and remainder of my estate and effects of any and what nature and kind soever and wheresoever, I give and bequeath the same unto C. Buckner and J. Robinson, their executors or administrators in trust, that they shall from time to time add the interest thereof to the principal, so as to accumulate the same. . . . " The Court held that a house, the only freehold property of which the testator was seised, did not pass by the will. Lord Kenyon in delivering the judgment of the Court said: "By adverting to the residuary clause there are no words to pass the estate in question. The testator only meant that that should extend to his personal estate. It is given to trustees, their executors and administrators, technical terms applicable to personalty. But I rely on the following words of the clause, 'To add the interest to the principal, so as to accumulate the same.' The interest and

principal were to make one consolidated sum of the same nature; but these are terms wholly inapplicable to a real estate." It is clear, however, that a general devise of "all the rest and residue of my estate of what nature and kind soever," may pass real estate, though followed by words of limitation applicable to personal estate; *Doe d. Burkitt* v. *Chapman* (1789), 1 H. Bl. 223, 2 R. R. 755. In *Doe d. Tofield* v. *Tofield* (1809), 11 East 246, 10 R. R. 496, the Court upon the terms of the whole will came to the conclusion that by a gift of "personal estates whatsoever and wheresoever," the testator intended to pass real estates, and that the testator meant by these words such real property over which he had an absolute personal power of disposition and control.

The rule was of importance in considering whether trust and mortgage estates passed by the will of a testator, a devise in general terms being sufficient for this purpose: *Lord Braybroke* v. *Inskip* (1803), 8 Ves. 417, 7 R. R. 106, Tudor Lead Cas. Conv. 986, 3rd ed. The matter is now of diminishing importance by reason of the provisions of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30, which enacts that trust and mortgage estates shall, on the death of a sole or surviving trustee or mortgagee, "notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him." Copyholds vested in the tenant on the Court Rolls are now excluded from the operation of this enactment by the Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 45.

The word "effects" primarily means personal property. *Doe d. Hick* v. *Dring* (1814), 2 M. & S. 448, 15 R. R. 308. Coupled with other expressions, however, the word effects has been read as extending to freeholds. *Doe d. Chillcott* v. *White* (1800), 1 East 33, 5 R. R. 502, *Hall* v. *Hall* (C. A. 1892), 1892, 1 Ch. 361, 61 L. J. Ch. 289, 66 L. T. 206, 40 W. R. 277.

The word "property" will pass freeholds. *Doe d. Wall* v. *Langlands* (1811), 14 East, 370, 12 R. R. 553. *Doe d. Wall* v. *Langlands*, was distinguished in *Doe d. Bunny* v. *Rout* (1816), 7 Taunt. 79, 2 Marsh, 397, 17 R. R. 488, where the Court saw indications in the will that the testatrix did not intend to pass freehold lands.

Section 26 of the Wills Act, 1837 (1 Vict. c. 26), overrides a rule of law, which must have frequently disappointed the wishes of testators. "If a man hath lands in fee and lands for years, and deviseth all his lands and tenements, the fee simple lands pass only, and not the lease for years; and if a man hath a lease for years and no fee simple, and deviseth all his lands and tenements, lease for years

passeth." *Rose* v. *Bartlett*, Cro. Car. 293; *Thompson* v. *Lady Lawley* (1800), 2 Bos. & P. 303, 5 R. R. 595. It is now however enacted: "A devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold and leasehold estates of the testator, or his customary, copyhold and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will." In *Hall* v. *Fisher* (1844), 1 Coll. 47, 8 Jur. 119, the testator, subsequently to the Wills Act, devised "all that freehold farm called the Wick Farm, containing two hundred acres or thereabouts, occupied by W. E., as tenant to me, with the appurtenances" to uses applicable to freehold. This was held not to include twelve acres of leasehold described as Wick Farm in the lease to the tenant. The section was again construed in *Wilson* v. *Eden*, a case which was considered several times. There the testator, who died after the coming into operation of the Wills Act, bequeathed "all the rest, residue and remainder of my personal estate, . . . whatsoever and wheresoever," subject to certain payments, to M., and devised "all and singular my manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes and hereditaments," which he described locally, "and all other my real estates" in Durham and York, to uses for M. and his issue in strict settlement, the limitations being peculiarly applicable to freeholds. The question was whether certain renewable leaseholds in Durham passed under the residuary bequest or under the residuary devise. The case came first before Lord Langdale, M. R., in 1848 (11 Beav. 237, 17 L. J. Ch. 459). His Lordship thought that the words "all other my real estates" excluded the leaseholds from the residuary devise, that these words would, prior to the Wills Act, have prevented the leaseholds from passing, and that the Wills Act had not affected the construction. He, however, sent a case for the opinion of the Court of Exchequer, which came on for hearing in 1850 (5 Ex. 752, 20 L. J. Ex. 73). The Court of Exchequer thought that the case was covered by the statute, and that the lands passed under the residuary bequest. The following are the more material portions of the judgment of the Court, which was delivered by Pollock, C. B. "Let us consider how the case would have stood prior to the Act if the testator had had no lands whatever, except leaseholds. It is clear in such a case the leaseholds would have passed in order that some effect might have been given to the will.

This, indeed, is a branch of the general rule enunciated in *Rose* v. *Bartlett*, and cannot be disputed. This being so, the 26th section of the statute states positively that the general devise shall be construed to include the leaseholds, unless a contrary intention appears by the will. It was alleged that such contrary intention does appear here, because there is an express gift of all the residue of the personal estate to the testator's brother, which he contended was inconsistent with the gift of the leaseholds, which are part of the personal estate, to the trusts for the purpose of the settlement; but this is a fallacy. If before the statute a testator having leaseholds, but no freeholds, in Durham, had given all his land in Durham to A. B. and all his personal estate to C. D. there can be no doubt that A. B. would have taken the leaseholds: the circumstances in such a case shew that under the words 'personal estate' the testator did not mean to include leaseholds; and if such would have been the construction before the statute in a case where the testator had only leaseholds, so now the same construction is by the express words of the statute to prevail, even although the testator had freehold as well as leasehold. . . . The only other circumstances relied on as showing an intention to exclude the leaseholds, were the powers of jointuring and leasing. We attribute no weight to this part of the argument. The power would be available in equity, and is to affect the renewed leases from time to time, and the case finds as a fact that such renewals were always made from time to time." The case came on before Lord ROMILLY, M. R. in 1851 (14 Beav. 317), and he sent the case to be heard before the Court of Queen's Bench, before which it came in 1852 (18 Q. B. 474, 21 L. J. Q. B. 385, 16 Jur. 1017). The Queen's Bench concurred in the opinion of the Court of Exchequer, without hearing counsel in support of that judgment, and Lord ROMILLY gave effect to the two certificates in 1852 (16 Beav. 153).

It would seem from a perusal of the report in Beavan that Lord LANGDALE was influenced in some degree by the fact that the limitations were peculiarly applicable to freeholds. The Court of Exchequer do not seem to have been influenced by that consideration, nor does Lord ROMILLY make any reference to the limitations. In the Court of Queen's Bench, ERLE J., referred in express terms to these limitations, but merely regarded them as an element, and not a conclusive argument, in favour of holding that the leaseholds were not intended to pass with the freehold, and that they did not necessarily show a contrary intention within the meaning of the statute. This view was approved of by Lord SELBORNE, L. C. in *Prescott* v. *Barker* (Ch. App. 1874), L. R. 9 Ch. 174, 43 L. J. Ch. 498, 30 L. T. 149, 22 W. R. 422. He says: "Looking at the present will, the first thing to be con-

sidered is the fact, which, and which alone, is common to the present case and *Wilson* v. *Eden*, that the gift, in which the appellants contend that the leasehold estates are included, is a gift to uses in strict settlement, which, in their entirety and integrity, cannot be applied to leasehold estates, but must, more or less, fail — that is, fail from the time at which the first tenant in tail is reached; there they must stop by the irresistible operation of law as to the leasehold estates, while they would go on as to the freeholds. The whole intention, therefore, apparently indicated by such a settlement, is capable of taking effect as to the freehold estates, but is not capable of taking effect as to the leasehold estates. Lord LANGDALE appears to have thought, in *Wilson* v. *Eden*, that this alone was a sufficient ground for holding that the intention could not be to include leasehold estates. . . . I think that Lord LANGDALE, who was an eminent judge, had at least this for his opinion — that a construction which cannot take effect equally as to all the subjects of the gift where they are blended together is, probably and *primâ facie*, one which had not presented itself to the mind of the testator as involving that result. The Courts of Law, however, and eventually this Court, came to the conclusion, that the fact of the devise being to limitations in strict settlement was not by itself sufficient to exclude leaseholds; and the argument now seems to be that, because it is not sufficient when standing alone, it is to have no weight at all when accompanied by various other indications in the context of the will."

Among the more recent cases on the section may be cited *Moase* v. *White* (1876), 3 Ch. D. 763, 24 W. R. 1038, and *Butler* v. *Butler* (1884), 28 Ch. D. 66, 54 L. J. Ch. 197, 52 L. T. 90, 33 W. R. 192. These cases do not, however, appear to add anything to the principles to be extracted from the earlier cases.

It seems sufficient merely to refer to the provisions of section 27 of the Wills Act, to the effect that a devise or bequest in general terms is sufficient to include property over which the testator has a general power of appointment. The detailed consideration of the section seems to fall more naturally under the subject of Powers.

In some cases in which the word "estate" has been employed the testator has added the name of a locality. In these cases the question is whether the words amount to a local description. If they do, then lands not falling within that local description will not pass by the devise. In *Doe d. Ashforth* v. *Bower*, (1832), 3 Barn. & Ad. 453, the devise was of "all my messuages situate at, in or near a street called Snig Hill, in Sheffield, which I lately purchased from the Duke of Norfolk's trustees." The testator had four houses in Sheffield, about twenty yards from Snig Hill, and two houses, about four hun-

dred yards from it, in Gibraltar Street, Sheffield. The houses had been purchased by the testator at the same time and they had been conveyed to him by one conveyance. The land tax had been redeemed by him by one contract. The testator had no other houses in Sheffield. It was held that the two houses in Gibraltar Street did not, but that the four other houses did, pass by the devise. In *Homer* v. *Homer*, (C. A. 1878), 8 Ch. D. 458, 47 L. J. Ch. 635, the testator devised lands "situate at or within Dormstone," and by reference to occupation. The Court held that the word "at" would include lands adjacent thereto, although not locally situate within Dormstone. The expressions "my estate of Ashton" and "my estate at Ashton" are words of the same import: *Doe d. Oxenden* v. *Chichester* (H. L. 1816), 4 Dow. 65, 16 R. R. 32. "My Briton Ferry estate," is not strictly an expression of local description, *Doe d. Beach* v. *Earl Jersey* (H. L. 1825), 3 B. & C. 870, 19 R. R. 380, 388. There the devise was "my Briton Ferry estate" followed by a devise of "my Penlline Castle estate, which, as well as my Briton Ferry estate, is situate . . . in the County of Glamorgan." It had been held by the King's Bench that the former devise was not confined to lands in the County of Glamorgan, but extended to all that was usually known to the testatrix by the name of the Briton Ferry estate. In the House of Lords a *venire de novo* was awarded, on the ground that this fact should have been substantiated by parol evidence of the knowledge of the testatrix, in that the question arising upon any particular tenement was a question of parcel or no parcel. So where a testator, who described himself as of "Ashford Hall in the County of Salop," devised "all my estates in Shropshire, called Ashford Hall," it was held that this description was not confined to the mansion house so called, and the lands immediately adjoining, but extended to other lands of the testator in Shropshire: *Ricketts* v. *Turquand* (1848), 1 H. L. Cas. 472. To the same effect is *Hardwick* v. *Hardwick* (1873), L. R. 16 Eq. 168, 42 L. J. Ch. 836, 21 W. R. 719.

In considering the cases in which property has been described by reference to locality, it must be remembered that effect has sometimes been given to the rule referred to by Lord WENSLEYDALE in *Doe d. Ashforth* v. *Bower*, *supra*. "If there be some land, wherein all the demonstrations in a grant are true, and some wherein part are true and part false, the words of such grant shall be intended words of true limitation to pass only those lands wherein all the circumstances are true." It cannot however be said that the rule will enable all the cases to be easily reconciled. In *Pedley* v. *Dodds* (1866), L. R. 2 Eq. 819, 12 Jur. N. S. 759, 14 L. T. 823, 14 W. R. 884, the testator devised all his freehold estates, consisting of "Arkley Hall Farm, in

the parish of Ridge, in the County of Hertford," and other estates to trustees as to his said farm called Arkley Hall Farm upon certain trusts declared by his will. The testator had purchased an estate called Aukley House otherwise Arkley Hall, which was in the parish of Ridge and in the County of Hertford. He subsequently acquired lands in adjoining parishes, but in the same county, and threw them into the Arkley Hall Farm, and the entirety was thenceforth known as the Arkley Hall Farm. All these purchases were made prior to the will. It was however held that the lands outside the parish of Ridge were not included in the devise. Under this topic the case of *Hall* v. *Fisher*, cited on p. 680, *ante*, may again be referred to. But it should be observed that *Hall* v. *Fisher* was questioned by Chitty, J. in *Re Bright-Smith, Bright-Smith* v. *Bright-Smith* (1886), 31 Ch. D. 314, 55 L. J. Ch. 365, 54 L. T. 47, 34 W. R. 252, where the devise was of "my freehold farm and lands situate at Edgware and now in the occupation of James Bray," and was held to pass 26 acres of copyhold. It is also somewhat difficult to reconcile the determination in *Hall* v. *Fisher* with the earlier case of *Lane* v. *Earl Stanhope* (1795), 6 T. R. 345, 3 R. R. 197.

In addition to the principal case, *Holdfast d. Cowper* v. *Marten* (1786), 1 T. R. 411, 1 R. R. 243; *Randall* v. *Tuchin* (1815), 6 Taunt. 410, 16 R. R. 635; *Bowen* v. *Lewis* (H. L. 1884), 9 App. Cas. 890, 54 L. J. Q. B. 55, 52 L. T. 189, are authorities supporting the view that the word "estate," unless restricted by the context of the will, carries the fee. In general, however, some words of limitation were necessary to carry the fee, although terms of art were not essential as in the case of a deed. *Denn d. Briddon* v. *Page* (1783), 3 T. R. 87 *n.*, 11 East 605, 1 R. R. 655, *n.*; *Hay* v. *Earl of Coventry* (1789), 3 T. R. 83, 1 R. R. 653; *Doe d. Tooley* v. *Gunniss* (1812), 4 Taunt. 313, 13 R. R. 604; *Gatenby* v. *Morgan* (1876), 1 Q. B. D. 685. A fee has been held to pass by implication. In *Smith* v. *Coffin* (1795), 2 H. Bl. 444, 3 R. R. 435, the Court saw an indication of intention from the introductory words of the will to include the fee in a residuary gift of "testamentary estate." However, as was pointed out in *Lloyd* v. *Jackson* (Ex. Ch. 1867), L. R. 2 Q. B. 269, 36 L. J. Q. B. 169, there must, in general, have been some connection between the introductory words and the gift in order to carry the fee where other expressions were used. In *Lloyd* v. *Jackson*, the operative part of the will was contained in the following words: "As touching such worldly estate wherewith it hath pleased God to bless me in this life, I give and bequeath to my wife, whom I likewise constitute my sole executrix, all and singular my lands, messuages, and tenements, by her freely to be possessed and enjoyed, together with all my houses and

household goods, deeds, and moveable effects; all my children to be educated and settled in business according to my wife's discretion." Both in the Court of Queen's Bench (L. R. 1 Q. B. 571, 35 L. J. Q. B. 188), and in the Exchequer Chamber, it was held that the last clause indicated an intention that the wife should take such an estate as would enable her to carry out the wishes of the testator, and that she therefore took an estate in fee. In the Court of Queen's Bench, the view which the Judges took, was that the obligation cast upon the wife was not a trust, but a mere expression of desire, but this was regarded as involving the same reasoning as if there had been a trust enforceable in a Court of Equity. In the Exchequer Chamber, however, the view that there was a trust prevailed. The principle of many cases is thus summed up by BLACKBURN, J. and in effect repeated in the Exchequer Chamber: "It was very early established before the Wills Act came into operation that a devise of 'lands, farms, tenements,' or equivalent words, though there was very little doubt that the testator meant in ninety-nine cases out of a hundred to devise absolutely, would only operate to give an estate for life to the devisee, and would not disinherit the heir, unless there were express words, or unless from the provisions of the will taken altogether it would appear to be the intention that an estate of inheritance should pass. On the other hand, it has been decided in many cases that the word 'estate' or an equivalent word contained in a devise, . . . would carry the inheritance, and would be sufficient to show the intention that the devisee should have the whole estate, and consequently should have the inheritance. But I do not think that where a testator merely makes a recital in the beginning of his will 'touching all my worldly estate,' which has the effect of saying, I do not intend to die intestate, those words would operate alone to pass a fee; but they may, by being distinctly connected with a subsequent devise, give an estate in fee. The distinction is somewhat fine, but where it is shown that the word estate is brought down into the devise, so that it is clear that the testator did not intend to die intestate, and in disposing of all his estate he uses the same general words, there the estate is included in the devise and carries the inheritance." Then, after dealing with certain cases which had been cited the learned Judge refers to another principle, upon which the case was ultimately decided, and cites the following passage from Jarman on Wills: "It has been long settled that where a devisee whose estate is undefined is directed to pay the testator's debts or legacies, or a specific sum in gross, he takes an estate in fee, on the ground that if he took an estate for life only, he might be damnified by the determination of his interest before reimbursement of his expenditure; and the fact that actual loss was

rendered highly improbable by the disparity in the amount of the sum charged relatively to the value of the land, does not prevent the enlargement of the estate."

In the subsequent case of *Pickwell* v. *Spencer* (1871), L. R. 6 Ex. 190, 40 L. J. Ex. 132 (Ex. Ch. 1872), L. R. 7 Ex. 105, 41 L. J. Ex. 73, the principle of the above quoted passage from Jarman was applied by the Court of Exchequer and by three Judges in the Exchequer Chamber, to a case in which an annual sum was directed to be paid. In the Exchequer Chamber three of the Judges rested their judgment entirely on the provisions of the will, which in their view afforded a clear indication of intention that the devisee was to take the fee, and two of the judges, who had concurred in the first ground, also assented to the second view.

A fee would be implied (before the Wills Act) in a devise to A., and, in case of his death before a given period, or under given circumstances, over. *In re Harrison's Estate* (Ch. App. 1870), L. R. 5 Ch. 408, 39 L. J. Ch. 501, 18 W. R. 795.

The Wills Act, 1837 (1 Vict. c. 26), s. 28, now provides: "Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will."

In *Wisden* v. *Wisden* (1854), 2 Sm. & G. 396, 18 Jur. 1090, 2 W. R. 616, the Court refused to infer a contrary intention from the fact that in the gift to daughters words of limitation were not found, whereas in other parts of the will words of limitation were used respecting other gifts. So too a power of appointment in favour of husband and children was held not sufficient to exclude the operation of the section, in a devise of copyholds to a married woman as her separate property; *Brook* v. *Brook* (1856), 3 Sm. & G. 280. In *Gravenor* v. *Watkin* (Ex. Ch. 1871), L. R. 6, C. P. 500, 40 L. J. C. P. 220, the Court was called upon to construe a somewhat obscure document. The testator devised as follows: — "I hereby devise and bequeath to my dear mother Mary, the wife of R. Gravenor, . . . all my real and personal estate of every sort and kind whatsoever and wheresoever, and all my property in reversion, remainder, or expectancy; . . . and knowing that what I give, devise, and bequeath to my said mother will become the property of her husband . . . R. Gravenor, I therefore declare the intention of this my will to be that the said R. Gravenor, . . . shall hold and enjoy all my said real and personal estate of every sort and kind, to him, his heirs, executors, administrators and assigns for ever, and to be absolutely at his free will

and disposal; provided that he does not at any time dispose of any portion of my said property to any of my late father Thomas Griffith's family." Both the Court of Common Pleas and the Exchequer Chamber held that R. Gravenor took the fee simple, but the Court of Common Pleas had held that the mother only took an estate for life. The latter point was left open in the Exchequer Chamber, as it did not arise for decision. A somewhat similar case, in which, however, the language employed was clear, is *Quarm* v. *Quarm* (1891), 1892, 1 Q. B. 184, 61 L. J. Q. B. 154, 66 L. T. 418, 40 W. R. 302. The testator there devised a freehold estate to several persons "as joint tenants and not as tenants in common, and to the survivor of them, his or her heirs and assigns for ever." It was held that the devisees took as joint tenants for their lives, with a contingent remainder in fee to the survivor. In *Chellew* v. *Martin* (1873), 28 L. T. 662, 21 W. R. 671, there was a devise to two persons, to whom power was given to sell their property, followed by a gift to the survivor of the devisees of the property given to the other. It was held that the survivor took the fee.

AMERICAN NOTES.

This doctrine is sustained by *Hunt* v. *Hunt*, 4 Gray (Mass.), 190; *Smith's Ex'r* v. *Smith*, 17 Grattan (Virginia), 276; *Andrews* v. *Brumfield*, 32 Mississippi, 107; *Archer* v. *Deneale*, 1 Peters (U. S. Sup. Ct.), 585; *Den* v. *Drew*, 14 New Jersey Law, 68; *Jackson* v. *DeLancey*, 11 Johnson (N. Y.), 365; *Thornton* v. *Mulquinne*, 12 Iowa, 549; 79 Am. Dec. 548; *Zimmerman* v. *Anders*, 6 Watts & Sergeant (Penn.), 218; 40 Am. Dec. 552; and many cases cited in note 14 Am. Dec. 576, including the principal case. The general doctrine is that the word "estate" comprehends all the testator's property, real and personal, unless limited by the context. To the same effect: *Turbett* v. *Turbett's Ex'rs*, 9 Yeates (Penn.), 787; 2 Am. Dec. 369; *Hammond* v. *Hammond*, 8 Gill & Johnson (Maryland), 436; *Hart* v. *White*, 26 Vermont, 260; *Arnold* v. *Lincoln*, 8 Rhode Island, 384; *Blewer* v. *Brightman*, 4 McCord (So. Car.), 60; *Crostwaight* v. *Hutchinson*, 2 Bibb (Kentucky), 407; *Mably* v. *Stainback*, 1 Martin (No. Car.), 75; 1 Am. Dec. 545. There can be no dissent from Judge Redfield's statement (3 Wills, p. 709): "The cases are too numerous to be here repeated, that the word 'estate' will be sufficient to create a fee-simple." Citing the principal case.

It was early held, however, that the will must employ some word of perpetuity or indicate the intention to convey a fee, to have that effect.

In *Hall* v. *Goodwyn*, 2 Nott & McCord (So. Car.), B. 382, the court was equally divided on the question whether a devise of lands, without words of perpetuity, may be enlarged from a life use to a fee merely by the employment of the word "estate" in the preamble to the devising clause. The court observed, after citing the principal case: "It then becomes a question whether we shall cut the *Gordian Knot* at once, and say that *no words of perpetuity*, or

other words evincive of the testator's intention, shall be required to carry a fee.

"It was said in a former argument that this was a relict of feudal tyranny, originally founded on reasons which do not now exist, and that we ought no longer to suffer ourselves to be bound by the fetters of a barbarous age. That it is still maintained in England, from motives of policy, peculiar to a country where the right of primogeniture is to be encouraged for the purpose of supporting the aristocratical feature of the government. Yet even there it is said the judges are deploring that the law is so, and are resorting to every subtilty to fritter it away, and to erect a more rational system on its ruins. Cases have been read from the American reports in support of these arguments, and our own Court of Equity, it is said, has decided that every devise of land shall be construed into a fee where no negative or restrictive words are used.

"If this was an antiquated doctrine of the feudal system, which was now for the first time attempted to be resuscitated, I might not, perhaps, be disposed to make it a part of our code. But it is one not only coeval with the first rudiments of the common law, but it is one which has passed down through successive generations, unimpaired by the vicissitudes of time, and recognized by a series of modern decisions, until there is no principle of law better established. Even the regret which learned judges have expressed that the law is so, while they continue to be governed by it, furnishes proof conclusive that it is too firmly established to be shaken.

"Among the American cases there are indeed some respectable opinions in favor of disregarding the English decisions. But I believe that ultimately most of them have agreed to adhere to them. Among these are the respectable States of New York, Pennsylvania, and Virginia. (*a*) In New York they have been uniform. In Pennsylvania and Virginia there appear to have been some conflicting decisions. But at length they have come back to the old rule. In Maryland there is one very old case to the contrary. But whether it would now be considered authority, even in that state, is perhaps questionable.

"It is satisfactory to observe an abatement of that spirit of innovation, which at one time appeared to be springing up in some of the States, and that those which seemed inclined to declare themselves 'independent of the English decisions,' have since returned to established principles.

"The cases from our Equity Reports are entitled to great respect. And it is very desirable that the decisions of the two courts should be uniform. But on an abstract question of law if it is not more peculiarly the province of this Court to settle the construction, it at least cannot be our duty to yield a point which we think already settled. But I do not consider the question yet settled in the Court of Equity. The judges of that court were divided in opinion, and I have but little doubt that they will finally adopt the decisions of this court as the correct rule. The well known regard which the distinguished members of that court, who concurred in that opinion, have for the settled rules of the common law, forbid us to believe that they will, upon a review of that decision, leave afloat a doctrine so well established."

No. 2. — Perrin v. Blake, Har. L. T. 490 n. — Rule.

The cases referred to in the foregoing opinion are given in a note as *Jackson* v. *Embler*, 14 Johnson (New York), 198; *Clayton* v. *Clayton*, 3 Binney (Penn.), 476; *Moberry* v. *Marye*, 1 Munford (Virginia), 453 (the last a miscitation, probably intended for *Wyatt* v. *Sadler's Heirs*, 1 Munford (Virginia), 537. The like doctrine is found in *Harvey* v. *Olmsted*, 1 New York, 483; *McClellan* v. *Turner*, 15 Maine, 436. A few States preserve the old rule: *Roy* v. *Rowe*, 90 Indiana, 54; *Robinson* v. *Randolph*, 21 Florida, 629. But in most of the States, it is now provided by statute that every devise passes a fee unless the contrary intention appears. See cases cited, 29 Am. & Eng. Enc. of Law, p. 430.

That only a life estate passes, in the absence of words of inheritance, or statute to the contrary: *Wright* v. *Denn*, 10 Wheaton (U. S. Sup. Ct.), 204; *Sheldon* v. *Rose*, 41 Connecticut, 371; *Doe* v. *Dill*, 1 Houston (Delaware), 398; *Fearing* v. *Swift*, 97 Massachusetts, 415; *Den* v. *Sayre*, Pennington (New Jersey), 598; *Jones* v. *Bramblet*, 1 Scammon (Illinois), 276; *Newton* v. *Griffith*, 1 Harris & Gill (Maryland), 111; *Lummus* v. *Mitchell*, 34 New Hampshire, 39.

No. 2. — PERRIN *v.* BLAKE.

(K. B. 1770, EX. CH. 1771.)

No. 3. — JESSON *v.* WRIGHT.

(H. L. 1820.)

RULE.

WHERE a gift to "heirs of the body" follows a gift in the same instrument of the same subject to the *praepositus*, the primary intention is to create an estate tail; and this intention is not displaced by expressions or directions as to the manner of holding inconsistent with that primary intention.

Perrin and another v. Blake.

Hargrave's Law Tracts, 489–510 (s. c. 4 Burr. 2579; 1 W. Bl. 672).

Devise.— Construction.— Rule in Shelley's Case.

William Williams of Jamaica, Esq., being seised in fee [490 *n*] of a plantation in that island, and having one son and three daughters, duly executed his will bearing date 13th of March, 1722.

No. 2. — Perrin v. Blake, Har. L. T. 490 n, 491 n.

In this will, after legacies of £2000 apiece of Jamaica currency to the three daughters, whose names were Bonella, Hannah, and Anna, the testator proceeds in the following words: —

"And should my wife be enseint with child at any time hereafter, and it be a female, I give and bequeath unto her the sum of £2000, current money of this island, and to be paid her when she attains the age of twenty-one years, or day of marriage, which shall first happen, and to be generously educated and maintained out of my estate till her portion becomes payable without any deduction of the same or any part thereof. And if it be a male, I give and bequeath my estate, both real and personal, equally to be divided between the said infant and my son John Williams, when the said infant shall attain to the age of twenty-one. Item, and it is my intent and meaning that none of my children should sell and dispose of my estate for longer time than his life; and to that intent I give, devise and bequeath all the rest and residue of my estate to my son John Williams and the said infant for and during the term of their natural lives, the remainder to my brother-in-law Isaac Gale and his heirs for and during the natural lives, of my said sons John Williams and the said infant; the remainder to the heirs of the bodies of my said sons, John Williams and the said infant lawfully begotten or to be begotten; the remainder to my daughters for and during the term of their natural lives equally to be divided between them; the remainder to my said brother-in-law Isaac Gale and his heirs during the natural lives, of my said daughters respectively; the remainder to the heirs of the bodies of my said daughters, equally to be divided between them. And I do declare it to be my will and pleasure, that the share and part of any of my said daughters that shall happen to die shall immediately vest in the heirs of her body in manner aforesaid. Item, it is my will and desire, that all the produce of my estates, after the payment of my debts, except what shall be thought needful by my executors for the support and expenses of my family and estates, be duly shipped upon insurance to the kingdom of Great Britain, or bills of exchange for the same to Humphrey South and Company, or some other substantial person or persons, to be put at interest into the Bank of England; and likewise to get in all my monies due on
[491 *n*] mortgages, bonds, bills, and any otherwise as they shall become due, to be remitted in goods or bills as aforesaid.

No. 2. — Perrin v. Blake, Har. L. T. 491 n.

And I give to my executors full power and lawful authority to authorize the said South, or some other substantial, knowing man, to lay out the said monies in good landed estates. And lastly, I do hereby nominate and appoint my loving wife, during her widowhood, executrix and guardian, together with my loving friends Isaac Gale, Jonathan Gale, Esquire; Barnart Lewis, Esquires John Gale and Thomas Woolley, senior, executors and guardians to my children during their minorities."

Isaac Gale, the devisee in trust in this will, died before the testator.

On the 4th of February 1723, the testator died, leaving issue John Williams his only son and heir, and the three daughters named in the will. The testator's wife was not enseint at his death or at any time after, and died 1st of March 1723.

In February, 1743, the testator's son John Williams came of age; and conceiving himself to be seised in fee tail under the will of his father, he immediately made such conveyance of the devised plantation in Jamaica as by the law of that island is equivalent to a common recovery here.

In March following John Williams executed a settlement in pursuance of marriage articles made whilst he was under age: and by this settlement the plantation entailed by his father's will was conveyed to trustees and their heirs to the uses following; namely to the use of John Williams for life; remainder to the use of trustees, during his life, to preserve contingent remainders; remainder to the use and intent that Sarah his wife, if she survived him, might receive out of the premises, during her life, a clear yearly rent charge of £1000, British money, payable at the Royal Exchange, London, quarterly, with powers of distress and entry; and subject to this rent-charge to the use of John Sharpe, William Perrin, and Thomas Vaughan, their executors, administrators, and assigns for 400 years, for securing the rent-charge; remainder to the first and other sons of John Williams by the said Sarah his wife, successively in tail male; remainder to John Williams in fee.

On the 31st of December 1744, John Williams died without issue, leaving Sarah his widow, and his two sisters, Bonella, the wife of Norwood Wilter, and Hannah, the wife of Benjamin Blake, his co-heirs, Anna, the other sister, having died unmarried in his lifetime.

No. 2. — Perrin v. Blake, Har. L. T. 491 n–492 n.

In 1745, immediately after the death of John Williams, the husbands of his two surviving sisters and co-heirs in their right entered into the plantation so devised and settled and became seised. Mr. Blake and his wife brought an action against Mr. Norwood Wilter and his wife in the Superior Courts of Judicature in Jamaica for a partition, and obtained judgment for that purpose; which judgment was afterwards executed by an actual partition under a writ to the Provost-Marshal.

After this partition the wife of Wilter died, leaving William Wilter her son and heir; and Benjamin Blake also died, leaving the said Hannah his widow.

Both William Wilter and Hannah Blake controverted the validity of the jointure of £1000 a year to Mrs. Williams the widow, on the ground, that her deceased husband John Williams was a mere tenant for life under the will of his father, and therefore could not bar the entail thereby created.

To try this point, which depended on the question, how the remainder in the will of William Williams to the heirs of the bodies of his sons John Williams and the unborn infant therein referred to ought to be construed, Perrin and Vaughan, the surviving trustees of the term of 400 years for securing Mrs. Williams' jointure, brought two ejectments in the Supreme Court of Judicature at St. Jago in Jamaica. One was brought against William Wilter, for that part of the plantation in his possession under the partition; and the other against Hannah Blake, for the part allotted to her. In both these ejectments the judgment of the Supreme Court was against Mrs. Williams' trustees.

[492 *n*] Writs of error were brought on both judgments in the Court of Appeals and Errors in Jamaica, which consists of the Governor and Council. But the fate of the two writs of error there was different, the judgment in the ejectment against Mr. Blake being reversed; but the other, against Mr. Wilter, which was not heard till several years afterwards, being affirmed.

On both judgments in the Court of Appeals and Errors in Jamaica, there was an appeal to the King in Council.

What was done by the Privy Council on the appeal against Mr. Wilter, I am not informed of.

But, in respect to the appeal to the Privy Council brought by Mr. Perrin and his co-trustee against Mrs. Blake, it appears to have taken the following course:

No. 2. — Perrin v. Blake, Har. L. T. 492 n.

The Lords of the Privy Council, conceiving that the record brought before them was, for want of a special verdict, too imperfect, therefore reversed the judgment of the Court of Appeals in Jamaica, but with a direction not to prejudice the merits, and a recommendation of a special verdict on a new ejectment to be brought by Mrs. Williams' trustees. Accordingly a new ejectment was prosecuted by Mr. Perrin and his co-trustee Mr. Vaughan; and a special verdict being found, and both the Supreme Court in Jamaica and the Court of Appeals and Errors there having given judgment for Mrs. Blake, the defendant, the plaintiffs appealed to the King in Council. In July 1765, the cause came on to a hearing before the Lords of the Committee of the Privy Council. But Lord MANSFIELD, being the only law lord who then attended the Council, did not choose that a question of so general a tendency in respect to all the landed property in England should be decided by his single opinion; and therefore it was agreed, that the appeal should be adjourned till a solemn adjudication of the point arising on the will of William Williams could be obtained in Westminster Hall. For this purpose a case was at first prepared for the opinion of the Court of King's Bench, and signed by the counsel on each side. But such a reference from the cockpit to one of the Courts of Westminster being a novelty, it was at length agreed to take the opinion of the King's Bench in a feigned action of trespass, in such a way as to give the benefit of a writ of error to the Exchequer Chamber, and from thence to the House of Lords. Accordingly a record was framed for the King's Bench to this effect.

Messrs. Perrin and Vaughan, the surviving trustees of the term of four hundred years for securing Mrs. Williams' jointure, brought trespass against Mrs. Hannah Blake for forcibly entering upon the plantation in Jamaica, with a *videlicet* to lay the action in a parish in Middlesex. To the declaration on this trespass, the defendant pleaded as to the force not guilty; and as to the residue of the trespass, that William Williams being seised in fee devised the premises to his son John Williams for his life, remainder to the defendants and the two other daughters of testator in fee; that the testator died seised 4th Feb. 1723; that the two other daughters and the son John died; and that on John's death defendant entered and was seised. To this plea the plaintiff put in a replication, stating the will of William Williams at length and his

death; that Isaac Gale mentioned in the will died before testator; and that afterwards John Williams suffered a common recovery, to the use of himself in fee, which was done, instead of stating the real fact of the conveyance operating as a bar of entails according to the law of Jamaica, in order to have the point determined, as if the estate actually was situate in England; and also that John Williams so becoming seised in fee demised to the plaintiffs for a thousand years, who entering under this term were trespassed upon by defendant, as in the declaration. To this replication the defendant demurred; and plaintiffs joining in demurrer, the case was thus brought before the Court of King's Bench for judgment.

[493 *n*] Upon these pleadings, in various parts of which some of the real facts were varied and others omitted, in order I presume to accommodate the record to the shortest mode of bringing forward the true point in issue, the case came on to a hearing in the King's Bench, in Easter term 9 Geo. III. when Mr. Serjeant Walker argued for the plaintiffs, and Mr. Serjeant Glyn for the defendant. It was argued a second time in Trinity term following by Mr. Serjeant Burland for the former, and by Mr. Dunning, then Solicitor-General, for the latter. The judgment of the Court was given in Trinity term 10 Geo. III. for the defendant Mrs. Blake; Lord MANSFIELD, Chief Justice, and ASTON and WILLES, Justices, holding that John Williams took merely an estate for life; but YATES, Justice, being of opinion that the remainder to the heirs of the body of John Williams, the tenant for life, were words of limitation, and passed an estate tail to him.

A writ of error was brought upon this judgment in the Exchequer Chamber, where it was argued several times, of which the last was in May 1771. After a pause of above seven months, the judges of the Exchequer Chamber delivered their opinion *seriatim* on the 29th of January, 1772; and then it was, that Mr. Justice BLACKSTONE delivered the following argument:

The result was a judgment of reversal, by the opinions of seven judges against one; Lord Chief Baron PARKER, Mr. Baron ADAMS, Mr. Justice GOULD, Mr. Baron PERROTT, and the Justices BLACKSTONE and NARES, being all against the judgment of the King's Bench and Lord Chief Justice DE GREY the only judge for it.

Upon the whole, therefore, eight judges were for an estate tail in John Williams, and four for an estate for life.

A writ of error was next brought in Parliament to carry the point for a final decision by the House of Lords. This writ of error was kept depending for several years without either party's choosing to force on a hearing. But at length a compromise took place between the parties; and on a petition from them to the House of Lords representing the compromise, that House on the 7th of May 1777 ordered a *non-pros.* to be entered on the writ of error, and that the record should be remitted to the King's Bench for executing the judgment of that Court, as if no writ of error had been brought into that House.

The following (which has always been treated as expressing this *ratio decidendi* of the Court of Exchequer Chamber, is set forth by Mr. Hargreaves as the judgment of

Mr. Justice Blackstone: —

Upon the fullest consideration which I have been able to give to this case, I am of opinion, that the judgment of the Court of King's Bench is erroneous and ought to be reversed.

I conceive that the great and fundamental maxim, upon which the construction of every devise must depend, is "that the intention of the testator shall be fully and punctually * ob- [* 490] served, so far as the same is consistent with the established rule of law; and no farther."— If it did not go so far, it would be an infringement of that liberty of disposing of a man's own property, which is the most powerful incentive to honest industry, * and is, therefore, essential to a free and [* 491] commercial country. If it went farther, every man would make a law for himself; the metes and boundaries of property would be vague and indeterminate, which must end in its total insecurity.

* But there is, I will acknowledge, a distinction to be [* 492] made, though too often confounded or forgotten, in what is meant by those rules of law, which must co-operate with the intention of the testator, in order to effectuate his devise.

* Some of these rules are of an essential, permanent, [* 493] and substantial kind; and may justly be considered as the indelible landmarks of property, irrevocably established by the well-weighted policy of the law, which have stood the test of ages, and which cannot * be exceeded or transgressed by [* 494] any intention of the testator, be it ever so clear and manifest. Such as, that every tenant in fee-simple or fee-tail shall

have the power of alienating his estate, by the several modes adapted to their respective interests; that no disposition shall be allowed, which in its consequence tends to a perpetuity; that lands shall descend to the eldest son or brother alone, or to all the daughters or sisters in partnership. These, and a multitude of other fundamental rules of property in this kingdom, are founded on the great principles of public convenience or necessity, and therefore cannot be shaken or disturbed by any whim or caprice of a testator, however fully or emphatically expressed. A condition not to alienate is void, when annexed to a devise in fee, or in tail: an executory devise which tends to a perpetuity, by depending on so distant a contingency as the general failure of issue, is totally null from the beginning; and no man would be suffered to direct, that his lands shall be descendible for the future to all his male issue, or only to the eldest of his female.

But there are also certain other rules of a more arbitrary, technical, and artificial kind, which are not so sacred as these, being founded upon no great principles of legislation or national policy. Some of these are only rules of interpretation or evidence, to ascertain the intention of parties, by annexing particular ideas of property to particular modes of expression: so that when a testator makes use of any of those technical modes of expression, it is evidence *primâ facie*, that he means to express the self-same thing which the law expresses by the self-same form of words. Thus, if a man devises his land, being freehold, to another generally, without specifying the duration of his estate, the devisee shall be only tenant for life: if he devises in like manner a chattel interest, the devisee shall have the total property: a devise to a man and his heirs shall give him the full and absolute dominion; to a man and the heirs of his body, shall give him a more limited inheritance.

Lastly, there are some rules, which are not to be reckoned among the great fundamental principles of juridical policy, but are mere maxims of positive law deduced by legal reasoning from some or other of these great fundamental principles. Such as, that a man cannot raise a fee-simple to his own right heirs, by the name of heirs, as a purchase; or, to bring it home to the case now before the Court, that a devise of lands to a man for his life, and afterwards in any part of the same will a devise of the same lands to the heirs of his body, shall constitute an estate tail in the first devisee for life.

* But some of these rules, of the second and third class, [*495] are rules of a more flexible nature than those of the preceding kind, and admit of many exceptions; whereas those admit of none. For, if the intention of the testator be clearly and manifestly contrary to the legal import of the words, which he has thus hastily and unadvisedly made use of, the technical rule of law shall give way to this plain intention of the testator. This has been clear law for four centuries at least, if not longer. It is said by the judges in 9 Hen. VI. fol. 24, that a devise is marvellous in its operations; and many instances are given, where it may countervail the ordinary rules of law. The like doctrine is to be met with in every reporter since; and is the same that obtained in equity for the construction of uses before the statute. In the case of uses (says Lord BACON of Uses, 308, 8vo edit.), the Chancellor will consult with the rules of law, where the intention of the parties does not specially appear. But then, this intention of the testator, which is to ride over and control the legal operation of his own words, must be "manifest and certain and not obscure or doubtful," as was resolved by all the judges of England in *Wild's Case*, 6 Co. Rep. 16. (No. 5 *post*). Or, according to the emphatical words of Lord HOBART 33, "the intent must not be conjectural, but by declaration plain." Which words of Lord HOBART, as they are adopted and construed by Lord HARDWICKE in *Garth* v. *Baldwyne*, 2 Ves. Sen. 646, must mean, "plain expression or necessary implication of his intent. But if that intent be uncertain, if it be in *æquilibrio*, or even in suspense or doubt, then (he afterwards adds) the legal operation of the words must take effect." And most certainly his lordship has laid down and explained the rule with that sagacity and caution, which so eminently distinguished his decisions. For as, on the one hand, it would be very unreasonable to control the plain intent of a testator by technical rules, which were principally contrived to ascertain it; so, on the other hand, where the intent is obscure or even doubtful, and liable to a variety of conjectures, it is the best and the safest way to adhere to these criterions, which the wisdom of the law has established for ages together, for the certainty and quiet of property. Every testator, when he uses the legal idiom, shall be supposed to use it in its legal meaning, unless he very plainly declares that he means to use it otherwise. And if the contrary doctrine should prevail;

if courts either of law or equity (in both of which the rules of interpretation must be always the same), if these or either of them should indulge an unlimited latitude of forming conjectures upon wills, instead of attending to their grammatical or legal construction, the consequence must be endless litigation. [* 496] Every title to an estate, * that depends upon a will, must be brought into Westminster Hall; for if once we depart from the established rules of interpretation, without a moral certainty that the meaning of the testator requires it, no interpretation can be safe till it has received the sanction of a Court of Justice. For how can a client or a purchaser be assured that the conjectures of the most able counsel, or the most experienced conveyancer, will be in all points the same as the conjectures of the Judges or the Chancellor? A civilian of some eminence, Mantica, has written a learned treatise on their law, which he has entitled, *de conjecturis ultimarum voluntatum;* but I hope never to see such a title in the law of England. For, should such a doctrine ever prevail in this country, it were better that the statute of wills should be totally repealed than be made the instrument of introducing a vague discretionary law, formed upon the occasion from the circumstances of every case; to which no precedent can be applied, and from which no rule can be deduced.

The principles being thus cleared, upon which I have endeavoured to found my present opinion, I shall now proceed to state what is the legal and technical import of the words made use of in this devise; and will then consider whether there is any plain and manifest intention of the testator, to be gathered from any part of his will, which may control and overrule the legal operation of the words, and at the same time be consistent with the fundamental and immutable rules of law.

The words which are material to be considered, in the event that has happened (when stript of all embarrassment from the contingency, which never arose, of the birth of a posthumous son) are the following: — "Item, and it is my intent and meaning, that none of my children should sell and dispose of my estate for longer time than his life; and to that intent I give, devise, and bequeath all the rest and residue of my estate to my son John Williams for and during the term of his natural life; the remainder to my brother-in-law Isaac Gale and his heirs, for and during the natural life of my said son John Williams;

* the remainder to the heirs of the body of my said son [*497] John Williams, lawfully begotten or to be begotten; the remainder to my daughters for and during the term of their natural lives, equally to be divided between them; the remainder to my said brother-in-law Isaac Gale and his heirs during the natural lives of my said daughters respectively; the remainder to the heirs of the bodies of my said daughters, equally to be divided between them. And I do declare it to be my will and pleasure, that the share or part of any of my said daughters, that shall happen to die, shall immediately vest in the heirs of her body in manner aforesaid."

It is necessary to take notice, that Isaac Gale died in the life-time of the testator, whereby the remainder limited to him and his heirs for the life of John Williams became, in point of law, a lapsed devise.

The disposition therefore, at the death of the testator, stood thus: "To John Williams for the term of his natural life; the remainder to the heirs of his body," without any interposing estate. The legal consequence of which is, that if this be an estate tail in John Williams, it is an estate tail in possession, by immediately uniting with the life-estate; and not an estate tail in remainder, as in the cases of *Duncomb* v. *Duncomb* (3 Levinz, 437), and *Coulson* v. *Coulson* (2 Atk. 250), it was held to be, by reason of the interposing estate, which subsisted in both those cases. And indeed, were it otherwise, the plaintiff's replication could not be supported upon this general demurrer; for therein he pleads, that "by virtue of the said will, John Williams entered into the close in question, and became seised thereof in his demesne as of fee tail, to wit, to him and to the heirs of his body issuing." How far the interposition of this estate to Isaac Gale and his heirs, though it never took effect, is an evidence of the testator's intention, will afterwards come to be considered. At present the only question is, what estate is by these words devised to John Williams, according to the general rule of law, uncontrolled by other considerations? And I apprehend there is no doubt, but that the words, in their legal construction, convey an estate tail to John Williams.

For the rule of law, as laid down in *Shelley's Case*, 1 Co. Rep. 104, and recognised in Co. Litt. 22, 319, 376, is, that "where the ancestor takes an estate of freehold, with a remainder, either

mediate or immediate, to his heirs, or the heirs of his body, the word "heirs" is a word of limitation of the estate, and not of purchase:" that is, in other words, that such remainder vests in the ancestor himself, and the heir (when he takes) shall take by descent from him, and not as a purchaser.

This rule, though too plain and positive to be openly [* 498] questioned * or denied, has yet been obliquely reflected on; and insinuations have been thrown out, that it is a strict and a narrow rule, — founded upon feodal principles, which have long ago ceased; — that in *Shelley's Case* it is only laid down *arguendo* by the counsel, and not by the Court; — and that too in the case of a deed and not of a will. It will not therefore be foreign to the present question, to make a short enquiry into the reason, the antiquity, and the extent of the rule.

Were it strictly true, that the origin of this rule was merely feodal, and calculated solely to give the lord his profits of tenure (either wardship or relief) upon the descent to the heir from the ancestor, of which the lord might be defrauded if the heir was to take by purchase, of which (by the way) I have never met with a single trace in any feodal writer; — still it would not shake the authority of the rule, or make us wish for an opportunity to evade it. There is hardly an ancient rule of real property, but what has in it more or less of a feodal tincture. The common law maxims of descent, the conveyance by livery of seisin, the whole doctrine of copyholds, and a hundred other instances that might be given, are plainly the offspring of the feodal system; but, whatever their parentage was, they are now adopted by the common law of England, incorporated into its body, and so interwoven with its policy, that no Court of Justice in this kingdom has either the power or (I trust) the inclination to disturb them. The benefit of clergy took its origin from principles of popery: but is there a man breathing that would therefore now wish to abolish it? The law of real property in this country, wherever its materials were gathered, is now formed into a fine artificial system, full of unseen connexions and nice dependencies; and he that breaks one link of the chain, endangers the dissolution of the whole.

But it is by no means clear, that this rule took its rise merely from feodal principles. I am rather inclined to believe, that it was first established to prevent the inheritance from being in

abeyance. For, though it has been the doctrine of modern times, in order to effectuate executory devises, that, where a limitation of the inheritance depends in contingency, an interim estate may descend to the heir until the contingency happens, yet it is manifest to any one the least conversant in our ancient books, that during the pendency of a contingent remainder in fee or in tail, the inheritance was formerly always (and in some cases is to this day) held to be in abeyance, or *in nubibus*, as they then expressed it. Thus if a gift be made to one for life, remainder to the right heirs of J. S., then living, the fee simple is in suspense or *abeyance during the life of J. S. Bro. t. Done. 6. [*499] And so is Co. Litt. 342 *b*.

But this state of abeyance was always odious in the law; and therefore the whole freehold or frank-tenement could not be in abeyance, except in the single case of the death of a parson, or other corporation sole. Dyer, 71 Hob. 338. For in that interval there could be no seisin of the land, no tenant to a praecipe, no one of ability to protect it from wrong or injury, or to answer its burthens or services. And this is one principal reason, why a particular estate for years is not allowed to support a contingent remainder; that the freehold may not be in abeyance: as is laid down in Hob. 153.

But when the first or particular estate was a freehold, there in some cases the law allowed the inheritance to be put in abeyance, by the creation of a contingent remainder; but this very sparingly and with great reluctance. For, during such abeyance of the inheritance, many operations of law were totally suspended. The particular tenant was rendered dispunishable for waste: for the writ of waste can only be brought by him who is entitled to the inheritance. The title, if attacked, could not be completely defended; for there was no one in being, of whom the tenant of the freehold could pray in aid to support his right. The mere right itself, if subsisting in a stranger, could not be recovered in this interval: for, upon a writ of right patent, a lessee for life cannot join the mise upon the mere right. 1 Roll. Abr. 686. For these among other reasons, the law was extremely cautious of admitting the inheritance to be in abeyance, unless in very particular cases; as is laid down by Hobart and Doddridge, 2 Roll. Rep. 502, 506, Hob. 338. Indeed, where the particular estate was made to A. for life, with remainder to the right heirs of B.

then living, there till the death of B. the inheritance was necessarily in abeyance; for B. the ancestor was entitled to nothing. But, where the ancestor had already an estate of freehold limited to him, the law (to prevent such abeyance) adjudged that a subsequent remainder to his heirs (who, during his life, are uncertain) was a remainder vested in the ancestor himself, and that his heirs shall claim by descent from him. For, as HANKFORD, J. says in 11 Hen. IV. 74: "If land be given to a man for term of his life, the remainder in tail, and for default of issue the remainder to the right heir of the first tenant, the remainder in fee simple takes its being by the possession which the first tenant hath." And though in this case it was argued at the bar, that the fee was *in nubibus*, or in suspense, yet this was [* 500] * strongly denied both by him and by HILL, another of the Judges. And indeed, if we consider it attentively, the whole of this rule amounts to no more than what happens every day in the creation of an estate in fee or in tail, by a gift to A. and to his heirs for ever, or to A. and to the heirs of his body begotten. The first words (to A.) create an estate for life: the latter (to his heirs, or the heirs of his body) create a remainder in fee or in tail; which the law, to prevent an abeyance, refers to and vests in the ancestor himself; who is thus tenant for life, with an immediate remainder in fee or in tail; and then, by the conjunction of the two estates, or the merger of the less in the greater, he becomes tenant in fee or tenant in tail in possession. Hence therefore I am induced to think, that one principal foundation of this rule was to obviate the mischief of too frequently putting the inheritance in suspense or abeyance.

Another foundation might be, and was probably, laid in a principle diametrically opposite to the genius of the feodal institutions; namely, a desire to facilitate the alienation of land, and to throw it into the track of commerce, one generation sooner, by vesting the inheritance in the ancestor, than if he continued tenant for life, and the heir was declared a purchaser. Therefore, where an estate was limited to the ancestor for life, and afterwards (mediately or immediately) to his heirs, who are uncertain till the time of his death; the law considered the ancestor as the first and principal object of the donor's bounty; and therefore permitted him (who, as it is said, Co. Litt. 22, beareth in his body all his heirs, and who had the only visible and notorious freehold in

the land) to sell it, devise it, where the custom would permit, or charge it with his debts and incumbrances. And however narrow and illiberal the original establishment of this rule, or the adhering to it in later times, may have been represented in argument, I own myself of opinion, that those constructions of law, which tend to facilitate the sale and circulation of property in a free and commercial country, and which make it more liable to the debts of the visible owner, who derives a greater credit from that ownership; such constructions, I say, are founded upon principles of public policy altogether as open and as enlarged as those which favour the accumulation of estates in private families, by fettering inheritances till the full age of posterity now unborn, and which may not be born for half a century.

Then as to the antiquity of the rule in question, it hath been said, that in *Shelley's Case*, it is only urged by the counsel for the defendant in their argument, and not relied on by the Court. *But the determination of the Court is grounded [*501] on this rule, as well in *Shelley's Case*, as in the *Case of the Earl of Bedford*, Moor. 720, where the same rule is likewise argued from by the counsel as a known and undeniable maxim. And Lord COKE in his Commentary on Littleton (the great result of all his experience) has often adapted and relied upon it; and has cited in his margin, to support it, a long list of authorities from the Year Books; chiefly those of Edward the Third. I have looked into all these, and into some besides; and shall only say that they do most explicitly warrant the doctrine extracted from them by that great and learned Judge.

There is one case, which I have never seen cited, and which is by far the earliest of any that have occurred to me upon a diligent search. In this the question before the Court was, whether an estate thus circumstanced (that is, settled on a man for life, and after an immediate remainder in tail, to the right heirs of the tenant for life) was, on failure of the remainder in tail, liable to the debts of the tenant for life; and it was determined to be liable, upon the ground of its being a fee simple vested in the ancestor; and therefore vested in him, in order to prevent the inheritance from being in abeyance. This, I believe, is the very first case in our books, wherein this principle was established. It is in the Year Book of Edward II. published by Serjeant Maynard, M. 18 Edw. II. fol. 577. And the case was

this: "John Abel, having two sons Walter and John, purchased the manor of Fortysgray in Kent; to hold to himself and Matilda his wife, and Walter Abel his eldest son, and to the heirs of the body of Walter begotten; and, if Walter died without heir of his body, the manor should remain to the right heirs of John the father. Matilda the wife died; and Walter the son also died without heir of his body. John the father became bound in a statute merchant to pay £100 to B. at a day certain; and died, leaving his younger son John his heir. After the day of payment was elapsed, the creditor sued out a writ to the sheriff of Kent, to extend and deliver to him all the lands which John Abel the father had, on the day of acknowledging the statute. The sheriff returns, that he had delivered to other creditors upon recognizances all the lands which John Abel had in fee, except the manor of Fortysgray, in which he had only an estate for term of life. Upon this return it was argued, that John the father had only the freehold for term of life, the fee simple being limited to his heirs, who therefore took by purchase and not by descent. But the Court held the contrary; for which this reason (among others) is given by STONOR, J. *viz.* because otherwise the [* 502] fee and the right after the * death of Walter the eldest son, would have been in nobody. And therefore BERESFORD, C. J. gave the rule, that execution should be awarded upon this manor of Fortysgray."

The rule of law, deducible from hence, is well and emphatically collected by Fitzherbert, in his Abridgment, tit. Feoffment, pl. 109, who refers (I presume) to this case (though it was not then in print) when he says, that it was resolved in M. 18 Edw. II. "that if a man give land to B. for term of life, remainder to C. in tail, remainder to the right heirs of B. in fee, this remainder in fee vests in B. as much as if the remainder was limited to B. and his right heirs in fee; and the right heir of B. shall have this by descent and not as purchaser."

And from all these authorities I infer, that the rule in question is a rule of the highest antiquity; not merely grounded on any narrow feodal principle, but applied, in the first instance we know of, to the liberal and conscientious purpose of facilitating the alienation of the land by charging it with the debts of the ancestor.

However, it hath been urged, that though the rule must be

allowed with respect to estates created by deed; yet it doth not follow, that it also extends to devises: and so the MASTER OF THE ROLLS is said to have declared (in the case of *Papillon* v. *Voice*, 2 Wms. 477) "that he knew of no case, where lands being devised to A. for life, remainder to the heirs of the body, this (in case of a will) had been construed an estate tail in A." But either the reporter has misapprehended his Honour's meaning or else he had surely forgotten the cases of *Whiting* v. *Wilkins*, 1 Bulstr. 219, *Rundale* v. *Eeley*, Cart. 170, and *Broughton* v. *Langley*, Lutw. 814, wherein that point is resolved *in terminis*. It will therefore be sufficient to observe upon this head, that the rule in Co. Litt. 22, 319, is laid down in general terms, "where and wheresoever the ancestor taketh an estate for life, &c.," and in Co. Litt. 376, and also in *Shelley's Case*, and in Moor. 720, *The Earl of Bedford's Case*, it is extended to all conveyances. And devises of land (which differ totally from testaments of chattels) are held in all our books, and particularly in *Windham* v. *Chetwynd*, 1 Burr. 429, to be a species of conveyance; and this is the reason why lands purchased after the execution of it cannot pass by such a devise.

But, however strongly this rule may be founded in antiquity, and supported by reason and authority, I have in the outset conceded, that when it is applied to devises, it may give way to the plain and manifest intent of the devisor; provided that intent be consistent with the great and immutable principles of our legal * policy; and provided it be so fully expressed [* 503] in the testator's will, or else may be collected from thence by such cogent and demonstrative arguments, as to leave no doubt in any reasonable mind, whether it was his intent or no. Which leads me to the last consideration.

Whether there is any such plain and manifest intent of the devisor, expressed in or to be collected from any part of this devise, as may control the legal operation of the words, and at the same time be consistent with the fundamental rules of law? And I am of opinion, that there is no such plain intent.

In order to decide this question clearly, it is necessary to state it accurately. And first, let us see what the question is not.

The question is not, whether the testator intended that his son John should have a power of alienation. If that was all, the dispute would be soon at an end; for his intention is most clearly expressed (and it is the only clear intent I can find) that the son

should not have such a power. And, if a conveyance were now to be directed of this estate by a Court of Equity, it would probably be in strict settlement, according to the case of *Lennard* v. *Earl of Sussex*, 2 Vern. 526. But that and all similar cases (of directing a conveyance by a Court of Equity) must be laid out of the present question; for we are now in the case of a legal estate, executed either one way or the other, and not of an executory trust. And if the testator has in fact devised an estate to John, with which such a restriction of alienation is incompatible by the fundamental rules of law, the restriction is null and void.

Again: the question is not, whether the testator intended that his son John should have only an estate for life. I believe there never was an instance, when an estate for life was expressly devised to the first taker, that the devisor intended he should have anything more. But if he afterwards gives an estate to the heirs of the tenant for life, or to the heirs of his body, it is the consequence or operation of law that in this case supervenes his intention (as Lord HALE expresses it, 1 Ventr. 225, 379), and vests a remainder in the ancestor: which remainder, if it be immediate, merges his estate for life, and gives him the inheritance in possession; but if mediate only, by reason of some interposing estate, then it vests the inheritance in the tenant for life, as a future interest, to take effect in possession when the interposition is determined. And therefore it has been frequently adjudged, that though an estate be devised to a man for his life only, or for life *et non aliter* or with any other restrictive expressions; yet, if there be afterwards added apt and proper words to create an estate of inheritance in his heirs or the heirs of his body, [* 504] the * extensive force of the latter words shall overbalance the strictness of the former, and make him tenant in tail or in fee. These therefore are not the true questions in the present case.

But I apprehend the true question of intent will turn, not upon the quantity of estate intended to be given to John the ancestor; but upon the nature of the estate intended to be given to the heirs of his body. That the ancestor was intended to take an estate for life, is certain: that his heirs were intended to take after him, is equally certain: but how those heirs were intended to take, whether as descendants, or as purchasers, is the question. If the testator intended they should take as purchasers, then John

the ancestor remained only tenant for life. If he meant they should take by descent, or had formed no intention about the matter, then, by operation and consequence of law, the inheritance first vested in the ancestor. The true question therefore is, — Whether the testator has or has not plainly declared his intent, that the heirs of the body of John Williams shall take an estate by purchase, entirely detached from and unconnected with the estate of their ancestor? or, in other words, Whether he meant to put an express negative on the general rule of law which vests in the person of the ancestor (when tenant of the freehold) an estate that is given to the heirs of his body? But, in order to say this, we must suppose, that the testator was apprised of this rule, and meant an exception to it; of which there is no evidence whatsoever. And here lies the great difficulty, which the defendant in error must encounter. It is not incumbent on the plaintiff to show, by an express evidence, that this testator meant to adhere to the rule of law; for that is always supposed till the contrary is clearly proved: but it is incumbent on the defendant to show, by plain and manifest indications, that the testator intended to deviate from the general rule; for that is never supposed, till made out, not by conjecture but by strong and conclusive evidence.

Let us therefore see what evidence has been usually required to demonstrate such a devious intention, and what the evidence is that is relied on in the present case.

I am far from maintaining, that by a devise to a man's heirs or the heirs of his body, they shall never take as purchasers in any case. But I have never observed it to be allowed, excepting in one of these four situations; not one of which will apply to the present case.

1. Where no estate at all, or (which is the same thing in the idea of our ancient law) where no estate of freehold is *devised to the ancestor. Here the heirs cannot take [*505] by descent, because the ancestor never had in him any descendible estate. And this must always be the case, where the ancestor is dead at the time of the devise, as in the known case of *John de Mandeville* (Co. Litt. 26), the heir then taking a vested estate by purchase. It is also the same, if the ancestor be living and has no sort of estate devised to him; only that then the estate of the heir is contingent, because *nemo est hæres viventis.*

No. 2. — Perrin v. Blake, Har. L. T. 505, 506.

And, if the ancestor has only the devise of a chattel interest, with a subsequent estate to his heirs, the heirs must likewise take as purchasers, or not take at all. For, if between the term of the ancestor and the estate of his heirs, there is no vested freehold remainder, the heirs can only take by way of executory devise; which, *ex vi termini*, implies an estate not executed in the ancestor. Or, if there be any such vested estate of freehold, interposed between the ancestor's term and the contingent remainder to his heirs, that contingent remainder is supported entirely by the interposed estate, and does not derive its being or any degree of assistance from the chattel estate of the ancestor.

2. The next case is, where no estate of inheritance is devised to the heir; as in the case of *White* v. *Collins*, Com. 289 (cited by the counsel for the defendant). There the devise was to Frank Mildmay for life, with a power of jointuring, and after his death (and jointure, if any be) to the heir male of his body lawfully begotten, during the term of his natural life; remainder over. Common sense will here tell us, that when no estate of inheritance is devised to the heir male of the body, he cannot take by descent as heir.

3. The third case is, where some words of explanation are annexed by the devisor himself to the word heirs, in the will; whereby he discovers a consciousness, distrust, or apprehension that he may have used the word improperly, and not in its legal meaning; and therefore he in a manner retracts it, he corrects the inaccuracy of his own phrase, and tells every reader of his will how he would have it understood. Thus, in *Burchel* v. *Durdant*, (2 Ventr. 311, Carth. 154), the devise was, "in trust for Robert Durdant for life, and after his decease to the heirs male of his body, now living." As if the testator had said, "I do not mean a perpetual succession in the male line of Robert Durdant, which perhaps may be the legal sense of heirs male of his body; but I mean by that expression only such of his sons as are at present born and known to me." And accordingly the Court held, [* 506] that George Durdant, the son of Robert, and living * when the will was made, should take the estate as a purchaser. So in *Lisle* v. *Gray* (2 Lev. 223), the words were, "to Edward for life remainder to his first, second, third and fourth sons in tail male; and so to all and every other the heirs male of the body of Edward." Which words "and so" (together with the manifest

reason of the thing) plainly showed that the "other heirs male of the body" in the subsequent clause of the will, were to be understood just so as the "first, second, third, and fourth sons" were to be understood in the preceding. And in *Lowe* v. *Davis* (Lord Raym. 1561), when the testator had first devised, in a loose unguarded manner, to "his son Benjamin and his heirs lawfully to be begotten," he immediately recollects himself and adds, by way of explanation, "that is to say, to his first, second, third, and every other son and sons successively, lawfully to be begotten of the body of the said Benjamin, &c." This devise to the heirs, thus explained, was held to be by way of purchase. So in the case of *Doe on demise of Long* v. *Laming*, (Burr. 1100), the devise was of gavel-kind lands "to Anne Cornish and the heirs of her body begotten, as well female as male, to take as tenants in common." Now, since gavel-kind lands cannot descend to heirs female as well as males (as is expressly declared by the statute De Prærog. Regis, 17 Edw. II. c. 16), nor can heirs, as such, be tenants in common but coparceners, it is clear, that by the words heirs of the body (thus explained by the words female as well as male, and to take as tenants in common), the devisor could only mean to describe the children of Ann Cornish.

4. The last case, wherein heirs of the body have been held to be words of purchase, is where the testator hath superadded fresh limitations, and grafted other words of inheritance upon the heirs to whom he gives the estate: whereby it appears, that those heirs were meant by the testator to be the root of a new inheritance, the stock of a new descent; and were not considered merely as branches derived from their own progenitor. Where the heir is thus himself made an ancestor, it is plain, that the denomination of heir of the body was merely descriptive of the person intended to take, and means no more than "such son or daughter of the tenant for life, as shall also be heir of his body." The cases of *Lisle* v. *Gray*, and *Lowe* v. *Davis* and *Long* v. *Laming*, fall under this head as well as the other; these having also words of limitation superadded to the word heirs, as well as the explanatory words I before took notice of. Thus too in *Check* v. *Day* (which, as Lord Raymond observes, Fitzg. 24, Fortesc. 77 is the true name of the case usually called *Clerk* v. *Day*), the devise, as there cited from the roll, was "to my daughter Rose for life, and if she marry after my death, * and have any heirs lawfully [* 507]

begotten, I will that her heir shall have the lands after my daughter's death, and the heirs of such heir." So likewise *Archer's Case*, 1 Co. Rep. 66, is "to the right and next heir of Robert Archer (the tenant for life), and to the heirs of his body lawfully begotten for ever." And the case of *Backhouse* v. *Wells*, 2 Wms. 476, is "from and after the decease of the tenant for life to the issue male of his body, and to the heir male of such issue male."

All the cases therefore that have hitherto occurred, from the statute of wills to the present time (a period above two centuries) all the cases, I say, in which heirs of the body have been construed to be words of purchase, are reducible to these four heads: either where no estate of freehold is given to the ancestor; or where no estate of inheritance is given to the heir; or where other explanatory words are immediately subjoined to the former; or, lastly, where a new inheritance is grafted on the heirs of the body, — none of which is the present case. We have therefore no authority from precedents to warrant such a construction as is now contended for.

I do not however say, that this construction can never be made under other circumstances than those which I have now mentioned, but only that at present I am not aware of any other circumstances that can warrant the same construction. At the same time I allow, that the same construction may and ought to be made, whenever the intent of the testator is equally clear and manifest.

What then is the evidence of this intention in the present case? It may be resolved into two particulars: 1. The testator's previous declared intention, "that none of his children should sell or dispose of his estate for longer term than his own life," together with his consequent disposition "to that intent"; and, 2. The interposed estate to Isaac Gale, and his heirs, during the life of the testator's son. For, as to what was mentioned at the bar, of his making the daughters and the heirs of their bodies tenants in common, and directing the share of each daughter immediately upon her death to vest in the heirs of her body; — that is plainly done to prevent the inconvenience of survivorship among the daughters; which must otherwise have been the consequence, according to the rules laid down, Co. Litt. 25 *b*, that "where there is a gift to two women and the heirs of their bodies, they have a joint estate for life, and several inheritances."

Nor indeed do I think much stress can be laid on the second particular, the interposed estate of Isaac Gale and his heirs. For had that been expressly created to preserve contingent remainders, * the case of *Coulson* v. *Coulson* (2 Atk. 250), [* 508] is an express authority, that this will not make the heir of the body a purchaser. Much has been said, and much has been insinuated at the bar to discredit that case. But I hold it to have been determined upon found legal principles. For the misapprehension of a testator, in thinking the remainders were contingent when they were not so, cannot alter the rule of law. But were it otherwise, had the case of *Coulson* v. *Coulson* been decided upon dubious grounds, I should tremble at the consequences of shaking its authority, after it has now been established for thirty years, and half the titles in the kingdom are by this time built upon its doctrine. But there is no occasion, upon the present question, to disturb the case of *Coulson* v. *Coulson*, by either affirming or denying it. For, in the devise to Isaac Gale and his heirs, there is no such purpose avowed as the preserving contingent remainders: it is only to be conjectured and guessed at. The purpose of the testator might be (as in the case of *Duncomb* v. *Duncomb*), to prevent dower in the wife of his son, or tenancy by the curtesy in his daughters' husbands; — especially as he had, by another clause in his will, destroyed the joint-tenancy of his daughters, which would otherwise (according to 2 Roll. Abr. 90), have prevented the curtesy of their husbands. And where it is possible there may be more intents than one, the selecting of the true intent is at best but probability and guess-work; and does not amount to that declaration plain, which Lord Hobart and Lord Hardwicke require, before it shall set aside a positive rule of law.

If this be so, we are driven back to the introductory words as the only evidence of this intent: and then the result of the whole matter is, that the testator, having declared his intent, that his son shall not alien his land, he to that extent gives his son an estate to which the law has annexed the power of alienation: an estate to himself for life, with remainder to the heirs of his body. Now, what is a Court of Justice to conclude from hence? Not, that a tenant in tail, thus circumstanced, shall be barred of the power of alienation; this is contrary to fundamental principles. Not, that the devise shall take a different estate from what

the legal signification of the words imports; this, without other explanatory words, is contrary to all rules of construction. But, plainly and simply this: that the testator has mistaken the law, and imagined that a tenant for life, with first an interposed estate, and then a remainder to the heirs of his body, could not sell or dispose of this interest.

My Lord Chief Baron on the argument put a question to the counsel for the defendant, to which no satisfactory answer [* 509] was * or could be given. Suppose, after the like declaration of his intent, the testator had devised the premises to his son and his heirs for ever: Would that have made the son tenant for life only, and his heirs take as purchasers? Most clearly not. This case is the same in kind, and differs only in species. The words now used are as apt legal words to create an estate tail, as those an estate in fee. And as I conceive, that when a testator has devised a vested estate, his creation of a trust to preserve contingent remainders will not turn it into a casual executory interest; so also I think, that when he has (though ignorantly) devised an estate that is alienable, no previous or concomitant intent to prevent his devisee from alienating shall alter the nature of that devise.

Will it be said, that when the testator's intent is manifest, the law will supply the proper means to carry it into execution, though he may have used improper ones? This would be turning every devise into an executory trust, and would be arming every Court of law with more than the jurisdiction of a Court of Equity; a power to frame a conveyance for the testator, instead of construing that which he has already framed.

Will it then be said, that because the means marked out by the testator will not answer the end proposed, therefore he intended to use other means and not those which he has marked out? This consequence, I apprehend, will not follow by any rules of law or logic. For then it must be supposed, that every man, who has so in view a particular end, knows also and is sure to employ the most effectual means to carry it into execution; which is paying too great a compliment to human wisdom. Let us see how this argument will stand in form. The testator intended to use those which were the most effectual means to prevent his son from selling his estate; that the son's heir should take by purchase was the most effectual means: therefore the

testator intended that the heir should take by purchase. Here the first proposition will not be granted, that he intended to use those which were the most effectual means; for this intent implies his knowledge of what were the most effectual, of which there is no shadow of evidence. Or, put it otherwise; the testator intended to use what he thought the most effectual means: but he thought the heir's taking by purchase was the most effectual; therefore he intended that the heir should take by purchase. Here the second proposition can never be proved; that the testator thought any such thing. The true consequence I conceive to be this; that because the means marked out by the testator are not adequate to the end proposed, therefore he was mistaken in their efficacy.

* If a man proposes to qualify a son to sit in the House [* 510] of Commons, and to that intent devises to him an annuity of £300 per annum for 99 years, if he so long lives; we cannot argue from this declared intent of the testator, that this term of years shall be construed to be a freehold estate for life, because otherwise it would not answer the intent. We should rather conclude, that the testator was ignorant of the distinction between the two estates, and had unfortunately chosen that which was unfit for his purpose.

The case of *Popham* v. *Bamfield* (as the two parts of it are reported in 1 Vern. 79, 1 Wms. 54), was in this respect stronger than the present. One Rogers had devised a large estate to the testator's Popham's son, on condition that his father would also settle two thirds of his estate on the son and his heirs male. Now, though the testator was under a strong obligation, by this condition, to give an estate to his son and his heirs male; though he recited in his codicil that he had devised the lands to his son and heirs male of his body; which were indisputable evidences of his intention to give his son an estate in tail male; yet, having in his will by express words made his son only tenant for life, with remainder to his first and other sons in tail, the Lord KEEPER, assisted by the two Chief Justices, the MASTER OF THE ROLLS, and Mr. Justice POWEL, all agreed that the estate must remain in strict settlement. And, if an intention of the testator (so manifestly and directly proved) was not in that case sufficient to make the words "first and other sons" be construed "heirs male of the body," much less in the present instance shall it turn the words "heirs of the body" into "first and other sons."

No. 3. — Jesson v. Wright, 2 Bli. 2.

Upon the whole, I conclude, that though it does appear, that the testator intended to restrain his son from disposing of his estate for any longer term than his life, and to that intent contrived the present devise; yet, it does not appear by any evidence at all, much less by declaration plain, that in order to effectuate this purpose he meant that the heirs of the body of his son should take by purchase and not by descent, or even that he knew the difference.

The consequence is, that by the legal operation of the words, which are not in my opinion controlled by any manifest intent to the contrary, the heir could only take by descent, and of course John Williams the son was tenant in tail of the premises, and duly authorized to suffer the recovery that has been pleaded; and therefore I am of opinion that the judgment below should be reversed.

Jesson v. Wright.

2 Bligh, 1–59 (21 R. R. 1).

Devise.— Construction.— Rule in Shelley's Case.

[* 2] *Devise. — To W. (a natural son of the testator's sister) for life, and after his decease to the heirs of his body in such shares and proportions as W. by deed, &c. shall appoint; and for want of such appointment to the heirs of the body of W. share and share alike as tenants in common; and if but one child the whole to such only child, and for want of such issue to the heirs of devisor. *Held* — that an estate tail vested in William by this devise.

The rule is, that technical words shall have their legal effect, unless from subsequent inconsistent words it is clear that the testator meant otherwise.

This was an ejectment brought in the Court of King's Bench against the plaintiff in error, to recover the possession of tenements in the county of Stafford.

This cause came on to be tried at the assizes for the county of Stafford, holden at Stafford, on the 16th day of March, 1815, before the Honourable Mr. Justice DALLAS, when the jury, by the consent of the parties, found a special verdict.

The special verdict states,

That one Ezekiel Persehouse, being seized in fee of the premises set forth in the declaration, made and published his last will in writing, on the 24th of April, 1773, executed and attested as the law requires, for passing real estates by devise, and that

thereby, among other things, he gave and devised *the [* 3] premises in the declaration mentioned, with the appurtenances, in the words following: —

"I give and devise unto William, one of the sons of my sister Ann Wright, before marriage, all that messuage, tenement, or dwelling-house, malt-house, stable, buildings, garden, hereditaments, and premises, with their and every of their appurtenances, situate and being in the parish of Tipton, otherwise Tibbington, and county of Stafford, now in my own possession: and all those two dwelling-houses, barn, shops, buildings, gardens, hereditaments, and premises, situate in the said parish of Tipton, otherwise Tibbington, now in the occupation of John Law, and Timmins: and also all those seven closes, pieces or parcels of land, or ground, to the said two dwelling-houses and buildings adjoining, or nearly adjoining, and belonging, with their and every of their appurtenances, now in my own possession: to hold the same premises unto the said William, son of my said sister Ann Wright, for and during the term of his natural life, he keeping all the said dwelling-houses and buildings in tenantable repair: and from and after his decease, I give and devise all the said dwelling-houses or tenements, buildings, garden, lands, hereditaments, and premises, with their and every of their appurtenances, unto the heirs of the body of the said William, son of my said sister Ann Wright, lawfully issuing, in such shares and proportions as he the said William, in and by any deed or writing, deeds or writings, or in and by his last * will [* 4] and testament, in writing, to be by him duly executed, in the presence of three or more credible witnesses, shall give, direct, limit, or appoint the same; and for want of such gift, direction, limitation, or appointment, then to the heirs of the body of the said William, son of my said sister Ann Wright, lawfully issuing, share and share alike, as tenants in common, and if but one child, the whole to such only child. And for want of such issue, I give and devise all the said dwelling-houses, buildings, lands, hereditaments, and premises, to my right heirs for ever, charged and chargeable, nevertheless, with and for the payment of one annuity or yearly sum of £20, of lawful money of Great Britain, half yearly, to my said sister, Ann Wright, and her assigns, for and during the term of her natural life; the first half-yearly payments thereof to begin and be made by the said William, son of my said sister, Ann Wright, at the end of six months next

after my decease, or by such other person or persons, who, according to the true intent of this my will, may be seized of the said dwelling-houses, buildings, lands, hereditaments, and premises; and when and so often as the said annuity, or any part thereof, shall be behind and unpaid by the space of twenty days, next after the same ought to be paid, as aforesaid, that then, and at any time then after, it shall and may be lawful to and for my said sister, Ann Wright, or her assigns, into and upon the said dwelling-houses, buildings, lands, hereditaments, and prem-
[* 5] ises, or any of * them, or any part thereof, to enter and distrain; and such distress and distresses to sell and dispose of to satisfy and discharge all such arrearages, with the costs and charges of taking, keeping, and disposing of the same."

The special verdict then states, that the said Ezekiel Persehouse died on the same day, seized of the said premises, without altering his will; and that, upon the death of the said Ezekiel Persehouse, Thomas Stokes, Ann Wright, and Elizabeth Persehouse, were his co-heirs, of whom Ann Wright and Elizabeth dying, respectively, Daniel Wright and Elizabeth Mosley succeeded, as heirs, which said Thomas Stokes, Daniel Wright, and Elizabeth Mosley, are three of the lessors of the plaintiff.

The special verdict further states, that immediately after the death of the said Ezekiel Persehouse, the said William Wright named in his will, entered in the said premises, and became seized of such estates as legally passed to him under the will of the said Ezekiel Persehouse; and that, afterwards, on the 13th December, 1774, he married one Mary Jones, by whom he had issue, Edward Wright, Elizabeth Wright, Lucy Wright, Ezekiel Wright, John Wright, Thomas Wright, George Wright, Isaac Wright, Mary Wright, and William Wright, the younger, born in the above order, of whom Elizabeth, afterwards, on the 23d February, 1798, died without issue; and Lucy, Ezekiel, John, Thomas, George, Isaac, Mary, and William, the younger, are the other lessors of the plaintiff.

[* 6] The special verdict further states, that * afterwards, by certain indentures of lease and release, executed, respectively, on the 16th and 17th January, 1800, the said premises were conveyed by the said William Wright, and Mary, his wife, and the said Edward Wright, their eldest son, to Robert Long, as tenants, to the precipe, to the intent that a common recovery might be

suffered, for the purpose of barring and extinguishing all estates tail, and all remainders and reversions, of and in the said premises; and, that a recovery accordingly was afterwards suffered as of the Hilary term following, wherein the said William Wright, and Mary, his wife, and Edward Wright, were vouched to warranty, and entered into the warranty, and defended their right in the usual way; whereupon a writ of seizin afterwards issued and was executed.

The special verdict then states the entries of the several and respective lessors of the plaintiff, on the premises, and their seizin, according to law; and the several demises to John Doe, the plaintiff in ejectment, who entered and was possessed, until the plaintiffs in error entered on the premises and ejected him thereout.

This special verdict was argued in Court in Easter term, 1816, the plaintiff below arguing that William Wright, the devisee, took an estate for life only, with remainders to his children for life, respectively, as tenants in common, while the defendants below contended that the said William Wright took an estate tail. The Court gave judgment for the plaintiff below (5 M. & S. 95).

* Against this judgment a writ of error was brought. The [*7] principal error assigned was, that the Court below by their judgment, had decided, that "William Wright took only a life-estate under the will of, &c., with remainder to his children for life; and that the recovery suffered by William Wright, Mary, his wife, and Edward Wright, was a forfeiture of their estate. Whereas the plaintiffs in error contended, that the testator intended to embrace all the issue of William Wright, which intention could only be effected by giving William Wright an estate tail, for which purpose the words of the will are fully sufficient."

For the plaintiffs in error — Mr. Jervis and Mr. Sugden.

It was the intention of the testator to include all William's issue, and sufficient appears on the face of the will to enable a court of law to effectuate his intention. The decision in the Court below attributes this meaning to the testator, — That if William had only one child born who survived him, such child should take the whole estate for life; but if he had twelve (for example) and eleven died in his life-time, the surviving child should have

only a twelfth of the estate for his life. Is this a probable intention? — Again, if he had twelve children, and they all died in his lifetime leaving issue, according to this decision none of the issue could take? If their parents, indeed, had lived, they might have been supported out of the estate, but if their parents chanced to die in William's lifetime, they could derive no benefit [* 8] from * the estate. William was an illegitimate child, and yet the testator thought fit to provide for him and all his unborn children. If we consider the probable duration of their lives, it is not likely that the testator intended to stop there, with all the risks attending such a limited bounty, and then to give the estate to his heir at law. What is the value of such a gift? To the devisees it is highly important, that the estate should not go over until a total failure of all their issue, but to the heir the value of a reversion in fee after a life estate to a young person with remainders for life to all his children is trifling. Suppose that twelve children had survived William, is it a probable intention, that upon the death of each a share should fall to the heir, who would thus perhaps be a long series of years acquiring all the shares in the property?

The testator has given the estate to the heirs "of the body of William lawfully issuing." Those words clearly include all the posterity of William. But it is said that he has translated his words to mean children. There is no doubt but that he intended the children to take. But the translation is too narrow. It makes the testator say that William's children shall take only for life, and that none of their children shall take after them. What warrant is there for this in the will? Can it be argued, that because under the latter words in the will, had they stood alone, William's children would merely have taken estates for life, therefore, they shall in this case take only that quantity of interest, although the testator has expressly given the property to [* 9] * the heirs of William's body, which would include all his possible heirs? The testator intended William to take for life, and he intended all his issue to take. But he intended his children to take as purchasers; and it is manifest that he considered (although erroneously in point of law) that his intention to include all William's possible issue would be effectuated if the children did take as purchasers. The argument assumes this shape, that because he intended the children to take as purchasers,

and has not repeated words of inheritance, they can only take for life as tenants in common.

It seems impossible to contend, that William under this power might not have appointed an estate of inheritance to a grandson, or more remote issue, born in his lifetime, and this of itself decides the case. This, it is argued, the rule of perpetuity forbids. It may be admitted, that he could not appoint to a child, with remainder to the issue of that child, to take as a purchaser; but where, as in this case, the power is to appoint to heirs of the body a class of unborn persons as * purchasers, it may [* 10] be exercised by appointing, in the first instance, to a grandchild as a purchaser. The rule of perpetuity forbids only a possibility upon a possibility — as an appointment to an unborn son, with remainder to an unborn son of the son. Appointments to grandchildren as purchasers, under powers in marriage settlements, are of every day's practice. It is immaterial that in this view of the testator the children, &c. must take by purchase — that must be of necessity: they could not take under the power from William.[1] It is indeed said, that as issue taking under a power must take by purchase, this shows the words were used in that sense. If this were conceded, it would remain to be shown, that used as words of purchase, they were not intended to include more than the first line of generation, and merely to give to them life estates as tenants in common.

Let us consider this proposition. A devise to A. and the heirs of his body: of course he takes an estate in tail. A similar devise with a power to A. to appoint to any of the heirs of the body. Is it possible to contend that this right to defeat the estate so given to him, and to make those take by purchase, who, if the power remained unexercised, would take by descent, can * vary the construction of the devise to A. in tail? The [* 11] supposed case is not different in principle from the present. In the one the estate tail is given in the first instance, but defeasible by exercise of the power; in the other the limitation in tail

[1] At this part of the argument, the Lord Chancellor observed, as to the distribution under the power, that, although the words heirs of the body, in a legal construction, could apply to one person only, it might be contended, where a power was given to appoint to heirs of the body, that it meant a class of persons. The ulterior limitation to one child, in default of appointment, might operate as a description of the person, and would not conclusively prove that no estate tail was intended to be given.

follows the power. It is immaterial whether it precedes or follows. In the former case the children would take by purchase when the power should be executed in their favour. If the power remained unexercised, the heirs of the body would take by descent. So in this case — where the first limitation is to William for life, with remainder to the heirs of the body of William, according to his appointment, remainder, in default of appointment, to the heirs of his body, &c. If the power is exercised, the heirs being appointees take by purchase; if no appointment is made, the estate descends to the heir to whom it is limited. The words, notwithstanding the power, may operate as words of limitation.

This case was decided in the Court below, upon its own merits, without reference to authorities; but the decided cases are strong authorities against the judgment. In the case of *Seale* v. *Barter*, 2 Bos. & P. 485 (5 R. R. 676), which was a devise of all the testator's lands to his son, John, and his children lawfully to be begotten, with power to settle the same, or any part thereof, by will or otherwise, to them or any of them as he should think proper; and for default of such issue, over — it was held that John took [* 12] an estate tail, and that this construction * was not weakened by the power. The power, it was said by Lord ALVANLEY, in delivering the judgment of the Court, had some operation, since it enabled the devisee to dispose of the estate to his children without going through the forms of a recovery. But the power, because it enabled John to make his children take by purchase, did not make it imperative on the Court to give the estate to the children by purchase in all events, and to confine them to life estates as tenants in common. So in the case of *Doe d. Cole* v. *Goldsmith*, 7 Taunt. 209, 2 Marsh. 517 (17 R. R. 487), which is reported by Taunton, vol. vii. p. 209, but more strongly to the point in question in 2 Marshall, 517, upon a devise to F. G. and his assigns for life, and from and immediately after his decease to the heirs of his body in such shares, &c. manner and form as he should appoint, and in default of such heirs of his body, then from and immediately after his decease to J. G., it was held by the Court, as matter beyond doubt, that the testator intended that all the heirs of F. G. in a line of succession, should be extinguished before J. G. should take by the limitation over, and, therefore, that an estate tail by implication must be held to arise to F. G. because there was no other way to

perpetuate the succession in the manner intended. There was no distinct limitation, as in this case, to the heirs of the body of the tenant for life in default of appointment. That expression occurred only in the clause giving the power, and the words introducing the devise * over, and the referential word such is to be [* 13] found in that case as in this. In *Doe* v. *Goldsmith*, the intent to give an estate tail was implied from the words preceding the limitation over. Here is a distinct gift in words having a fixed legal operation.

The Lord Chancellor. The gift is to the heirs of the body share and share alike as tenants in common.

Mr. Sugden. If it can be made consistent with other words in the will, to give the children estates for life only, — then they must take by way of purchase, as tenants in common. But the words, share and share alike, may be construed by reference to the power which contains an implied or possible gift, under which they would take as tenants in common.

Lord Chancellor. If I had lived 200 years ago, I should have had no doubt that such limitations, as we see in this will, would have given an estate tail. But your argument supposes, that the donee of the power might appoint among grandchildren, &c. to the remotest posterity. That I should have thought impossible, if I had lived 200 years ago.

Mr. Sugden. Keeping within the rule of perpetuity, he might have appointed to any the remotest heir of the body.

It may be admitted, that if "heirs of the body" means children, — such heirs, or such issue, must mean the same thing. The same words cannot have different meanings, in the different parts of a will. But the supposed virtue of the word such, * did [* 14] not avail in *Doe* v. *Goldsmith*, where it must have been held an executory devise; — whereas, in this case, it is clearly a contingent remainder.

The inconvenience of the supposed intention has been already noticed. If only one child should be born, they imagine the testator meant that he should take the lands for life. If twelve children, and eleven died infants, according to one construction, the survivor would take the whole; — according to another construction, he would take only a twelfth part. If the eleven died, leaving families, the families would take nothing. It was argued in the Court below, that under the will, cross remainders for life were

to be implied, as among the children of William. But this argument was adverse to the interest of the heir at law, by whose counsel it was urged. It may be necessary to ascertain on which of the counts in the declaration they have entered up the verdict. — Some are on the demise of the children, some on that of the heirs at law. The judgment itself does not furnish the information.

Mr. Taunton. Lord ELLENBOROUGH said, that as there were counts on the demise of the heir at law, as well as the children, it was unnecessary to enter into the argument, as to the cross remainders, which might be material, as between the two sets of Plaintiffs; but was immaterial, as between them and the Defendants.

Lord REDESDALE. Is Edward Wright living?

Mr. Sugden. Edward the son is living as well as the father. They put it as a forfeiture of the life estate.

[* 15] Lord REDESDALE. If it is a forfeiture by Edward the son, it must be because he took under the appointment; and so it must be argued as a forfeiture of the whole.

LORD CHANCELLOR. Were other children living at the time?

Mr. Sugden. That appears only by inference to be drawn from the special verdict. The word "afterwards" in that part of the verdict which states the conveyance, does not conclusively mean in point of time, after all the facts before stated in it.

Lord REDESDALE. Could the power be destroyed by forfeiture where all the children have an interest?

Mr. Sugden. Such a question is now depending before the VICE-CHANCELLOR,[1] and probably will go farther.

Lord REDESDALE. How could it be destroyed by such instruments as these? It must be by some instrument expressly renouncing it. How can a man, having a power for the benefit of children, destroy it?

LORD CHANCELLOR. The appointment ought to be
[* 16] stated. It appears by the verdict, that Edward * was the son of William. How does it appear that the appointment did not take effect in his favour before any other child was born?

[1] *Smith* v. *Death*, before the VICE CHANCELLOR (Leach), who delivered his judgment on the 19th of June, 1820 [5 Madd. 371, 21 R. R. 314]. The decision was that the power could be destroyed. [See *In re Radcliffe, Radcliffe* v. *Beves* (C. A. 19 Dec. 1891), 1892, 1 Ch. 227, 61 L. J. Ch. 186, R. C.]

Mr. Taunton. In the special verdict there is no appearance of appointment.

Lord Chancellor. We sit here to decide on cases as they appear on the record.[1]

Mr. Taunton. On the trial, the appointment could not be proved; and it was agreed that it should be put out of consideration. The recital of a fact in a deed is no evidence against strangers. *A fortiori*, the mere description cannot be evidence against the plaintiffs in the action.

Lord Redesdale. Would not this instrument (in the absence of any other) operate as an appointment?

Mr. Taunton. It was executed *alio intuitu*, merely to make a tenant to the præcipe.

Lord Chancellor. The making Edward a party to the deed, is evidence that they did not choose to deal with William, as having an estate tail; and therefore took in Edward as having such estate. The question is, whether William so acting towards Edward, the deed of William must not operate as an appointment.

* Mr. Sugden. A recital has in Chancery been held to [*17] be an appointment, *Wilson* v. *Pigott*, 2 Ves. Jr. 351 (2 R. R. 246). A covenant to levy a fine has been held not to operate as a destruction of the power, *The Earl of Leicester's Case*, 1 Ventr. 278. It is also reported under the name of *Wigson* v. *Garrett*, or *Garrad*, 2 Lev. 149, Raym. 239. 3 Keb. 366, 489, 510, 536, 572, because the court looks to intention. So even where a fine has been levied. *Herring* v. *Brown*, 2 Shower, 185, 1 Ventr. 368, 371. Skinner, 35, 53, 71, 184, Carth. 22, Comb. 11. A deed of covenant cannot so operate, because it imports an intention that something more should be done. And where a deed, declaring the uses (after the fine levied), was executed, in the manner required by the power, it was held, that the deed and fine taken together, operated as an appointment, *Herring* v. *Brown*. Admitting that the description alone does not make the son appointee, yet it may operate to show an intention of appointment, and being followed by the declaration of uses in the deed of recovery, they altogether operate as an execution, and not as a destruction of

[1] No appointment is stated in the special verdict; but, in the printed case of the plaintiff in error, William is described as *appointee in tail general*. Upon this point see the observations of the Lord Chancellor in giving judgment, p. 745, *post*. This part of the argument is preserved on account of the judicial observations.

the power. This is a stronger case than that of Lord LEICESTER, and others of that class. There the ground was intention, to be inferred from the nature of the transaction. But here is an express declaration, operating as an appointment to the son. There is nothing on the face of the verdict to show that any other child was living at the date of the appointment. The subsequent birth of issue, in such circumstances, could never defeat the estate of the son. The difficulty which occurs in other cases, [* 18] where there * are not contingent remainders, does not arise in this case.

The argument that the children took mere life estates, is sufficient to destroy the respondent's case. There is no authority extant, in which the words, " heirs of the body," in such a case as this, have been cut down to life estates. The children have always been held to take the inheritance.

The authorities cited in support of the adverse claim are not applicable to this case. In *Goodtitle* v. *Herring*, 1 East, 264 (6 R. R. 270), the limitation to the " heirs male of the body," was in a subsequent part of the will clearly explained, nay, even expressed to mean sons. In this case we have no such expression or explanation. In *Archer's Case*, Rep. 66, the limitation was to the next heir, in the singular number, and words of limitation were superadded, viz., to the heirs of the body of that next heir. In *Cheek* v. *Day*, Moor. 593, 2 Roll. Abr. 417 (G.) pl. 7. Cro. Eliz. 313, Ow. 148 (cited Ld. Raym. 295, and Fitz. Gib. 24). See also *White* v. *Collins*, Com. Rep. 289, the devise was to the heir in the singular number, and words of inheritance in fee were grafted upon that limitation. In *Walker* v. *Snow*, Palm. 359, the same circumstances occurred, and it was, moreover, clearly a description of the person. *Lisle* v. *Gray*, 2 Lev. 223. Raym. 278, was nearly similar to *Goodtitle* v. *Herring*, where the words heirs male of the body, were explained by the will, to mean sons successively. [* 19] So in *Lawe* v. *Davies*, 2 Ld. Raym. 1561, occurred the * same explanation by subsequent words, of the limitation to the heirs lawfully to be begotten. In *Doe* v. *Laming*, 2 Burr. 1100, 1 Black. Rep. 265, not only were there superadded words of limitation in fee grafted on the limitation, to the heirs of the body; but, moreover, the devise was to heirs of the body, as well males as females; and being of lands in gavelkind, those words could not operate by way of limitation, but must of necessity,

in order to effectuate the intent of the testator, operate by way of purchase. For the limitation, as it stood expressed, included issue who could not take by descent.

In this case the testator by the word *such*, might mean to refer to children; children might have been the issue contemplated. But he had before expressed, and it must be presumed he intended an entail that all the issue of William might inherit. Here, therefore, are incompatible intentions, and the general must prevail against the particular intent. So in the case of *Coulson* v. *Coulson*, 2 Stra. 1125. 2 Atk. 246 [*et vid. Hodgson et uxe* v. *Ambrose*]. Dougl. Rep. it was argued, from the interposition of trustees, to preserve contingent remainders, that the testator contemplated, and intended to raise contingent remainders to be preserved, and probably it was so. But the general rule prevailed in that case, notwithstanding such probable particular intent to be inferred from that provision and limitation.

William being an illegitimate son, he and his children were strangers to the testator. This has in all * such cases [* 20] furnished an argument upon the gift, over in default of issue. The words operate as a gift to the heir at law. But when vested, he is in at law by descent. The question is, whether the testator ever intended it should go to his heir at law, whether by descent or by devise, until all the issue of the illegitimate son were extinct.

As to the words "among the heirs of the body, share and share alike, as tenants in common, &c.," they have in many cases been rejected, where it has appeared that the testator intended to give to the whole line of the issue. It is necessary in such cases, to hold it to be an estate tail, to guard against the inference from the want of any express limitation or implication of cross remainders among the children, so as to give the estate of a child dying without issue, to the survivors. The cases show that it ought not to be implied that the father takes for life only, unless the court can raise such further implication, as to give the whole estate to all the children. In *Doe* v. *Smith*, 7 T. R. 531 (4 R. R. 521), the devise was to M. A. and the heirs of her body, as tenants in common, which was held to give an estate tail, notwithstanding those latter words, and the reasoning of Lord KENYON, in delivering judgment in that case, is applicable to, and decisive of this case. Again, in *Doe* v. *Cooper*, 1 East, 229 (16 R. R. 264), the devise was expressly to R. C. for life only; and after, &c. to the

issue of R. C. as tenants in common; and in case R. C. should die without leaving lawful issue, to E. H. and her heirs. The [* 21] court held * that an estate tail by implication vested in R. C., because cross remainders among the children could not be implied; and although it was admitted by the judges, that it appeared to be the particular intent of the devisor that R. C. should take only an estate for life; yet that intent, being inconsistent with the general and paramount intent, that all his issue should inherit the entire estate before it went over, was disregarded. The words of the will in that case were, on the one hand, much stronger for a tenancy for life; on the other, much weaker for a tenancy in tail, than the words of this will. In *Frank* v. *Stoven*, 3 East, 548, which was a devise to B. F. for life, without impeachment of waste, and with power to jointure; and after, &c. to the issue male of his body and their heirs; and in default of such issue, to R. F. &c. It was held an estate tail in B. F., although the issue or children, apparently were made the stock of a new line of heirs, and the first estate was given expressly for life, with powers not wanted by a tenant in tail. In that case also, the particular intent was disregarded; and the recovery was upheld, by which the children were disappointed. So in *Franklin* v. *Lay*,[1] lately decided, although superadded words of inheritance occurred in that case also, the same principles of decision were upheld. In *Mogg* v. *Mogg*, 1 Meriv. 654 (15 R. R. 185), where the first devise was to children for life, and [* 22] the remainder to the issue of the children * and their heirs, as tenants in common; and in default of such issue over,— it was held on the doctrine of Cy-pres, where the limitations

[1] Before the Vice Chancellor, 3rd May, 1820. A note of the case furnished to the reporter by Mr. Sugden, was as follows: —

"I give to my grandson, John Franklyn, all that my moiety or half part of and in all that messuage, tenement, and farm, lands and premises, situate, lying, and being in Great Bromley, in the county of Essex, called the Brush Farm, as the same is now in the occupation of my nephew, Wm. Barnard, of Lawford, in the same county, farmer, to hold the said moiety of the said farm, lands, and premises unto my grandson, John Franklyn, and to the issue of his body lawfully to be begotten; and to the heirs of such issue for ever, but subject and chargeable with the payment of the mortgage of £400, and interest to my brother-in-law, Thomas Barnard, of Lawford aforesaid, farmer. But if my said grandson, John Franklyn, shall die without leaving any issue of his body lawfully begotten, then I give and devise the said moiety of the said messuage, farm, lands, and premises, with the appurtenances, unto my said nephew, Wm. Barnard, and to his heirs for ever. *Held* to be an estate tail in John." *Franklin* v. *Lay*, Vice-Chancellor, May 3, 1820. [The case is fully reported in 6 Madd. 258, 23 R. R. 215].

would otherwise have been void as a perpetuity, a devise to the children, as tenants in common in tail, with cross remainders. In *Mogg* v. *Mogg*, the limitation was void, as against the policy of the law, and the Court might on that account have refused to interfere. Here is no such impediment, and the children cannot otherwise than by giving an estate tail to the parent, take such interest as the testator intended. If, according to the argument, the children would take estates only for life, the necessary consequence is, that the parent must take an estate tail; otherwise the intention of the testator is frustrated. He intended to provide for the issue, and they would have no provision.

If the gift had been to "children," instead of "heirs of the body," the same argument would have arisen. The word children, when used as a class, gives the same interest. That appears by the authority of the Court of K. B. in *Doe* v. *Webber*, 1 B. & Ald. 713 (19 R. R. 438), a case in which there was a devise to M. H. and her heirs; and in case M. H. should die and leave no child or children to J. B., &c. The Court held that child or children meant issue, not confined to immediate, but extending to the remotest descendants. Such was the opinion of that Court upon a question, whether it was an estate tail, or an executory devise; whether the words child or children, in the contingent clause, introducing the remainder over, reduced the fee before * given to an estate tail. Upon which point, nothing is to be collected in that case, except from the words introducing the devise over itself. But in this case, it is an express devise in tail; and the intention clearly appears not to give any estate to the heir at law, until the remotest issue of W. are extinct. [*23]

As to the intention, the respondents have argued nothing. They rely on the rigid legal construction of the words. They contend, 1. that under the power, the heirs of the body must take as purchasers; and if so, as children. 2. That in default of appointment, they take as tenants in common; again, as they argue, as children. Lastly, they say, the limitation introducing the remainder over, viz., in default of such issue, directly refers to "child," the last antecedent; and therefore issue in that place means children as before. To the first argument, the answer is that the donee might have appointed to any of the heirs of the body, considering them as a class. Which of the words come first, and which last, is immaterial. The power is to appoint to heirs

as purchasers, and not as descendants. Such a power cannot break the estate tail; it would not do so if the devise were to children. Taking the word to be "children," according to their construction, he might appoint to any of his descendants. *Liefe* v. *Saltingstone*, 1 Mod. 189. Under the power in this case, [* 24] William might have * given the estate in fee to a person filling the character of heir of the body. It is said that there are no words empowering such appointment. But the authority last cited proves that words of inheritance are not necessary, even if the devise had been to "such children," &c. In *Doe* v. *Goldsmith*, 7 Taunt. 209, 2 Marsh. 517 (17 R. R. 487), the devise was to F. G. for life, and after, &c. to the heirs of his body, &c. as F. H. should appoint; and in default of such heirs of his body, then immediately after his decease to J. G. In that case heirs of the body must mean children, if they do so in this; and so it was argued. Yet the court held it to be an estate tail by implication. Such a power was never adjudged to defeat an estate tail.

As to *Doe* v. *Goff* (11 East, 668), where the devise was to M. and the heirs of her body, as tenants in common, and not as joint tenants; but if such issue should die before he, she, or they respectively attain the age of twenty-one, then to J. M. and his heirs, it was held an estate in the children, in common in [* 25] tail, chiefly upon the effect of the * words preceding the limitation over. As to *Gretton* v. *Haward*, 6 Taunt. 94, the devise was to A. H. she first paying all my just debts, &c.; and after her decease, to the heirs of her body, share and share alike, if more than one; and in default of issue, to be lawfully begotten by me, to be at her own disposal. The case was decided on the peculiar language of the will importing that the gift was not after an indefinite failure of issue. *Doe* v. *Covey*, in the K. B. which is not yet reported, depends on the principle of *Doe* v. *Laming*, 2 Burr. 1100. The children themselves, in each of those cases, by the effect of the superadded words, took a fee as the stock of a new inheritance. In *Seward* v. *Willock*, 5 East, 198, the estate was given to the issue expressly for their lives only. The ground of decision was, that the will showed a single intent to create a succession of estates for life, not warranted by law. And it could not be modelled as an executory devise, as in *Humberstone* v. *Humberstone*, 1 P. W. 332, in Chancery. But here the devise does

not confine the estate to the children, to an interest for life; but, on the contrary, clearly means to give an inheritance.

It is argued, that he meant the children to take, if more than one, because he gives to one child, if there should be but one. No doubt that was his * intention, and that they [* 26] should take as purchasers; but he also intended that children's children, to the last generation, should inherit before the estate should go to the remainder-man. In the case of one child, he meant that the one child should take the inheritance; and a limitation to children, or a child, as a class, is sufficient to give such interest. It is said, that in the power enabling appointment to the heirs of the body, there are no words of inheritance; and that, therefore, the appointment of an estate of inheritance is not authorized by the power. But it is settled, that where there is a devise to the heir, although there are neither words nor intent expressed to give him the inheritance, and although the estate vests in him by purchase, as a person described, yet he may take the whole inheritance. *Burchel* v. *Durdant* (2 Ventr. 311) was decided on this principle. The objection was taken in that case, for the want of words of inheritance; but the * Court [* 27] held it was a fee [tail] in the person described, as heir of the body now living. Such limitation operates doubly; first, to point out the person, then to give the inheritance. That is an authority depending upon three judgments in the courts below, and two in this house. The children, therefore, in this case, must take an estate of inheritance, and for that purpose, William must take an estate tail. In *Wharton* v. *Gresham*, 2 Black. Rep. 1083, although the devise was to sons,[1] one branch only of issue, the Court held, that the tenant for life had an estate tail. In *Hodges* v. *Middleton*, Dougl. Rep. 415, the words child or children are used throughout the will, the limitation over is on failure of children, not issue. The Court collects the intention to give the parent the inheritance, from the use of these words as a class. So in *Jones* v. *Morgan*, 1 B. C. C. 206, Lord THURLOW held, that where children are to take as a class, they must take as heirs.

As to the argument founded on the word such, and its reference to the immediate antecedent child; the words are "for want of

[1] It was to A. and his sons in tail male; and for want of such issue over, and A. had no issue at the date of the will, or at the death of the testator. — See *Wild's Case*, 6 Co. Rep. 16.

such issue;" and the fair construction, even grammatically, is not by a narrow reference to the last preceding object designated, but generally to all the limitations, to "heirs, issue, or children." Reading all the clauses of the will together, it means in default of all the issue before named or specified. It is said, the tes-
[*28] tator himself has explained what he means * by heirs of the body. But he does not say that children only are to take as heirs of the body; but that they are to take in the first instance, the first in the order of succession. So in *Robinson* v. *Robinson*, 1 Burr. 38, and 2 Ves. Sen. 225, and *Pierson* v. *Vickers*, 5 East, 548 (7 R. R. 760), the word such occurred, following the word "son" in the first, and "sons and daughters" in the latter case. Yet the Court held in both those cases, that the word "such" referred to issue generally, and was not restricted to sons and daughters. So also in *Doe* v. *Goldsmith*.

The question, whether cross remainders are to be implied between the children as tenants for life, ought to be decided for the satisfaction of the plaintiffs in error, if the judgment is against them. It ought to be ascertained by the judgment, which of the plaintiffs below are entitled, that the plaintiffs in error may know the grounds on which they are deprived of the estate, if that should be the result.

The words "heirs of the body" having, in the present case, been considered to mean children, the subsequent words, "and for want of such issue," were held by the judges in the Court below to refer only to children; for such, it was said, is a word of reference. But why, it may be asked, not extend it to the heirs of the body, to whom the estate was expressly given? There is certainly considerable evidence, on the face of the will, that the testator intended that William's children should take by purchase; but there is stronger evidence that he meant them to take such an estate as they could transmit to their issue, so as to include all, "the heirs of the body of William issuing," for want of
[*29] which * only he intended the estate to go over to his own right heirs. Some stress was laid upon the circumstance that the estate was expressly devised to William for his life. But that circumstance has been disregarded in similar cases, even where the strong negative words "only" and "no longer" have been superadded. But it is material in this view, that it shows, by opposition, that he did not intend the children to take life estates

only. "To William for life, and after his decease to his children." Had he intended them also to take for life, only, he would, of course, have said so. Lord MANSFIELD often truly observed, that when a man gives a house to one, he always means to give the entire interest in it, the same as if he had given him a horse. To effect this intention the Courts have gone great lengths, to supply by other words and implications, the want of express words of inheritance. This is the only case in which express words of inheritance have been cut down to life estates only, and this in order to effectuate a supposed intention, which in itself is absurd, and evidence of which is wanting on the face of the will.

It is said, the provision and devise, if one child, to that one, includes the other case, viz., of there being more than one, in which case they were all to take. Granted. But still it remains to show, that, because the children were to take, they were to take life estates only. "If but one child, the whole to that one child," *i. e.*, the whole estate, and also the testator's interest in it. This is what the testator meant, although his meaning cannot in this way be effectuated. The gift over, "for want of such issue," afforded irresistible evidence of the * intention that the estate should [* 30] not go over until a general failure of William's issue. The force of those words was taken away by considering them to apply only to children. The will, as it stands by force of the decision in the Court below, is certainly a very different disposition from that which the testator intended to make.

The will made by the judgment in the Court below is to William for life: remainder to his sons and daughters as he shall appoint, but not giving them more than life estates: in default of appointment, to his sons and daughters share and share alike for their lives; and if there shall only be one child born, the whole to that one for life; and after the death of each child, his or her share over.

It was only by this construction that it was possible to weaken the force of the words "for want of such issue." Lord NORTHINGTON has observed, that "for want of such issue," means for default of such issue. There is something, he adds, of peculiar force in this expression, and the law supposes the inheritance already attached in the first taker, but liable to be defeated by a subsequent event, his dying without issue. So Mr. Justice LAWRENCE said in 5 East, 552, *Pierson* v. *Vickers*, that these words are always construed to mean an indefinite failure of issue, unless restrained by

other words. In this case there are no such words, nor any authority in the books for the construction which has been put upon the words actually used by the testator.

It is immaterial whether the words were "heirs of the [* 31] body" or "children," in either case the intention * would be equally apparent to pass the inheritance. A tenancy in common is incompatible with an estate tail in the parent, but that does not prove that the testator intended the children to take for life only.

The following rules may be safely laid down:

I. That a devise may, in favour of the intention, include all a man's possible issue, although in terms only a particular class is included.

II. That if words are used which denote an intention to give the estate to the children by purchase, they shall take in that character, where they can take by force of the will, such an estate as will include all the issue, so that the estate may not go over before a total failure of issue.

III. That although such an intention is apparent, yet where the general intention, viz., to include all the issue, can only be effectuated by vesting an estate tail in the parent, he shall take that quantity of interest in opposition to the words of the will. The particular intent of the testator shall be sacrificed in favour of his general intent.

The leading authority on the first rule is *Robinson* v. *Robinson*, 1 Burr. 38, and 2 Ves. Sen. 225. There the testator devised his estate to Lancelot Hicks, for and during the term of his natural life and no longer, provided that he altered his name to Robinson, and lived at his house of Boclyne. And after his decease to such son as he shall have lawfully to be begotten, taking the name of Robinson; and for default of such issue then, I bequeath the same to my cousin, Wm. R. and his heirs forever. The judges [* 32] * certified that Lancelot must by necessary implication to effectuate the manifest general intent of the testator, be construed to take an estate in tail male, he and the heirs of his body taking the name of Robinson, notwithstanding the express estate devised to him for his life and no longer. This cause was decided the same way in the Court of Chancery; and afterwards, upon great consideration, was affirmed in the House of Lords (3 Brown, P. C. 180). It was the leading authority upon which Lord

KENYON decided many similar cases, all of which will be overruled, if the children in this case shall be held to take for life only.

The power in this case is in favour of the Plaintiff in Error; but we may strike out the power, without weakening the effect of the other words, upon the authority of *Seale* v. *Barter*, 2 Bos. & P. 485 (5 R. R. 676).

In *Robinson* v. *Robinson*, the limitation, after Lancelot Hicks's decease, was to such son as he shall have lawfully to be begotten, taking the name; and for default of such issue over.

Will any lawyer attempt to distinguish the cases, with a view to show that Mr. Robinson intended to include all Mr. Hicks's issue and that Mr. Persehouse did not intend to include all Mr. Wright's issue?

The case of *Robinson* v. *Robinson* is a decisive authority also in favour of the general construction of the words "for want of such issue." According to the decision of this case in the Court below, the will in *Robinson* v. *Robinson* should have been [* 33] construed as giving an estate for life in Lancelot, with remainder to his first son for life, with remainder over. There no words like "heirs of the body" intruded themselves. It was not necessary to take away the force of any words, but merely to put a plain construction on the words which the testator had actually used; and they were simply to Lancelot for life, then to such son as he should have, and for default over.

In the case of *Pierson* v. *Vickers*, 5 East, 548 (7 R. R. 760), which was decided by Lord ELLENBOROUGH, C. J. Lawrence, J. GROSE, J. and LE BLANC, J. the limitations were to the testator's daughter, Ann, and to the heirs of her body lawfully to be begotten, whether sons or daughters, as tenants in common, and not as joint tenants; and in default of such issue, to his sisters for their joint lives; remainder to a trustee to preserve contingent remainders: and after the decease of either of them, to all and every the child and children of, &c., whether sons or daughters, and their heirs and assigns forever, as tenants in common, and not as joint tenants: it was held that Ann took an estate tail, notwithstanding the argument, that the testator had explained heirs of the body to mean children, viz., sons and daughters. How, said Lord ELLENBOROUGH, do you get rid of the words, "in default of such issue"? Such, it was insisted, had reference to sons and daughters. The testator, it was said, meant the estate to go over, if Ann left no

[* 34] sons or daughters living at her death. But * Mr. Justice LAWRENCE asked, what is there in the will to confine the words, "in default of issue," to issue living at the time of Ann's death? Because (it was answered) a fee was before given to the children; but the learned Judge added, "these words are always construed to mean an indefinite failure of issue, unless restrained by other words." This is a decisive authority. Where is the distinction between the cases? The devise here, it may be said, is expressly to W. for life; whereas, the other devise, is in one sentence to Ann and the heirs of her body. But we have seen, that an express devise to a man for his life and no longer, is in these cases immaterial. It is immaterial, Lord THURLOW observes, in *Jones* v. *Morgan*, that the testator meant the first estate to be an estate for life. "I take it that in all cases the testator does mean so. I rest it upon what he meant afterwards. If he meant that every other person, who should be his heir, should take, he then meant what the law could not suffer him to give, or the heir to take as a purchaser. All possible heirs must take as heirs." If then we discard as utterly unwarranted by law this distinction, the next difference is, that the testator, in the supposed explanation of what he means by "heirs of the body," in the one case speaks of children, in the other of sons or daughters. Children is a stronger expression in favour of an estate tail than sons or daughters. Sons or daughters, it may be said, mean males or females. No [* 35] doubt * they do; but considered, as the words in our case have been in the judgment below, they mean males or females who are "sons and daughters," not males and females who are grandsons and granddaughters. Besides, in *Pierson* v. *Vickers*, the testator had expressly in a subsequent part of the will said, that, when speaking of sons or daughters, he meant children, and children only. For in the devise over to the children of his sisters in fee (who took strictly by purchase) he says, "to their children, whether sons or daughters." Did this mean whether grandsons or granddaughters? If not, how was that meaning collected in the prior part of the will, except from the very words which are found in the present case, and lead to the same construction? But in our case, it may be urged, that the testator says "if only one child," &c. The same thing is implied in *Pierson* v. *Vickers*, for it is quite clear that if there had been only one child, he was as competent to take as an only child in our case would be. In both of the cases

there was a manifest intent to include all the issue. In the case of *Pierson* v. *Vickers*, that intent was effectuated in the face of obstacles which do not occur in this case. It is impossible that the decisions in the two cases can stand together.

The case of *Doe* and *Burnsall*, 6 T. R. 30 (3 R. R. 113), was relied upon as supporting the judgment in the Court below, but there the children took the fee; the words being large enough for that purpose; and therefore that case, like many others, must be classed under the second rule above noticed, and cannot govern a case, * in which, if the children do take by pur- [* 36] chase, the consequence may be, that neither they nor their issue may ever derive any benefit whatever from the devise.

The only cases which were relied upon in favour of the words "for want of such issue," being construed "and after the deaths of the children," were *Hay* v. *Lord Coventry*, 3 T. R. 83 (1 R. R. 652), and *Denn* v. *Page*, 3 T. R. 87 n. (1 R. R. 655 n.). But those cases differ, *toto cœlo*, from the present. There, after a regular provision for sons in tail, a limitation was added to daughters without words of inheritance; and for want of such issue over. That is not an improbable disposition, and cannot be compared with this case. Upon the judgment in *Denn* v. *Page*, Lord KENYON has made the following observations, in *Daere* v. *Daere*, 8 T. R. 112, 116 (4 R. R. 607, 612) — "The case of *Denn* d. *Briddon* v. *Page*, has been relied on by the Plaintiffs in Error, where Lord MANSFIELD intimated an opinion that there was a blunder in the will. I find myself pressed by whatever fell from so great a Judge, and it is always with doubt and distrust of my own mind that I differ from him in opinion; but I am not prepared to say that there was any blunder in that will. There the devisor gave to S. Nash, the son of T. and M. Nash, for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of S. Nash, and the heirs male of his and their bodies; then having provided for the male heirs (who are generally the favourites in cases of landed property), * it is not improbable that it [* 37] should occur to the testator to provide for the present generation, and therefore he devised to all and every the daughters of the body of T. Nash, by his then wife, and for default of such issue, to the right heirs of T. Nash forever. Now, when there is nothing in the will to lead to such a supposition, why should it be supposed that that was a blunder which brought forward the daughters of

sons in preference to the issue of the sisters? I have known many cautious testators make limitations in their wills like that." In the above case clearly all the children took by purchase; the sons express estates of inheritance, the daughters estates of freehold only. It was not a gift to children generally, but to daughters, a particular class of issue. And the words, "for want of such issue," were satisfied by the previous estates of inheritance in the sons, and the life estates in the daughters. It never occurred to any judge that that case clashed with *Robinson* v. *Robinson*, or *Pierson* v. *Vickers*, which are clear and decisive authorities, that in a case like this, the words, "for want of such issue," mean a general failure of issue.

This is the first case in the books in which the force and operation of the words "heirs of the body" have been so frittered away; but even if it be conceded, that the testator has explained the words heirs of the body to mean children, yet it would equally follow, that all the posterity of William were intended to take.

In *Wilde's Case*, 6 Co. Rep. 16, Mo. 397, there was a [* 38] devise to A. for life, * remainder to B. and the heirs of his body, remainder to Rowland Wilde and his wife, and after their decease to their children, Rowland and his wife then having a son and a daughter, it was ruled that "they took joint estates for their lives: but if A. devise to B. and his children or issues, and he hath not issue at the time of the devise, the same is an estate tail." According to Moore's report, Popham, and Gawdy, held that Wylde took an estate tail, notwithstanding that he had children living at the time of the devise, though Fenner and Clench thought it was only an estate for life, all agreed that it was an estate tail if no children. In the present case William had no children at the time of the devise or at the death of the testator.

So a devise "to William for the term of his life (as in the present case), and after his decease to the men children of his body; and if William die without man child of his body," then over was held to be an estate tail in William, 1 And. 43. There are other authorities to the same effect.

The case of Hodges and Middleton, Doug. 431, bears closely upon this, if the words, heirs of the body, are to be read as children. There the devise was of real estate to A. and at her death to her children, and in case of failure of children, over. A. had issue living at the death of the testatrix, and at the date of the will.

The court inclined to think that A. took in tail, but if she took only for life, they held that the children would take in tail. It is a powerful authority against the decision in the present case.

So in *Seale* v. *Barter*, 2 Bos. & P. 485 (5 R. R. 676), where the devise was * to the testator's son John and his children, [* 39] lawfully to be begotten, with power for him to settle the same on them; and for default of such issue, over. John had no issue at the date of the will, and it was held that he took an estate tail.

No answer was attempted to be given to these authorities, which directly prove that William Wright became entitled to an estate tail under Persehouse's will.

It is not necessary to demonstrate that the intention cannot be effectuated under the second rule. It is clear, that, if the children are to take by purchase, they cannot take all the interest which the testator intended. The very decision in their favour gives them merely life estates as tenants in common, which in event might not give to them any beneficial interest. In all the cases which it is possible to cite from the books, where the heirs have been held to take by purchase, the words of the will were sufficient to give them an estate, which would include all the issue for whom the testator intended to provide. There are several cases accordingly, in which although the children taking by purchase, would take an estate tail; yet that construction was not adopted, because cross remainders could not be raised between them.

The consequence of the exclusion of the case from the second rule, is, that it falls within the third. Certainly the intention that the children should take as tenants in common is incompatible with an estate tail in the parent; but it has long been the settled law of the land, that that circumstance shall give way to the general * intention to include all the issue. *King* v. [* 40] *Burchall*, Ambl. 379, 4 T. R. 296 *n*, *Doe* v. *Applin*, 4 T. R. 83 (2 R. R. 337), *Doe* v. *Smith*, 7 T. R. 531 (4 R. R. 521), *Doe* v. *Cooper*, 1 East, 229 (6 R. R. 264), and *Pierson* v. *Vickers*, 5 East, 548 (7 R. R. 760), have decided this point beyond the reach of controversy. It will be conceded, that all William's possible issue can only take through him. He therefore, to effectuate the testator's manifest general intent, must be held to take an estate tail.

For the Defendants in Error — W. E. Taunton and C. Puller.

The ejectment was brought on behalf of the children; and an attempt was made to argue the case, on the ground that cross remainders were to be implied among the children. But as the heirs were made parties to the action in a distinct count, the Court refused to hear that argument; and the judgment was entered up on the count for the heirs, which might be applied in favour of the children. If cross remainders can be implied, the entry of the judgment is wrong. But this does not affect the substance of the case. The proposition to be maintained is, that William took only an estate for life, with remainder for life to the children. On the other side they contend that the testator had two intentions, and that one is paramount; viz., that the estate shall not go to the ultimate remainder man, until after an indefinite failure of issue. There is no such paramount intent. The testator designates the class of persons among whom the power is to be exercised, [* 41] and gives the estate over, on failure of the * objects of the power, if they should not be living at the death of the tenant for life. That the words "heirs, or heirs of the body," have not always their strict technical meaning in so extensive a sense as the Plaintiffs in Error contend, it is sufficient to quote Archer's case, 1 Co. 66. That case is not indeed applicable in terms, which can rarely happen in the case of a will. But it may be cited to prove that there is no such essential virtue in the word heir, that it must carry the estate to all generations. *Walker* v. *Snow*, Palm. 359, *Lisle* v. *Gray*, 2 Lev. 223, Raym. 278, *White* v. *Collins*, Com. Rep. 289, *Lawe* v. *Davies*, 2 Lord Raym. 1561, *Doe* v. *Laming*, 2 Burr. 1100, 1 Black Rep. 265, and *Goodtitle* v. *Herring*, 1 East, 264 (6 R. R. 270) may be adduced in proof of the same proposition.

In *Lawe* v. *Davies*, the devise was to B. and his heirs, lawfully to be begotten, that is to say, to his first, &c., sons successively to be begotten of the body of the said B.; and the heirs of the body of such first, &c., sons successively, &c., remainder over. That was held an estate for life in B. notwithstanding the subsequent limitation, to the heirs of the body of, &c. In the cases before cited, the words heirs of the body, or words equivalent, were contained in the instrument creating the limitations. Yet persons designated by those words were held to take by purchase. These words therefore may give less than the inheritance. In *Goodtitle* v. [* 42] *Herring*, Lord KENYON speaking of * the technical force of

those words, in delivering judgment, says, "it never has been decided that those words might not be otherwise explained in a will by the testator himself. They were so explained in *Lawe* v. *Davies:*" and afterwards he adds, "In former times indeed, greater strictness was attributed to the meaning of the words, 'heirs of the body.'" Here those words, as they are explained by the testator, are descriptive of the class of persons among whom the power was to be exercised; and it is the manifest intent of the testator, that if no such objects should be living at the decease of the tenant for life, the estate should go to the remainder man.

The words of the will are to be weighed and considered, and also the fact that William was a natural son of the sister of the devisor. If the will had ended at the words "heirs of the body," where it occurs in the limitation over, for want of appointment, William, though the previous estate is to him expressly for life, would undoubtedly have taken an estate tail. As to the argument founded on *Seale* v. *Barter*, 2 Bos. & P. 485 (5 R. R. 676), if it is supposed to show that such a power of appointment is sufficient to give an estate tail, no such thing was decided in *Seale* v. *Barter:* nor do we argue that such power of appointment cannot possibly subsist with an estate tail, or that it is inconsistent with its nature. The limitations in *Seale* v. *Barter* are very different from the limitations in this case. In *Seale* v. *Barter* the question arose upon the codicil, which the court held ought to be construed without reference to, or not to be * controlled by, the will. [* 43] By the codicil the estates were devised to J. S. and his children, lawfully to be begotten, with power for J. S. to settle the same on such of them as he should think proper; and for default of such issue, to, &c. Such a devise, without doubt, gave an estate tail to the son, no child of J. S. being in existence at the date of the will, or the death of the testator: and the Court properly held, that the power given to defeat or abridge the estate tail by appointment, did not of itself destroy that estate.

In this case there is no paramount intention that the estate should not go over, but upon indefinite failure of issue. The words "heirs of the body" must receive a limited construction. The testator himself translates the words, and shows what persons he means by "heirs of the body." In the first instance, clearly he must mean the children. If so, can he in the subsequent use of the same words mean something different? To make the will

consist with the construction attempted by the plaintiffs in error, a multitude of words must be struck out of the instrument. "Share and share alike, as tenants in common; and if but one child, the whole to such only child." All these words must be expunged. According to their construction, the former clause of these words is inconsistent, and the latter superfluous.

The words, "in default of such issue," must refer to the issue contemplated, as objects of the power of appointment, not issue indefinitely. Between a devise over to right heirs, and to a stranger, there is a material distinction. In the former case [* 44] the party dies virtually intestate: for the devise is * inoperative; the heir takes by descent. But where the devise is to A. B. and then over to a stranger, he can only take in the event specially provided by the testator. An heir at law is not to be disinherited, but by express words or necessary implication. A special object of bounty must bring himself within the intent of the testator. Here the plain intent is, that if there should be no children of William, the estate should go over to the sister. "Heirs of the body," cannot here consistently mean all generations of issue, as in case of an estate tail. The donee of the power could not have appointed so as to give indefinitely to his issue forever. William (for instance) could not have appointed to his eldest son, grandson, great-grandson, &c. The clear intent was, that he should limit to the children living at or before his death. Could he pass by the existing generation, and appoint to a future descendant, however remote? That is forbidden by the law against perpetuities.

The provision in default of appointment for the special event, if there should be but one child, that he should take the estate, manifests the intent of the donor, that the power should be exercised among children. There is but one case adverse to this construction, *Doe* v. *Goldsmith*, 7 Taunt. 209 (17 R. R. 487). It is an extraordinary argument to say that case is free from prejudice, because former cases were not there cited. That is rather a ground to impeach the authority of that case. If there is plain demarcation of the objects to which the words heirs of the body are applied, the power of appointment cannot be extended [* 45] beyond them. The * limitation over, is not in default of the issue of William, or generally, but in default of such issue, *i. e.*, the particular objects of the appointment.

"Heirs of the body," in the clause conferring the power, and the limitation in default of appointment, means such heirs within a limited time, the life of William, the donee of the power. In default of such issue, can only mean such specific issue as before designated. There is, therefore, a total absence of the supposed paramount intention to give the estate over, only upon indefinite failure of issue. If so, the secondary, as it is called, being in fact the only intent, must prevail.

There are no words of limitation superadded, and consequently the children must take for life, according to the doctrine established in *Hay* v. *Earl of Coventry*, 3 T. R. 83 (1 R. R. 652). There the limitation was to F. C. for life, remainder to her first and other sons in tail male; and in default of such issue, to the use of all and every the daughters of F. C. as tenants in common; and in default of such issue to his right heirs. That it is to "children" in one case, and daughters in the other, makes no difference in principle; and the limitation, over, is in the same words. The argument in that case, was not that it was to be presumed the testator did not mean to give an estate tail to the daughters, because he had expressly given one to the sons; but on the contrary, that the gift to the sons furnished a presumption of a similar intention as to the daughters, as appears by the judgment of Lord KENYON, in which, upon this point he says, "I cannot find any words in the will to warrant *such a [*46] construction. If indeed, the word 'such' had not been introduced in this clause, we might, perhaps, have said, that as issue is *genus generalissimum*, it should include all the progeny. But here the word 'such' is relative, and restrains the words which accompany it."

In *White* v. *Collins*, Comyns Rep. 289, the first limitation was to F. for life and after his death to the heir male of his body for life; and the limitation over was for default of such heir male. It was held to mean such as before mentioned, that is, an heir male who was to take for life. In the present case, for want of words of inheritance, it is, by construction of law, an estate for life in the children. That circumstance does not, in principle, make it different from the case of *White* v. *Collins*, where the estate is given to the heir expressly for life. These are cases directly applicable, as authorities to the words of this will.

In the cases cited on behalf of the plaintiff in error, there was a

paramount intent sufficient to over-rule the secondary intent. *Robinson* v. *Robinson* is the strongest of that class of cases, having words clearly indicating the intent, that the remainder should not take effect, but upon failure of all the issue of the particular tenant. The word used in the devise in that case, was "son" in the singular number. It was argued that the word was intended as *nomen collectivum*, meaning all the heirs forever, and that the limitation over was to be construed and guided by that intent.

In the certificate that argument was adopted: and it is to [*47] be noticed that in *Robinson* v. *Robinson*, the *testator at the end gave to L. H. the perpetuity of certain presentations in the same manner as he had given his estates.

In *Wharton* v. *Gresham*, 2 Blac. Rep. 1083, there was an express limitation in tail.

As to the dictum quoted from *Jones* v. *Morgan*, there is no doubt that to enable all the heirs to take by descent, the ancestor must have an estate of descendible quality. That principle is not denied; but the words of the will in that case were different from the words in this.

In *Bennet* v. *Lord Tankerville*, 19 Ves. 170, the limitation over was in case of dying without issue of the body, referring to the words "heirs of the body," which had been used before. The intent that all the issue should succeed in turn, could not be effectuated without giving an estate tail to the parent, which necessarily enlarged the estate for life. In *Doe* v. *Aplin*, *Doe d. Chandler* v. *Smith*, *Doe* v. *Cooper*, and *Pierson* v. *Vickers*, the intent is clear, that the estate should not go over, but upon indefinite failure of issue. And it is to be observed, that in all those cases, the limitation over is to a stranger, who is a gratuitous object of the testator's bounty, and must bring himself within the clear intent. In this devise the limitation over is to the heir.

Frank v. *Stovin*, 3 East, 548, is the case of an estate tail by implication. So in *Coulson* v. *Coulson*, *Mogg* v. *Mogg*, and *Doe* v. *Webb*, 1 Taunt. 234 (9 R. R. 754), which were decided on special [*48] *grounds. In *Burchel* v. *Durdant*, the first question was whether the first limitation by way of use was executed. The decision was, that the use was not executed. But the authority of the case on that point has since been questioned by Lord Holt in *Broughton* v. *Langley*, 2 L. Raym. 873, 2 Salk. 679. A limitation to permit A. to receive, &c., would be a use executed.

The second point in that case was, whether the remainder was contingent or vested, it being to the heir of B. now living. There was a son living at the date of the will and death of the devisor. Under such circumstances, the court held it a description of the person, and a vested remainder.

In *Hodges* v. *Middleton*, Dougl. 431, the word "estate" occurred in the first limitation, and it was given over on failure of children, that is, of children indefinitely, which creates an estate tail by implication, upon the same principle as the words "issue," &c. *Lief* v. *Saltingstone* is not applicable. The power in that case was altogether different. The decision in that case established only this doctrine, that a power of appointment may extend to an appointment in fee. That is not inconsistent with an estate for life in the donee, but the contrary. By a decision in favour of the plaintiff in error, the doctrines of implication would be carried beyond all former bounds. Here the words of the will clearly import the immediate children of the tenant for life. These were manifestly the heirs of the body in the *contempla- [*49] tion of the testator. He has so explained himself.

Gretton v. *Haward*, 6 Taunt. 94, *Goodtitle* v. *Woodhull*, Willes, 592, *Doe* v. *Goff*, are all authorities in favour of the defendant in error, applicable generally in language and in principle, if not in precise circumstance. As in those cases, so in this, "such issue" must mean such descendants of William, to whom he might, and by the will it was intended, he should appoint, that is, children. No paramount intent is to be collected from the circumstances of the case. The fact that William was an illegitimate son, is adverse to his claim.

The Lord Chancellor ELDON, at the conclusion of the reply: "It is a general rule of law, to be collected from a consideration of all the cases, that a particular intent expressed in a will, must give way to a general intent. It is surprising that so much pains should have been taken to establish such a rule, the effect of which is, usually, to enable the first taker to destroy both general and particular intent. The words 'heirs of the body,' *primâ facie*, mean all descendants; and it is likewise a rule of law, * that all descendants should take under these words, [*50] unless they are clearly qualified and restricted by other words so as to give them a more limited sense. The great judicial difficulty arises in the application of these rules to the words of

each will. I cannot admit that all the cases cited have been well decided: but it was hardly to be expected that judges should agree in the decision of all these cases; for the mind is overpowered by their multitude, and the subtlety of the distinctions between them. These difficulties make it the more necessary that we should deliberate before we determine this case. The decision ought to accord with former authorities, if possible; but, at all events, we must adhere to the established rules of legal construction." *Cur. adv. vult.*

The Lord Chancellor, (on moving the judgment). The question to be decided in this case is expressed in the words to be found in the errors assigned, the principal of which is, that the Court, by their judgment, have decided "that the said William Wright took only a life estate under the said will of the said E. Persehouse, with remainder to his children for life; and that the recovery suffered by the said William Wright, and Mary his wife, and Edward Wright, was a forfeiture of their estate. Whereas, the said R. Jesson, J. Hately, W. Whitehouse, J. Watton, E. Dangerfield the elder, and T. Dangerfield, allege for error, that the testator intended to embrace all the issue of the said [*51] William Wright, which *intention can only be effected by giving to the said William Wright an estate tail, and the words of the will are fully sufficient for that purpose." I will not trouble the House by going through all the cases in which the rule has been established; that where there is a particular and a general intent, the particular is to be sacrificed to the general intent. The opinion which I have formed concurs with most, though not with every one of those cases. A great many certainly, and almost all of them coincide and concur in the establishment of that rule. Whether it was wise originally to adopt such a rule might be a matter of discussion; but it has been acted upon so long, that it would be to remove the landmarks of the law, if we should dispute the propriety of applying it to all cases to which it is applicable. There is, indeed, no reason why judges should have been anxious to set up a general intent to cut down the particular, when the end of such decision is to give power to the person having the first estate, according to the general and paramount intent to destroy the interest both under the general and the particular intent. However, it is definitely settled as a

rule of law, that where there is a particular, and a general or paramount intent, the latter shall prevail, and courts are bound to give effect to the paramount intent.

This is a short will. The decision in the Court below has proceeded upon the notion, that no such paramount intent is to be found in this will. Here, I must remark, how important it is, that, in preparing cases to be laid before the House, great * care should be taken not to insert in them more than the [*52] words of the record. In page 3 of the printed case delivered on behalf of the plaintiffs in error, are to be found the words "appointee in tail general of the lands, &c., thereinafter granted and released of the second part." These words are not to be found in the record. I mention the fact, because, if this is to be quoted as an authority in similar cases, it may mislead those who read and have to decide upon it, if not noticed. According to the words of the will, it is absurd to suppose that the testator could have such intention as the rules of law compel us to ascribe to his will. "I give and devise unto William, one of the sons of my sister Ann Wright before marriage, all that messuage, &c., to hold the said premises unto the said William, son of my said sister Ann Wright, for and during the term of his natural life, he keeping all the said dwelling-houses and buildings in tenantable repair." If we stop here, it is clear that the testator intended to give to William an interest for life only. The next words are, "and from and after his decease, I give and devise all the said dwelling-houses, &c., unto the heirs of the body of the said William, son of my said sister Ann Wright lawfully issuing." If we stop there, notwithstanding he had before given an estate expressly to William for his natural life only, it is clear that, by the effect of these following words, he would be tenant in tail; and, in order to cut down this estate tail, it is absolutely necessary that a particular intent should be found to control * and alter it [*53] as clear as the general intent here expressed. The words "heirs of the body" will indeed yield, to a clear particular intent, that the estate should be only for life, and that may be from the effect of superadded words, or any expressions showing the particular intent of the testator; but that must be clearly intelligible, and unequivocal. The will then proceeds, "in such shares and proportions as he, the said William, shall, by deed, &c., appoint." This part of the will makes it necessary again to advert to the

extraneous words inserted in the case of the plaintiffs in error, and to caution those who prepare them. "Heirs of the body" mean one person at any given time; but they comprehend all the posterity of the donee in succession: William, therefore, could not strictly and technically appoint to heirs of the body. This is the power, and then come the words of limitation over in default of execution of the power; "and for want of such gift, direction, limitation, or appointment, then to the heirs of the body of the said William, son of my said sister Ann Wright, lawfully issuing, share and share alike as tenants in common."

It has been powerfully argued (and no case was ever better argued at this bar), that the appointment could not be to all the heirs of the body in succession forever, and, therefore, that it must mean a person, or class of persons, to take by purchase; that the descendants in all time to come could not be tenants in common; that "heirs of the body," in this part of the will, must mean the same class of persons as the "heirs of the body," [* 54] among whom he had before given the power to * appoint; and, inasmuch as you here find a child described as an heir of the body, you are therefore to conclude, that heirs of the body mean nothing but children. Against such a construction many difficulties have been raised on the other side, as for instance, how the children should take, in certain events, as where some of the children should be born and die before others come into being. How is this limitation, in default of appointment in such case, to be construed and applied? The defendants in error contend, upon the construction of the words in the power, and the limitation in default of appointment, that the words "heirs of the body," mean some particular class of persons within the general description of heirs of the body; and it was further strongly insisted that it must be children, because, in the concluding clause, of the limitation in default of appointment, the whole estate is given to one child, if there should be only one. Their construction is, that the testator gives the estate to William for life, and to the children as tenants in common for life. How they could so take, in many of the cases put on the other side, it is difficult to settle. Children are included undoubtedly in heirs of the body; and if there had been but one child, he would have been heir of the body, and his issue would have been heirs of the body: but, because children are included in the words heirs of the body, it

does not follow that heirs of the body must mean only children, where you can find upon the will a more general intent comprehending more objects. Then the words, "for want of such issue," which follow, it is said, * mean for want of children; [* 55] because the word such is referential, and the word child occurs in the limitation immediately preceding. On the other hand, it is argued, that heirs of the body being the general description of those who are to take, and the words "share and share alike as tenants in common," being words upon which it is difficult to put any reasonable construction, children would be merely objects included in the description, and so would an only child. The limitation "if but one child, then to such only child," being, as they say, the description of an individual who would be comprehended in the terms heirs of the body; for "want of such issue," they conclude, must mean for want of heirs of the body. If the words "children and child" are so to be considered as merely within the meaning of the words heirs of the body, which words comprehend them and other objects of the testator's bounty (and I do not see what right I have to restrict the meaning of the word "issue"), there is an end of the question. I do not go through the cases. That of *Doe* v. *Goff*, is difficult to reconcile with this case — I do not say impossible; but that case is as difficult to be reconciled with other cases. Upon the whole, I think it is clear that the testator intended that all the issue of William should fail before the estate should go over according to the final limitation. I am sorry that such a decision is necessary: because, when we thus enforce a paramount intention, we enable the first taker to destroy both the general and particular intent. But it is more important to maintain the rules of law, than to provide against the hardships of particular cases.

* Lord Redesdale. There is such a variety of combina- [* 56] tion in words, that it has the effect of puzzling those who are to decide upon the construction of wills. It is therefore necessary to establish rules, and important to uphold them, that those who have to advise may be able to give opinions on titles with safety. From the variety and nicety of distinction in the cases, it is difficult, for a professional adviser, to say what is the estate of a person claiming under a will. It cannot at this day be argued, that, because the testator uses in one part of his will words having a clear meaning in law, and in another part other

words inconsistent with the former, that the first words are to be cancelled or overthrown. In *Coulson* v. *Coulson,* it is clear that the testator did not mean to give an estate tail to the parent. If he meant anything by the interposition of trustees to support contingent remainders, it was clearly his intent to give the parent an estate for life only. It is dangerous, where words have a fixed legal effect, to suffer them to be controlled without some clear expression, or necessary implication. In this case, it is argued, that the testator did not mean to use the words, "heirs of the body," in their ordinary legal sense, because there are other inconsistent words; but it only follows that he was ignorant of the effect of the one or of the other. All the cases but *Doe* v. *Goff,* decide that the latter words, unless they contain a clear expression, or a necessary implication of some intent, contrary to the legal import of the former, are to be rejected. That the general intent should over-rule the particular, is not the most accurate ex-
[* 57] pression of the * principle of decision. The rule is, that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise. In many cases, in all, I believe, except *Doe* v. *Goff,* it has been held, that the words "tenants in common," do not over-rule the legal sense of words of settled meaning. In other cases, a similar power of appointment has been held not to over-rule the meaning and effect of similar words. It has been argued, that heirs of the body cannot take as tenants in common; but it does not follow that the testator did not intend that heirs of the body should take, because they cannot take in the mode prescribed. This only follows, that, having given to heirs of the body, he could not modify that gift in the two different ways which he desired, and the words of modification are to be rejected. Those who decide upon such cases ought not to rely on petty distinctions, which only mislead parties: but look to the words used in the will. The words, "for want of such issue," are far from being sufficient to over-rule the words "heirs of the body." They have almost constantly been construed to mean an indefinite failure of issue, and, of themselves, have frequently been held to give an estate tail. In this case the words, "such issue," cannot be construed children, except by referring to the words "heirs of the body," and in referring to those words they show another intent. The defendants in error interpret "heirs of the body"

to mean children only, and then they say the limitation over is in default of children; but I see no ground to restrict the words * "heirs of the body" to mean children in this will. [* 58] I think it is necessary, before I conclude, to advert to the case of *Doe* v. *Goff*. It seems to be at variance with preceding cases. In several cases cited in the argument, it had been clearly established, that a devise to A. for life, with a subsequent limitation to the heirs of his body, created an estate in tail, and that subsequent words, such as those contained in this will, had no operation to prevent the devisee taking an estate tail. In *Doe* v. *Goff*, there were no subsequent words, except the provision in case such issue should die under twenty-one, introducing the gift over. This seems to me so far from amounting to a declaration that he did not mean heirs of the body, in the technical sense of the words, that I think they peculiarly show that he did so mean — they would, otherwise, be wholly insensible. If they did not take an estate tail, it was perfectly immaterial whether they died before or after twenty-one. They seem to indicate the testator's conception, that, at twenty-one, the children would have the power of alienation. It is impossible to decide this case without holding that *Doe* v. *Goff* is not law.

In this case even admitting it to be the general intent of the testator, to give to William an estate only for life, the remainders to the children, might as easily be defeated, because William might, by agreement with the heir, have destroyed their estates before they arose. Suppose he had had a child who died, and then he had committed a forfeiture, the devisee over would have entered and enjoyed the estate. Suppose he had several children, and some had died, and some had been living, the * proportions would have been changed, and after-born [* 59] children would not have come in to take the shares of those who were dead. These are absurdities arising out of the construction proposed. If the testator had considered the effect of the words he used, and the rule of law operating upon them, he probably would have used none of the words in the will.

Judgment reversed.

ENGLISH NOTES.

The ruling cases have been chosen in preference to *Shelley's Case*, (1 Co. Rep. 93 *b*), which did not determine the question, but merely affirmed a rule settled long before that decision.

The principles upon which the Court acts are thus stated by Lord Denman, Ch. J. in *Doe d. Gallini* v. *Gallini* (1833), 5 B. & Ad. 621, 640, 2 Nev. & M. 619, 3 L. J. K. B. 71. "The doctrine that the general intent must overrule the particular intent has been much, and we conceive justly, objected to of late; as being, as a general proposition, incorrect and vague, and likely to lead in its application to erroneous results. In its origin, it was merely descriptive of the operation of the rule in *Shelley's Case;* and it has since been laid down in others, where technical words of limitation have been used, and other words, showing the intention of the testator, that the objects of his bounty should take in a different way from that which the law allows, have been rejected; but in the latter cases, the more correct mode of stating the rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense; and so it is said by Lord Redesdale, in *Jesson* v. *Wright*. This doctrine of general and particular intent ought to be carried no further than this; and thus explained, it should be applied to this and all other wills. Another undoubted rule of construction is, that every part of that which the testator meant by the words, he has used, should be carried into effect as far as the law will permit, but no further; and that no part should be rejected, except what the law makes it necessary to reject." To the same effect is the language of Alderson, B., in delivering the judgment of the Court, in *Lees* v. *Mosley* (1836), 1 Y. & C. Ex. 589.

The gift to the *præpositus* and the gift to the heirs or heirs of the body must be contained in the same instrument. *Doe d. Fonnereau* v. *Fonnereau* (1780), 2 Dougl. 487. In *Hayes d. Foorde* v. *Foorde* (1770), 2 W. Bl. 698, the testator devised an estate "to the heirs male of my brother Nicholas Foorde's sons, and to any of their heirs males, during their lives," with a limitation over. At the same time he published a schedule referred to in his will, which schedule was attested with the solemnities then required to the validity of a will passing real estate. The schedule was entitled "An account how I dispose of my estate . . . to my brother Nicholas Foorde's Sons." The Court of King's Bench, as a Court of Error, held that although it was doubtful whether an estate for life passed to the nephew by implication under the will, yet that the schedule and the will were to be read together, and that the nephew took an estate tail. This case seems a clear authority for the proposition that an estate for life and one to the heirs or heirs of the body would unite where the one gift was contained in a will and the other in a codicil.

The second essential is that the *præpositus* should take an estate of freehold. An estate given during widowhood is a sufficient estate of freehold, and a subsequent limitation to the heirs of the body of a woman to whom an estate during her widowhood is given will give her an estate tail; *Curtis* v. *Price* (1805), 12 Ves. 89, 8 R. R. 303. So, under a limitation to the heirs or heirs of the body of the survivor of several persons, to whom joint life estates are limited, the survivor will take an estate in fee: *Quarm* v. *Quarm* (1891), 1892, 1 Q. B. 184, 61 L. J. Q. B. 154, 66 L. T. 418, 40 W. R. 302; *Fuller* v. *Chamier* (1866), L. R. 2 Eq. 682, 35 L. J. Ch. 772, 14 W. R. 913, 12 Jur. N. S. 642. An estate for life by implication is a sufficient estate of freehold within the rule; *Pibus* v. *Mitford* (1675), 1 Vent. 372; *Hayes d. Foorde* v. *Foorde* (1770), 2 W. Bl. 698. Where there was a devise to the right heirs of husband and wife, to whom no estate was limited, a child of both was held to answer the description and to take an estate by purchase: *Roe d. Nightingale* v. *Quartley* (1787), 1 T. R. 630, 1 R. R. 326.

As pointed out by Lord Denman, Ch. J. in *Doe d. Gallini* v. *Gallini* in the passage which is set out at length at the beginning of this note, the question in every case is whether effect shall be given to the rule of law, or whether there are sufficient indications in the language employed in other parts of the document to show that the legal effect of the technical expressions was not intended. *Doe d. Gallini* v. *Gallini*, was a case of a will, and the expressions there used were equivalent to a limitation to the heirs of the body within the principles of *Slater* v. *Dangerfield*, No. 4, p. 759, *post*. It is clear, however, that in the case of a deed, where apt words of limitation or their statutory equivalents must be used, effect will be given to expressions showing an intent to exclude the technical rule: *Evans* v. *Evans* (C. A. 1892), 1892, 2 Ch. 173, 61 L. J. Ch. 456, 67 L. T. 152, 40 W. R. 465. There a third share in lands was limited "to such uses upon such trusts and for such estates or estate in favour of the said John Evans, and Thomas Evans, or either of them as the said Owen Evans [shall by deed appoint, and in default of appointment] to the use of the said Owen Evans and his assigns during his life without impeachment of waste [with remainders over for life, with remainder to the appointees by Will or Codicil of Owen Evans, with remainder] to the use of such person or persons as at the decease of the said Owen Evans shall be his heir or heirs at law, and the heirs and assigns of such person or persons." The power of appointment preceding the life estate of Owen Evans was never exercised, and the question arose whether Owen Evans took a life estate, or an estate in fee in the third share thus limited. The Court of Appeal held that the case did not fall within

the rule in *Shelley's Case* (1 Co. Rep. 93 *b*), but did fall within the modification of it, known as the rule in *Archer's Case* (1 Co. Rep. 66 *b*). In the course of his judgment in *Evans* v. *Evans,* LINDLEY, L. J. said: "I have found no case in which the doctrine in *Archer's Case* has been applied to a limitation to heirs in the plural; but in this case, although the expression 'heir or heirs' occurs, that expression is used in the sense of heir in the singular, as I have already pointed out." There is, however, one case in which the words "heirs of the body" was used in the plural, where the Court of King's Bench, presided over by Lord MANSFIELD, came to the conclusion that the heirs of the body were to take as purchasers: *Doe d. Long* v. *Laming,* (1760), 2 Burr. 1100. That was a devise of a fourth share in gavelkind land "unto my niece Anne, now the wife of William Cornish, and to the heirs of her body, lawfully begotten or to be begotten, as well females as males, and to their heirs and assigns for ever, to be divided equally share and share alike, as tenants in common and not as joint tenants." It was held that the heirs of the body took as purchasers. "Heirs male of the body" have been construed to mean first and other sons: *Goodtitle d. Sweet* v. *Herring* (1801), 1 East, 264, 6 R. R. 270, affirmed in the House of Lords, *per* Lord ALVANLEY, *Poole* v. *Poole,* 3 Bos. & P. 620, 628. In *North* v. *Martin* (1833), 6 Sim. 266, by a marriage settlement, estates were limited to the husband for life, with remainder to trustees to preserve contingent remainders, with remainder to the wife for life, with remainder to "the heirs of the body of [the husband on the body of the wife] and their heirs and if more children than one equally to be divided among them, to take as tenants in common and not as joint tenants, and for default of such issue" over. Here upon the subsequent words of the settlement SHADWELL, V. C. held that the words "if more children than one" must be taken to be interpretative of the words "Heirs of the body," and that the children of the marriage took by purchase in fee. A somewhat similar case is *Jordan* v. *Adams* (1860), 6 C. B. (N. S.) 765, 29 L. J. C. P. 180. That was a case of a devise to one for life, and after his decease "to the heirs male of his body . . . for their several natural lives in succession, according to their respective seniorities, or in such parts and proportions, manner and form, and amongst them as the said William Jordan their father shall by deed or will . . . appoint. And in default of such issue of the said William Jordan" over. The father was held to take an estate for life only. In the Exchequer Chamber (9 C. B. N. S. 483, 30 L. J. C. P. 161), the Court was equally divided. The cases of *Gummoe* v. *Howe* (1857), 23 Beav. 184, 26 L. J. Ch. 323; *Allgood* v. *Blake* (Ex. Ch. 1872), L. R. 8 Ex. 160, 42 L. J. Ex. 101, and in the Court of

Exchequer (1872), L. R. 7 Ex. 339, 41 L. J. Ex. 217; *Hampton* v. *Holman* (1877), 5 Ch. D. 183, 46 L. J. Ch. 248, and *Bowen* v. *Lewis* (H. L. 1884), 9 App. Cas. 890, 54 L. J. Q. B. 55, 52 L. T. 189, will give the clue to the very numerous authorities in which the rule has been applied.

In *Pedder* v. *Hunt* (C. A. 1887), 18 Q. B. D. 562, 56 L. J. Q. B. 212, 56 L. T. 687, 35 W. R. 371; the Court of Appeal laid down broadly the rule that where the limitation shows the testator's intention to have been that the heir shall take for life only, then the word "heir" is not to be treated as a word of limitation, and the rule in *Shelley's Case*, did not apply. The Court here were asked to apply the rule to the construction of a very obscure will, but they inferred the intention to be, after the gift to his eldest son for life, to create a series of life estates for ever, each of such estates vesting in the heir for the time being of the last surviving of his sons. For the rule so laid down, the case of *White* v. *Collins* (1718), Comyn, 289, and the passage of Mr. Justice BLACKSTONE'S judgment — "Common sense will here tell us," &c. (p. 708, *supra*), are cited as the authorities.

It may, however, be pointed out that the rule in *Shelley's Case* is not excluded by the mere addition of words of limitation to a gift to the heirs of the body of the first taker: *Jack* v. *Fetherstone* (H. L. 1835), 9 Bligh, 237, 3 Cl. & Fin. 67; *Douglas* v. *Congreve* (1837), 5 Scott, 233, 4 Bing. N. C. 1, 7 L. J. C. P. 4, 1 Beav. 59, 8 L. J. Ch. 53. In *Fuller* v. *Chamier* (1866), L. R. 2 Eq. 682, 35 L. J. Ch. 772, 12 Jur. N. S. 642, 14 W. R. 913; the testator devised to certain designated persons equally, "during their natural lives, and after their decease I give and bequeath the said real estate unto the next lawful heir of my nephew Thomas Crookenden after mentioned, all the said freehold estate for ever." Thomas Crookenden was one of the persons to whom a life estate had been given, and survived the others. It was held by Lord HATHERLEY, that Thomas Crookenden took a fee. So also, words pointing to an enjoyment by the heirs or heirs of the body in a different manner to that in which would follow if the rule in *Shelley's Case* were applied, will not exclude the operation of the rule. In *Jesson* v. *Wright*, the second principal case, there were words of distribution. In *Doe d. Cole* v. *Goldsmith* (1816), 7 Taunt. 209, 2 Marsh. 517, 17 R. R. 487, the devise was to one and his assigns for his life, and immediately after his decease, unto the heirs of his body lawfully to be begotten, in such parts and shares as the *praepositus* should appoint with remainder over. This devise was held to confer an estate tail.

The principle of these cases would not, however, apply to a devise, if the word "issue" or its equivalent were used. There the rule is, that

if an estate for life is followed by a remainder to the "issue," with the addition of words of distribution or words which would convey the fee or an estate tail to the issue, the estate of the first taker is limited to an estate for life; and a similar rule applies in those cases where the issue take a larger estate than an estate for life by implication: *Bradley* v. *Cartwright* (1867), L. R. 2 C. P. 511, 36 L. J. C. P. 218.

It is not sufficient to exclude the rule in *Shelley's Case*, that the course of descent would be altered, if effect were given to the limitation to the heirs of the body: *Doe d. Bosnall* v. *Harvey* (1825), 4 B. & C. 610, 7 Dowl. & Ry. 78, 4 L. J. (O. S.) K. B. 18. There gavelkind lands were devised to a nephew for life, with remainder to trustees to preserve contingent remainders, with remainder to and amongst all and every the heirs of the body of the nephew, as well female as male, such heirs, as well female as male, to take as tenants in common and not as joint tenants, with remainders over. Under this devise, the Court held that the nephew took an estate tail. The Court distinguished *Doe d. Long* v. *Laming* (1760), 2 Burr. 1100, on the ground that there were no words of limitation added to the gift to the heirs of the body.

The interposition of estates (not being of estates in fee) between the estate given to the *præpositus* and the estate limited to his heirs or the heirs of his body, will not exclude the operation of the rule: Fearne Contingent Remainders 31 citing Brooke Ab. tit. Done. pl. 11. So too where the intervening estates are contingent, the *præpositus* will take an estate in fee or in tail, as the case may be. Fearne Contingent Remainders 36, *Lewis Bowle's Case*, 11 Co. Rep. 80. Tudor. Lead Cas. Conv. 37, 3rd ed. Where the *præpositus* took an estate for life with a power to appoint among her children with a gift in default of appointment to the daughter's right heirs, the daughter took the fee. *Richardson* v. *Harrison* (C. A. 1885), 16 Q. B. D. 85, 55 L. J. Q. B. 58, 54 L. T. 456.

The rule in *Shelley's Case*, is applicable not only to socage lands but to customary tenures: *Roe d. Aistrop* v. *Aistrop* (1770), 2 W. Bl. 1228 (Borough English); *Doe d. Bosnall* v. *Harvey* (1825), 4 B & C. 610, 7 Dowl. & Ry. 78. A limitation which would give an estate tail in freehold lands confers an absolute estate in leaseholds; *Ex parte Sterne* (1801), 6 Ves. 159; *Ware* v. *Polhill* (1805), 11 Ves. 257, 8 R. R. 144. A quasi entail may be created in an estate *pour autre vie: Finch* v. *Tucker* (1690), 2 Vern. 184; *Low* v. *Burrow* (1734), 3 P. Wms. 262.

AMERICAN NOTES.

The Rule in *Shelley's Case* has ceased to be of much interest in this country except historical.

Kent stated (4 Com. 229): "The Rule in *Shelley's Case* has been received and adopted, in these United States, as part of the system of the common law," and he devoted many pages to a masterly discussion of it. In 22 Am. & Eng. Enc. of Law, p. 493, is an exhaustive history of the rule in this country, covering thirty-two pages. Pingrey, the latest text-writer on Real Property, says: "But whatever may have been the reason of the rule, it has been firmly established in England and in this country; it has now been abolished by statute in several States. It was recognized in Alabama, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, and Wisconsin. It was never in force in Kentucky (*Turman* v. *White's heirs*, 14 B. Monroe, 560), and this appears to be the case in Maine (*Pratt* v. *Leadbetter*, 38 Maine, 9). The rule has been abolished as to wills and deeds in Alabama, California, Connecticut, Georgia, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New York, Tennessee, Virginia, West Virginia, Wisconsin. It is not abolished in North Carolina, as some authorities say (*Starnes* v. *Hill*, 112 North Carolina, 1). It has been abolished as to wills in Montana, New Hampshire, New Jersey, North Dakota, Ohio, South Dakota, and Washington. In Rhode Island, under a statute, the rule does not apply to devises in which the property is limited to one for life and remainder to the children or issue of the devisee for life (*Boutelle* v. *Bank*, 17 Rhode Island, 781). But the rule is adopted in all grants and devises in which the limitation in remainder is to the heirs generally, or to heirs of the body of the first taker. (*Andrews* v. *Lowthrop*, 17 Rhode Island, 60.)

Some variations from the statement last above may be found in a classification of the State rulings and statutes, in the Encyclopædia article cited above, in which it is said that "the Rule has been abolished by statute in a majority of the States," but that "It may be questioned whether many of these statutes are comprehensive enough to accomplish their object." The searcher for judicial statistics may find a summary in Beach on Wills, p. 352. Reference may usefully be made to notes: 30 Am. Dec. 115, 3; Jarman on Wills (Randolph & Talcott's notes), p. 99. "Only in a few States is this much celebrated principle preserved."

Mr. Schouler (Wills, sect. 553), citing both the principal cases, and Mr. Bigelow's assertion, in a note on 2 Jarman on Wills, 332, that the Rule was two and half centuries older than *Shelley's Case*, observes, in speaking of the abolition or change of the Rule by statute in this country "in most of our States": "while in others the courts unaided have long felt competent to regard it as affording a mere presumption and no more, in those unfrequent cases where the question is raised for testamentary construction. A mass of

our early American precedents have lost their drift and momentum in consequence, and to us whose policy is to break up and disperse property among heirs and kindred, the English canon, which stands for five centuries undisputed, loses most of its interest except for purposes of judicial comparison."

Judge Redfield, one of our ablest commentators, observes (2 Wills, 720): "We should regret to find the American courts going further in the rigid application of such an unnatural rule of construction to devises, than such English judges as Mansfield and Wilmot were willing to go."

The Rule was defended by Chief Justice Gibson, in *Hileman* v. *Bouslaugh*, 13 Pennsylvania State, 344, as follows: "It ill deserves the epithets bestowed on it in the argument. Though of feudal origin, it is not a relic of barbarism, or a part of the rubbish of the dark ages. It is a part of a system, an artificial one it is true, but still a system, and a complete one. The use of it, while fiefs were predominant, was to secure the fruits of the tenure by preventing the ancestor from passing the estate to the heir, as a purchaser through a chasm in the descent disencumbered of the burdens incident to it as an inheritance; but Mr. Hargrave, Mr. Justice Blackstone, Mr. Fearne, Chief Baron Gilbert, Lord Chancellor Parker, and Lord Mansfield ascribe it to concomitant objects of more or less value at this day; among them the unfettering of estates, by vesting the inheritance in the ancestor, and making it alienable a generation sooner than it would otherwise be. However that may be, it happily falls in with the current of our policy. By turning a limitation for life, with remainder to heirs of the body, into an estate tail, it is the handmaid, not only of Taltarum's case, but of our statute for barring entails by a deed acknowledged in court; and where the limitation is to heirs general, it cuts off what would otherwise be a contingent remainder, destructible only by a common recovery. In a masterly disquisition on the principles of expounding dispositions of real estate, Mr. Hayes, who has sounded the profoundest depths of the subject, is by no means clear that the rule ought to be abolished, even by the legislature; and Mr. Hargrave shows in one of his tracts, that to engraft purchase on descent, would produce an amphibious species of inheritance, and confound a settled distinction in the law of estates. It is admitted that the rule subverts a particular intention in perhaps every instance; for as was said in *Roe* v. *Bedford*, 4 Maule & Selw. 363, it is proof against even an express declaration that the heirs shall take as purchasers. But it is an intention which the law cannot indulge consistently with the testator's general plan, and which is necessarily subordinate to it. It is an intention to create an inalienable estate tail in the first donee; and to invert the rule of interpretation, by making the general intention subservient to the particular one. A donor is no more competent to make tenancy for life a source of inheritable succession than he is competent to create a perpetuity, or a new canon of descent. The rule is too intimately connected with the doctrine of estates to be separated from it without breaking the ligament of property. It prevails in Maryland, Georgia, Tennessee, as well as perhaps in most of the other States; and it prevailed in New York till it was abolished by statute. We have no such statute, and it has always been recognized by this court as a rule of property."

On the other hand, ELLIOTT, J., in *Siceloff* v. *Redman's Adm'r*, 26 Indiana, 251, observes: "The Rule in *Shelley's Case* is a rule of the common law, and as the common law has been adopted in this State by statute, the rule is binding upon the courts as a law of real property in Indiana. It may be remarked that whatever reasons may have once existed for it in England have, even there, long since ceased, and no good reason is perceived for its incorporation into the legal policy of this country. It was doubtless introduced into many of the other States as into this, as a part of the common law, without discussion or question as to its propriety; but it has been abrogated in many of them by statute, especially in its application to devises. . . . Its propriety as a rule of law, in this State, is seriously doubted, and it may be regretted that the attention of the legislature has not been directed to the propriety of its repeal, as its only effect, and more particularly in its application to devises, is to defeat the real intention of testators."

And in *Belslay* v. *Engel*, 107 Illinois, 182, the Court say: "The Rule in *Shelley's Case* is, at most, a technical rule of construction, and has always, since the decision in *Perrin* v. *Blake*, 1 Burr. 2579, given way to the clear intention of the testator or donor, when that intention could be ascertained from the instrument in which the words supposed to be words of limitation were used. This rule will control, unless where it contravenes some settled principle of law; otherwise, instead of being a rule by which justice could be administered, it would be a source of incalculable mischief in its practical application."

Chancellor KENT observed: "The abolition of the Rule facilitates such settlements, though it does not enlarge the individual capacity to make them; and it is a question for experience to decide, whether this attainable advantage will overbalance the inconvenience of increasing fetters upon alienation, and shaking confidence in law, by such an entire and complete renunciation of a settled rule of property, memorable for its antiquity, and for the patient cultivation and discipline which it has received." His chief lament in the premises seems founded, however, on the removal of the pretext for such a "pretty quarrel," for he exclaims: "The judicial scholar, on whom his great master, Coke, has bestowed some portion of the 'gladsome light of jurisprudence,' will scarcely be able to withhold an involuntary sigh, as he casts a retrospective glance over the piles of learning, devoted to destruction by an edict as sweeping and unrelenting as the torch of Omar. He must bid adieu forever to the renowned discussions in *Shelley's Case*, which were so vehement and so protracted as to arouse the sceptre of the haughty Elizabeth. He may equally take leave of the multiplied specimens of profound logic, skilful criticism, and refined distinctions, which pervade the various cases in law and equity, from those of Shelley and Archer down to the direct collision between the courts of law and equity, in the time of Lord Hardwicke. He will have no more concern with the powerful and animated discussions in *Perrin* v. *Blake*, which awakened all that was noble and illustrious in talent and endowment, through every precinct of Westminster Hall. He will have occasion no longer, in pursuit of the learning of that case, to tread the clear and bright paths illuminated by Sir William Blackstone's illustrations, or to study and

admire the spirited and ingenious dissertation of Hargrave, the comprehensive and profound disquisition of Fearne, the acute and analytical essay of Preston, the neat and orderly abridgment of Cruise, and the severe and piercing criticisms of Reeve. What I have therefore written on this subject may be considered, so far as my native State is concerned, as a humble monument to the memory of departed learning."

If the great chancellor were alive to-day, he would probably have the candor to confess that our people have managed to get along pretty well without the Rule, and that it has become in this country "more honored i' the breach than i' the observance."

An amusing account of the Rule is to be found in William Allen Butler's account of "The Revision of Statutes of the State of New York and the Revisers," concluding: "Thus it was founded on no reason possibly applicable in this State, and yet it had been slavishly followed by our courts as an integral part of the English Common Law of real property, until swept away by the statute."

Very recent discussions of the Rule, in States where it still has vitality, may be found in *Leathers* v. *Gray*, 101 North Carolina, 162; 9 Am. St. Rep. 30; *Hughes* v. *Niklas*, 70 Maryland, 484; 14 Am. St. Rep. 377; *Carpenter* v. *Van Olinder*, 127 Illinois, 42; 11 Am. St. Rep. 92; 2 Lawyers' Rep. Annotated, 455; *Boykin* v. *Ancrum*, 28 South Carolina, 486; 13 Am. St. Rep. 698; *Kuntzleman's Trust Estate*, 136 Penn. State, 142; 20 Am. St. Rep. 909; *Conger* v. *Lowe*, 124 Indiana, 368; 9 Lawyers' Rep. Annotated, 165; *Ebey* v. *Adams*, 135 Illinois, 80; 10 Lawyers' Rep. Annotated, 162; *Fowler* v. *Black*, 136 Illinois, 363; 11 Lawyers' Rep. Annotated, 670; *Browning's petition*, 16 Rhode Island, 441; 3 Lawyers' Rep. Annotated, 209; *Pennington* v. *Pennington*, 70 Maryland, 418; 3 Lawyers' Rep. Annotated, 816; *Dukes* v. *Faulk*, 37 South Carolina, 255; 34 Am. St. Rep. 745; *Earnhart* v. *Earnhart*, 127 Indiana, 397; 22 Am. St. Rep. 652.

No. 4. — SLATER *v.* DANGERFIELD.

(1846.)

RULE.

With regard to realty, — the word "issue" in a will *primâ facie* means the same thing as "heirs of the body," and is to be construed as a word of limitation; but this *primâ facie* construction will give way if there be on the face of the will sufficient to show that the word was intended to have a less extended meaning and to be applied only to children, or to descendants of a particular class or at a particular time.

Slater v. Dangerfield.

15 Meeson & Welsley 263–276 (s. c. 16 L. J. Ex. 51).

Devise. — Construction. — "Issue" construed as "children," and to take as purchasers.

A testator devised lands to his grandson, G. D., to hold the same unto [263] and to the use of the said G. D. for the term of his natural life; and from his decease, unto and to the use of all and every the lawful issue of the said G. D. their heirs and assigns forever, equally, as tenants in common and not as joint-tenants, when and as he, she, or they should attain his, her, or their age or ages of twenty-one years. And the testator devised all the residue and remainder of his real and personal estate and effects, whatsoever and wheresoever, not before otherwise disposed of, to his daughter, S. D., absolutely, for her own sole and separate use.

Held, that, in the above devise, issue was to be construed "children," and therefore G. D. took an estate for life only, with remainder to his children as purchasers, and not an estate tail; and therefore that, on his death without issue, S. D. took under the residuary devise, notwithstanding a deed of disentailer executed by G. D. in his lifetime: for a deed of disentailer, executed under the 3 & 4 Will. IV. c. 74, has no effect in barring future contingent estates, unless the party executing it was in fact a tenant in tail.

This was an action of detinue for the title-deeds of an estate, of which the declaration alleged that the plaintiffs were lawfully possessed, as of their own property, in right of the plaintiff Maria Ann. The defendant pleaded *non detinet;* secondly, that the plaintiffs, in right of the said Maria Ann, were not possessed as of their own property *of the deeds, &c., in the declar- [* 264] ation mentioned. — Issues thereon.

By consent of the parties, the following case was stated, under a Judge's order, for the opinion of this Court: —

Henry Taylor, of Barking, in the county of Essex, carpenter, being seised in his demesne as of fee of and in the hereditaments, for the deeds and writings relating to which this action is brought (and which are hereinafter described as and called, "the premises in question"), on the 21st day of August, 1823, duly made, signed, and published his last will and testament in writing, bearing date the same day and year aforesaid, and thereby (amongst other things) gave and devised the premises in question in the words following: — "Also, I give and devise unto my grandson, George Dangerfield, all those three freehold messuages or tenements which I purchased of James Hawkins Hayllar, with the outhouses, yards,

and gardens and appurtenances thereto belonging, situate in the High-street of Barking aforesaid, and now in the occupation of William Bowers, John Wallround, and William Reed; also all that freehold piece or parcel of marsh land which I purchased of James Sanders, Esq., called Little Paradise Marsh, containing by estimation four acres or thereabouts, with the appurtenances thereunto belonging, situate in Barking aforesaid, and now in the occupation of James Crow, his under-tenants or assigns: To hold the same unto and to the use of my grandson, George Dangerfield, for and during the term of his natural life: And from and immediately after his decease, I do give and devise the same unto and to the use of all and every the lawful issue of my said grandson, George Dangerfield, their heirs and assigns forever, equally, as tenants in common and not as joint-tenants, when and as he, she, or they shall attain his, her, or their age or ages of twenty-one years." And in the said will was also contained a devise and bequest of the residue and remainder of the real and personal estate [* 265] of the said testator, in the * words or to the effect following, that is to say: "Also I give and bequeath all my stock and utensils in trade, household furniture, plate, linen, and china, and all other my real and personal estate and effects whatsoever and wheresoever, not hereinbefore by me otherwise disposed of, unto my said daughter, the wife of the said James Dangerfield, to and for her own sole and separate use, benefit, and disposal, independent of, and without being subject or liable to, the debts, control, management, or engagements of her present or any future husband she may marry, in manner hereinbefore mentioned."

The said Henry Taylor, after the making of the said will, died seised of the said premises in question, and without having revoked or in any manner altered the same will, leaving the said George Dangerfield and Sarah Dangerfield respectively him surviving, and also leaving his grandson, Henry Wellington Taylor, his heir-at-law, and which said will was duly proved in the proper ecclesiastical court.

The said George Dangerfield entered into possession of the premises in question, and continued possessed thereof until the month of July, 1844, when he departed this life without having had any issue. The said George Dangerfield, on the 16th day of January, 1844, by an indenture of disentailer, duly executed by the said George Dangerfield, Eliza, his wife, and the said Henry

Wellington Taylor, conveyed the premises in question to the said Henry Wellington Taylor and his heirs, to the uses, on the trusts, and for the purposes in that indenture mentioned.

The said Sarah Dangerfield, the residuary devisee, departed this life in the month of May, 1837, intestate, leaving Henry Dangerfield, her eldest son and heir-at-law.

The said Henry Dangerfield, on the 13th day of February, 1838, duly made and published his last will and testament in writing, bearing date on the same day and the year last aforesaid, in the words or to the effect following, that is to say, "First, I direct that all my just debts, funeral *expenses, and testamentary [* 266] charges, be fully paid and settled. After which I bequeath the whole of my property, of whatever description, unto my wife Maria Ann Dangerfield, for her sole use and benefit, namely, my household furniture, my ready money, my funded property, my interest in the house and shop I occupy, my landed property, also my plate, and any kind of property I may die possessed of, for her sole use and benefit; and I also appoint my said wife Maria Ann Dangerfield my sole executrix."

The said Henry Dangerfield, after the making of his said will, namely, on the 10th day of April, 1839, departed this life without having revoked or in any manner altered the same, leaving the said Maria Ann Dangerfield his widow him surviving; and the said will was, soon after the decease of the said testator, duly proved in the proper ecclesiastical court.

The said Maria Ann Dangerfield, after the decease of her said husband, namely, on the 20th day of January, 1844, intermarried with and became the wife of the plaintiff, Edward Slater, and is one of the plaintiffs. The defendant is, and was before and at the commencement of this action, in the possession of the deeds and writings for which this action is brought, and has refused to deliver them up to the plaintiffs, or to either of them, or to any one on their or either of their behalves, although he has had due notice of the intermarriage of the plaintiffs, and although the said deeds and writings have been, before this action brought, and since the intermarriage of the plaintiffs, duly demanded of him.

Copies of the said wills of the said Henry Taylor and Henry Dangerfield respectively, and also a copy of the said indenture of disentailer, and also a copy of the issues in this cause, are contained in the appendix to this case, and are for all purposes to be consid-

ered as constituting a part of this case, and by the court, counsel, and all parties, to be used and referred to accordingly.

[* 267] * The questions for the opinion of the Court are: —

1st, Whether the said George Dangerfield took merely an estate for life in the premises in question, under and by virtue of the will of the said Henry Taylor?

2nd. Whether, in the events which happened, the said Sarah Dangerfield took an estate in fee-simple, expectant on the decease of the said George Dangerfield in the premises in question, under and by virtue of the said will?

If the court should be of opinion, that, under and by virtue of the said will, the said George Dangerfield took merely an estate for life, and that the said Sarah Dangerfield took an estate in fee-simple in remainder in the premises in question, and that the said estate was not defeated by the deed of disentailer, then the defendant agrees that judgment shall be entered generally for the plaintiffs, by confession of the defendant, in respect of all the deeds, &c., mentioned in the declaration, damages £3000 (to be reduced to one shilling upon the delivering up of the said deeds, &c.): but if the Court shall be of opinion that the said George Dangerfield took a greater estate, or that the said Sarah Dangerfield did not take an estate in fee-simple in remainder in the premises in question, under or by virtue of the said will of the said Henry Taylor, or that the same was defeated by the said deed of disentailer, then the said plaintiffs agree that a judgment shall be entered against the plaintiffs of *nolle prosequi;* such judgment in either case to be entered immediately after the decision of this cause, or otherwise as the Court may think fit.

The case was argued at the sittings after Trinity Term, 1845 (June 28), by

Smirke, for the plaintiffs: who argued that the word "issue," in this will, was used by the testator as being synonymous with "children;" that he appeared in various parts of the will

[*268] to use the two words indifferently, having, * in three out of eleven devises to grandchildren and their descendants, used the word "children" only, in others the word "issue" only, in others both words; while the concluding proviso, which overrode them all, appeared to show that he had the same disposing intentions as to all; that, in the direction to his executors to apply the rents for the maintenance of the issue of his grandchildren, it was clear he

could not mean their issue generally, that is, all their descendants. That there was no inflexible rule of law to prevent this construction prevailing, and the word "issue" being interpreted to mean "children," where upon the whole will such appeared to be the intention of the testator. He contended, therefore, that George Dangerfield took for life only, and that on his death without issue the residuary devise took effect. He cited and commented on the following authorities: — *Festing* v. *Allen*, 12 M. & W. 279; *Doe* d. *Hills* v. *Hopkinson*, 5 Q. B. 223; *Merest* v. *James*, 1 Brod. & B. 484; *Lees* v. *Moseley*, 1 Y. & C. 589, and *Greenwood* v. *Rothwell*, 5 Man. & G. 628.

Secondly, he contended, that the words of the residuary devise carried all the real estate which remained undisposed of by the devise to George Dangerfield and his children, &c., to Sarah Dangerfield, and by his death without issue, her estate became an indefeasible estate in fee. And, lastly, that the deed of disentailer executed by George Dangerfield had no operation to defeat that estate, for that, under the stat. 3 & 4 Will. 4, c. 74, s. 3, it had the effect of a recovery at common law only when made by a tenant in tail, which, for this part of the argument, he was assumed not to be.

Bovill, *contrà*, urged, that there was no such expressed *intention in the will, to use the word "issue" as a word [*269] of purchase, as the Court could give effect to consistently with the rules of law, which considered it as a word of limitation: that, in some cases, the words "children," and "son," had even been held to be words of limitation, as in *Robinson* v. *Robinson*, 1 Burr. 38; *Broadhurst* v. *Morris*, 2 B. & Adol. 1; *Mellish* v. *Mellish*, 2 B. & C. 520 (26 R. R. 436); and *Doe* d. *Garrod* v. *Garrod*, 2 B. & Adol. 87; but that, according to all the authorities, "issue" was *primâ facie* to be read as a word of limitation, and as *nomen collectivum*, indicating descendants of every degree, and being equivalent to "heirs of the body:" *Doe* v. *Applin*, 4 T. R. 82 (2 R. R. 337); *Denn* v. *Puckey*, 5 T. R. 299 (2 R. R. 601); *Doe* d. *Cock* v. *Cooper*, 1 East, 229 (6 R. R. 264); *Mogg* v. *Mogg*, 1 Meriv. 654 (15 R. R. 185); *King* v. *Burchall*, 1 Eden, C. C., 424; 4 T. R. 296, n. (*d*). (No. 6, p. 782 *post*); *Tate* v. *Clark*, 1 Beav. 100; *Jesson* v. *Wright*, 2 Bligh, 1. (No. 3, p. 714 *ante*); *Doe* d. *Atkinson* v. *Featherstone*, 1 B. & Adol. 944. He urged, that a consideration of the other parts of the will aided this construction: first, there were no children in existence

at the time of making the will; secondly, there was no devise over on failure of issue; and, upon the whole context, the words went to show that the testator meant to designate a class through which the descent was to pass; and that this construction avoided all the difficulty which arose from having an indefinite class of parties to take under the devise. That there were many cases showing that the words of division, "as tenants in common," would not prevent an estate tail from being acquired: *Jesson* v. *Wright, Doe* d. *Cock* v. *Cooper, King* v. *Burchall, Denn* v. *Puckey, Bennett* v. *Earl of Tankerville*, 19 Ves. 170.

Secondly, he contended that the residuary devise passed an estate for life only, and not a fee; the words "all other my real [* 270] and personal estate," &c., being a designation of the * property, not of the interest: and cited *Doe* d. *Hurrell* v. *Hurrell*, 5 B. & Ald. 18 (24 R. R. 265), and *Doe* d. *Lean* v. *Lean*, 1 Q. B. 229, 4 P. & D. 662.

Thirdly, that even if George Dangerfield took an estate for life only, the estates in his children were contingent estates, and the estate would in the meantime vest in the heir-at-law; and the deed of disentailer had the same effect as a fine or recovery would formerly have had, in divesting the contingent estates, and creating a tortious fee.

Smirke, in reply, relied on *Lees* v. *Mosely* and *Greenwood* v. *Rothwell*.[1] *Cur. adv. vult.*

The judgment of the Court was now delivered by

Parke, B.—This was an action for the title deeds of an estate at Barking, and the only question is, whether the plaintiffs are the parties entitled to the land to which the deeds relate.

The question arises under the will of Henry Taylor, which bears date the 21st August, 1823, and which, so far as it is material to set it out, is as follows: — "Also I give and devise unto my grandson, George Dangerfield, all those three freehold messuages or tenements which I purchased of James Hawkins Hayllar, with the outhouses, yards, and gardens, and appurtenances thereto belonging, situate in the High Street of Barking, aforesaid, and now in the occupation of William Bowers, John Wallrond, and William Reed; and also all that freehold piece or parcel of marsh land, which I pur-

[1] The arguments and authorities in this case are so fully stated in the judgment, that it has been thought unnecessary to report the argument in greater detail.

chased of James Sanders, esquire, called Little Paradise Marsh, containing, by estimation, four acres or *thereabouts, with the appurtenances thereunto belonging, situate in Barking aforesaid, and now in the occupation of his undertenants or assigns: to hold the same unto and to the use of my said grandson George Dangerfield, for and during the term of his natural life; and from and immediately after his decease, I do give and devise the same unto and to the use of all and every the lawful issue of my said grandson George Dangerfield, their heirs and assigns for ever, equally, as tenants in common, and not as joint tenants, when and as he, she, or they, shall attain his, her, or their age of twenty-one years." In the said will was also contained a devise and bequest of the residue and remainder of the real and personal estate of the said testator to the effect following (that is to say): — "Also I give and bequeath all my stock and utensils in trade, household furniture, plate, linen, and china, and all other my real and personal estate and effects whatsoever and wheresoever, not hereinbefore by me otherwise disposed of, unto my said daughter, Sarah, the wife of the said James Dangerfield, to and for her sole and separate use and benefit and disposal, independent of and without being subject or liable to the debts, control, management, or engagements of her present or any other future husband she may marry, in manner hereinafter mentioned." [*271]

Henry Taylor died seised soon after the date of his will, and, on his death, George Dangerfield the devisee entered, and being seised, he, on the 18th of January, 1844, by an indenture of disentailer, conveyed the property in question to certain uses, under which the defendants, claiming title to the lands, obtained possession of the deeds in question.

In July, 1844, George Dangerfield died, never having had any issue. Sarah Dangerfield, the residuary devisee, died in 1837; and all her right to the lands in question under the residuary devise has become vested in the plaintiffs.

This action is brought for the conversion by the defendant of the deeds in question; and it is admitted that a verdict shall be entered for the plaintiffs, if, under the *circumstances, they are entitled to the lands devised by George Dangerfield. [*272]

The point, therefore, to be decided, is, what estate George Dangerfield took. If he took an estate tail, then, by the deed of disentailer, the rights of all persons in remainder, including the plaintiffs, who

claim under Sarah Dangerfield, the residuary devisee, have been barred, and the present action cannot be sustained; but if he took for life only, with remainder to his children as purchasers, then, as he never had any issue, on his death, the plaintiffs as claiming under the residuary devisee, became entitled in possession, and will be entitled to recover in this action.

The question, therefore, is one of those which are of very frequent occurrence, namely, whether the word "issue" is to be treated as a word of limitation or a word of purchase. The general rule in such cases is clear and well established. The word "issue," in a will, *primâ facie*, means the same thing as heirs of the body, and is to be construed as a word of limitation; but this *primâ facie* construction will give way, if there be on the face of the will sufficient to show that the word was intended to have a less extended meaning, and to be applied only to children, or to descendants of a particular class or at a particular time.

Though, however, the rule thus stated is perfectly simple, yet its application is often very difficult. The real question in each particular case is, what are the circumstances which are to be considered sufficient to indicate that the word has been used in a restricted sense. Indeed, the rule itself is one not more applicable to the word "issue," than it is to the words "heirs of the body," or indeed to any other words which can be suggested. In all cases the *primâ facie* import of words used by a testator is liable to be controlled or modified by the context.

When it was once established that a devise to a man and his issue, means the same thing as a devise to him and the heirs of his body, it might have appeared reasonable to hold [*273] * that all the rules of construction applicable to the latter words were applicable to the former also; considering the great importance of abiding by general rules in the interpretation of wills, with the view of attaining as much certainty and uniformity of decision as the subject admits of. But the Courts have been less reluctant to narrow the *primâ facie* meaning of the word "issue," than of the words "heirs of the body," and have done so in some cases, so nearly resembling the present, and so incapable of being distinguished from it on any satisfactory ground, that we, without deciding what the construction would have been, if the words "heirs of the body" had been used, feel ourselves bound to take the same course, and to hold that the grandson, George Dangerfield, took an estate for life.

The case of *Greenwood* v. *Rothwell*, 5 Man. & G. 628, is precisely in point. That was a devise to J. G. for his life, and after his decease to all and every the issue of his body, as tenants in common, and the heirs of such issue. Under this devise the Court of Common Pleas decided that J. G. took an estate for life only. That case is a distinct authority for holding, that, where there is a devise to one for life, with remainder to his issue as tenants in common, with a limitation to the heirs general of the issue, the issue take as purchasers in fee. It would be impossible for us to decide in the case before us that the grandson took an estate tail, without at the same time overruling the case of *Greenwood* v. *Rothwell*. All the circumstances there indicating that the word issue was used as a word of purchase, and not of limitation, occur also in the case before us, with the further circumstance, that in the present case the parties to take under the description of issue, are only to take when and as they attain the age of twenty-one years, which brings the case very closely within the principle of *Merest* v. *James*, 1 Brod. & B. 484, where a gift over, in * case of [* 274] the issue dying under twenty-one, was of itself held sufficient to show that the word issue was used in its limited, and not its general sense. Whether the decision in that case was quite satisfactory, is not now the question, but it would be a strong thing, where, as in the present case, we find, as well the qualification which in *Greenwood* v. *Rothwell* was sufficient to induce the Court to treat the word "issue" as a word of purchase, as also the circumstances which in *Merest* v. *James* were considered to have the same effect, to hold that both those cases are to be disregarded, and that, acting on the same supposed rule of law, the more extended and legitimate meaning of the word "issue" must be adhered to.

But it is not merely these two cases which we should have to encounter, in deciding that the grandson took an estate tail. Such a decision would be in direct opposition to the case of *Lees* v. *Moseley*, 1 Y. & C. 539, in this court. That was a devise to H. J. for life, with remainder to his lawful issue, and their respective heirs, in such shares as H. J. should appoint; but in case H. J. should not marry and have issue who should attain twenty-one, then to testator's son and his heirs. The Court, after great deliberation, held "issue" there to be a word of purchase, and that H. J. took for life only. The decision proceeded on the ground, that the issue were

intended, in default of appointment, to take as tenants in common and to take an estate in fee, but only in the event of their attaining twenty-one; and those circumstances were held sufficient to show, that "issue" was used in its restricted and not its *primâ facie* general meaning of descendants extending through all time. This case appears to us as not merely to be decisive of the present, but to go beyond it; for in that case there was what is not found here, namely, a devise over; a circumstance which has, in several cases, been mainly and even exclusively relied on, as the ground [*275] for *deciding the word "issue" to have been used in its extended sense, and as a word of limitation. This was certainly the main ground on which the cases of *Doe* v. *Applin*, 4 T. R. 82 (2 R. R. 337), and *Doe* v. *Cooper*, 1 East, 229 (6 R. R. 264), relied on by the defendant, proceeded. The Court, in those and similar cases, construed the devise over in default of issue, as clearly meaning a devise on a general failure of issue; and, proceeding on that construction of the devise over, it was a very natural corollary, that the original devise to the issue must have been also intended to embrace all issues, so as to make the objects of the devise co-extensive with those on failure of whom the devise over was to take effect; and this might fairly justify the Court in disregarding circumstances, which, but for the devise over, would have had the effect of narrowing the *primâ facie* meaning of the word "issue."

All the other cases relied on by the defendant will, on examination, be found either to have turned on the words "heirs of the body," and not the word "issue," or else to have wanted some of the circumstances, which, in *Merest* v. *James*, *Lees* v. *Moseley*, and *Greenwood* v. *Rothwell*, were held to make the word "issue" a word of purchase, and not a word of limitation.

Upon these authorities we feel ourselves bound to hold, that the grandson, George Dangerfield, took for life only, and that, on his death, without having had issue, the residuary devise took effect.

It may be right to advert to one matter contended for in the argument at the bar, namely, that in this case there was in fact a devise over, inasmuch as the residuary clause would carry all the interest not previously given to the issue; but this is founded altogether in fallacy. The gift over, in the cases where that has been relied on, has always been a gift over expressly in default of issue, and its importance, in helping the Court to come to

a decision, has *depended entirely on the circumstance [*276] that it has been to take effect only on a general failure of issue. Whether the language has always been such as fairly to warrant the Court in saying that the devise over was to take effect only on a general failure of issue, and so, reasoning backwards, to infer that in the original devise the word "issue" meant issue extended through all generations, may be matter of doubt; but it is quite clear that the tenor of the reasoning on which, in these cases, the Judges have proceeded, cannot be applied to a general residuary devise of all not previously disposed of. It can make no difference whether the interests in real estate undisposed of are to be carried by the law to the heir, or are disposed of by the testator to the devisee.

It remains only to advert to a point rather suggested than seriously argued, that, even taking George Dangerfield to have been tenant for life only, yet that the deed of disentailer had the same effect as a fine or recovery would formerly have had, in divesting the subsequent contingent estates, and so creating a tortious fee. But the answer given by the plaintiffs' counsel was conclusive. The deed would have had no such operation at common law, and its effect under the statute depends entirely on its having been executed by a tenant in tail; and as we are of opinion that George Dangerfield was not tenant in tail, his deed can have no statutable operation.

We are therefore of opinion, that, for the reasons we have already stated, George Dangerfield took an estate for the term of his life only; and that, on his death, without having had any issue, the plaintiffs, claiming under the residuary devise, became entitled to the lands in question, and consequently that they are entitled to our judgment in this action.

Judgment for the plaintiffs.

ENGLISH NOTES.

The case of *Lees* v. *Moseley* (1836), 1 Y. & C. Ex. 589, to which reference is made in the principal case, contains a reference to the more important cases decided previously, and amongst others to the case of *King* v. *Melling* (Ex. Ch. 1674), 2 Lev. 58, 61, 1 Vent. 225, 232, which seems to be the earliest authority on the question. In *Lees* v. *Moseley*, the word "issue" was treated as a word of purchase; in *King* v. *Melling*, as a word of limitation. In

King v. *Melling*, the majority in the Court below considered that the existence of a power of jointuring given to the *praepositus* was an indication that the word was intended to be used as a word of purchase, but it was considered by Lord Hale, Ch. J., whose opinion was affirmed in the Exchequer Chamber, that this was not conclusive.

The word "children" in its primary sense is to be read as a word of purchase and to be confined to issue in the first degree, but the Court may form an opinion upon the construction of the whole will that it was intended to be used as a word of limitation, and if the latter construction prevails it will be treated as equivalent to "heirs of the body." *Byng* v. *Byng* (H. L. 1862), 10 H. L. Cas. 171, 31 L. J. Ch. 470; *Earl of Tyrone* v. *Marquis of Waterford* (1860), 1 De G. F. & J. 613, 29 L. J. Ch. 486, 6 Jur. N. S. 567; *Bowen* v. *Lewis* (H. L. 1884), 9 App. Cas. 890, 54 L. J. Q. B. 55, 52 L. T. 189. In all these cases the Court treated the word as a word of limitation. In *Doe* d. *Gallini* v. *Gallini* (1833), 5 B. & Ad. 621, 2 Nev. & M. 619, 3 L. J. K. B. 71 (Ex. Ch. 1835), 3 Adol. & El. 340, the word was treated as having its primary signification.

The word "son" (with a context) has been treated as a word of limitation: *Jenkins* v. *Hughes* (H. L. 1860), 8 H. L. Cas. 571, 30 L. J. Ch. 870. So where there was a gift to "my eldest son John . . . for his life, and to his eldest legitimate son after his death, and in default of such issue" over, it was held that John took an estate tail; *Lewis* v. *Puxley* (1847), 16 M. & W. 733, 16 L. J. Ex. 216. In *Forsbrook* v. *Forsbrook*, (Ch. App. 1867), L. R. 3 Ch. 93, 16 W. R. 290, the material words of disposition were: "It is my will, after the decease of my brother . . . and my daughter . . . that my aforesaid real and personal property be inherited by my nephew Charles Forsbrook . . . and my nephew Thomas Forsbrook . . . during their lives, and after the decease of my aforesaid nephew Charles Forsbrook, and after the decease of my aforesaid nephew Thomas Forsbrook, it is my will that the eldest son of the aforesaid Charles Forsbrook and the eldest son of the aforesaid Thomas Forsbrook inherit the aforesaid property during their lives, and so on, the eldest son of the two families of the name of Forsbrook to inherit the aforesaid property for ever, and that each two of the succeeding inheritors shall have my aforesaid property and inherit it free from any incumbrance whatever." This was construed as limitations to Charles and Thomas for their lives, with remainder to their eldest sons, respectively for their lives, with remainder to Charles and Thomas in tail male.

Gifts or limitations to the "eldest son" suggest the converse case of settlement of property, not being provisions by way of portion, for the benefit of younger children. The question frequently arises in these

cases whether a person who originally filled the character of a younger son, but has become an eldest son by reason of the death of an elder brother, is excluded by the terms of the gift. The general inclination of the Court is in favour of early vesting, and unless there are clear words divesting the interest, a person who was originally a younger son will not lose the benefit of a gift by becoming an eldest son; *Driver* d. *Frank* v. *Frank* (Ex. Ch. 1818), 8 Taunt 468, 15 R. R. 385, affirming 3 M. & S. 25; *Domvile* v. *Winnington* (1884), 26 Ch. D. 382, 53 L. J. Ch. 782, 50 L. T. 519, 32 W. R. 699. Where the provision is by way of portion, different considerations apply, and the primary object of portions being to make provision for those who are not entitled to the profits of the settled estate, a younger son who has become entitled to the settled property by the death of an elder brother, ceases to be considered a younger son. The leading authority is *Chadwick* v. *Doleman* (1705), 2 Vern. 528, Eq. Cas. Ab. 343, pl. 8. This class of case is distinguished by Dampier, J., in *Driver* d. *Frank* v. *Frank*, *supra*, and by Kay, J., in *Domvile* v. *Winnington*, *supra*.

The words "to be begotten" do not in their primary legal meaning import futurity: *Doe* d. *James* v. *Hallett* (1813), 1 M. & S. 124, 14 R. R. 408. Where, however, it appears from other expressions in a will, that only the future sons were intended to be benefited, the gift will be restricted so as only to embrace sons born after the date indicated: *Locke* v. *Dunlop* (C. A. 1888), 39 Ch. D. 387, 57 L. J. Ch. 1010, 59 L. T. 683 (affirming 56 L. J. Ch. 697). From the authorities referred to in these cases it appears that the words "begotten" and "to be begotten" have long been regarded primarily as words of similar import.

In *Locke* v. *Dunlop*, *supra*, the Court also considered the effect of the words "other sons," and came to the conclusion that the words were used in the will there in question as words of exclusion. Similar expressions have been sometimes differently construed, and many of the more important cases are referred to in the judgment of Stirling, J. In addition to the cases there referred to may be cited *Allgood* v. *Blake* (1872), L. R. 7 Ex. 339, 41 L. J. Ex. 217, (Ex. Ch. 1872), L. R. 8 Ex. 160, 42 L. J. Ex. 101. In that case the Court held that a grandson of the testator to whom an estate for life was limited, was also entitled to an estate in tail general in remainder expectant on the determination of intermediate estates under a gift to "all and every other the issue of my body."

No. 4. — Slater v. Dangerfield. — Notes.

AMERICAN NOTES.

The principal case is cited by Pingrey on Real Estate and Schouler on Wills.

This doctrine obtains in this country even in the States that cling to the Rule in *Shelley's Case*. *Henderson* v. *Henderson*, 64 Maryland, 185; *Adams* v. *Ross*, 30 New Jersey Law, 512; *Ford* v. *Flint*, 40 Vermont, 394; *Leake* v. *Watson*, 60 Connecticut, 498; *Boykin* v. *Ancrum*, 28 South Carolina, 486; 13 Am. St. Rep. 698; *Starnes* v. *Hill*, 112 North Carolina, 1; *King* v. *Savage*, 121 Massachusetts, 303; *Robins* v. *Quinliven*, 79 Penn. State, 333; *Daniel* v. *Whartenby*, 17 Wallace (U. S. Sup. Ct.), 639. In the last case the devise was to testator's son, R. T., "during his natural life, and after his death to his issue, by him lawfully begotten of his body, to such issue, their heirs and assigns forever." The Court said: "In this class of cases in the English courts the doctrine of *Shelley's Case* is applied unless there are circumstances which clearly take the case out of that rule. Every doubt is resolved in favor of its application. Here, we think, the tendency should be otherwise. There, the rule is in accordance with the established law of descent — the general sentiment of the people — their public policy and the spirit of their institutions. It helps to conserve the power and splendor of the ruling classes, by keeping property in the line of descent which the rule prescribes. Our policy is equality of descent and distribution. Such is the sentiment of our people, and such the spirit of *our* institutions. This is manifested by the statutes of descent and distribution which exist in all our States and Territories." In *Adam* v. *Ross*, *supra*, it was said: "No circumlocution has ever been held sufficient. It is believed no case can be found where this rule has been held to apply, unless the word heirs has been used in the second limitation." In *Henderson* v. *Henderson*, *supra*: "There can be no doubt that where the testator manifests an intention to give the first taker only an estate for life, and uses the words 'issue,' 'sons,' 'children,' or 'descendants,' the case will be withdrawn from the operation of the rules." In *Robins* v. *Quinliven*, *supra*: "It is well settled that the word 'issue' in a will, *primâ facie*, means 'heirs of the body,' and in the absence of explanatory words, showing that it was used in a restricted sense, is to be construed as a word of limitation. But if there be on the face of the will sufficient to show that the word was intended to have a less extended meaning, and to be applied only to children or descendants of a particular class, or at a particular time, it is to be construed as a word of purchase and not of limitation, in order to effectuate the intention of the testator." Citing the principal case. See *Wistar* v. *Scott*, 105 Pennsylvania State, 200; 51 Am. Rep. 197; *Parkhurst* v. *Harrower*, 142 Pennsylvania State, 432; 24 Am. St. Rep. 507. "'Issue' in a will is sometimes a word of limitation and sometimes of purchase, according to the context." *Lyles* v. *Digges*, 6 Harris & Johnson (Maryland), 364; 14 Am. Dec. 281; *Boykin* v. *Ancrum*, 28 South Carolina, 486; 13 Am. St. Rep. 698.

The contrary was held by the Vice Chancellor, in *Kingsland* v. *Rapelye*, 3 Edwards Chancery (N. Y.), 1, remarking: "'Issue' is a word as extensive in its import as the phrase 'heirs of the body.'" Citing *King* v. *Melling*, 1 Vent. 225, and *Jesson* v. *Wright*, 2 Bligh, 1. The Vice Chancellor was

etymologically right, and the distinction between the phrases was born only of the loyalty to ancient precedent and the dislike of its doctrine.

"But the authorities show that whatever be the *primâ facie* meaning of the word 'issue,' it will yield to the intention of the testator, to be collected from the will, and that it requires a less demonstrative context to show such intention than the technical expression 'heirs of the body' would do. In short, it is well settled that although the intention of the testator as to whether the rule shall apply is immaterial when the meaning of his phrases is once ascertained, his intention as to the sense in which he uses words is controlling": *Craig* v. *Warner*, 5 Mackey (District of Columbia), 460; 60 Am. Rep. 381. In *Chwatal* v. *Schreiner*, 148 New York, 683, it was held that "The rule therefore is that the word 'issue,' in its general sense, in the absence of any indication of intention to the contrary, includes in its meaning descendants generally. But when it is apparent from the extrinsic circumstances, proper to be considered, or the provisions of the will, that the testator intended children, its meaning will be so limited."

No. 5. — WILD'S CASE.

(K. B. 1600, HIL. 41 ELIZ. 1).

RULE.

WITH regard to realty, — a devise to A. and his children or issue, where A. has no issue at the date of the devise, gives an estate tail to A. But if he has issue, it gives to A. and his children joint estates, which prior to the Wills Act would have been estates for life only.

But where the devise was to A. and his wife, and after their decease to their children, this was construed as a gift to A. and his wife for life, with remainder to their children for life.

Wild's Case.

6 Co. Rep. 16 *b.*–17 *b.* (s. c. *nom. Richardson* v. *Yardley*, Moore 397, pl. 519).

Will.— Construction.— Gift to one and his children or issue.— Rule in Wild's Case.

Devise to A. for life, remainder to B. and the heirs of his body, re- [16 *b.*]
mainder to W. and his wife, and after their decease to their children; W. and his wife then having issue, a son and daughter. *Held* that W. and his wife have but an estate for life; and on such a devise, although they have not any child at the time of the devise, yet every child which they may have after may take by way of remainder.

No. 5. — Wild's Case, 6 Co. Rep. 16 b., 17 a.

A devise to B. and to his children, or issues, B. having no issue at the time of the devise, is an estate tail; otherwise when he has issue at the time.

Hil. 37 Eliz. *in Ejectione firmæ* between Richardson and Yardly, in the King's Bench, on not guilty pleaded the jury gave a special verdict to this effect. Land was devised to A. for life, the remainder to B. and the heirs of his body, the remainder to "Rowland Wild and his wife, and after their decease to their children," Rowland and his wife then having issue a son and daughter; and afterwards the devisor died, and after his decease A. died, B. died without issue, Rowland and his wife died, and the son had issue a daughter, and died; if this daughter should have the land or not, was the question; and it consisted only upon the consideration what estate Rowland Wild and his wife had, viz. if they had an estate-tail, or an estate for life, with remainder to their children for life; and the case for difficulty was argued before all the Judges of England; and it was resolved, that Rowland and his wife had but an estate for life with remainder to their children for life, and no estate-tail. And in the construction of this will, the Judges did first consider the judgment of the common law, if the conveyance had been made by the devisor in his life. And, 2. the reason and cause that the judgment shall not be according to the rule of law: and it was resolved, without question, that at the common law they had but an estate for life, the remainder to their children for life. Then what shall be the reason and cause to give them an estate tail by construction in this case? It will be answered, the intent of the testator. But it was resolved, that such intent ought to be manifest and certain, and not obscure or doubtful: for at the common law lands were not devisable (but only by custom, and that in ancient cities and boroughs, of houses and small things), but by the statute of 32 and 34 H. VIII. all lands according to the purview thereof are devisable, [* 17 a.] which statutes * were made to the great disadvantage of heirs at the common law by wills for the most part made in extremity of sickness, and that utterly against the rule and reason also of the common law; for the ancient common law did favour him whom the common law made heir, because he was to sit in the seat of his ancestor, and to serve the King and commonwealth in as good estate as his ancestor did. And therefore it appears by Glanvile, who was Chief Justice in the time of H. II.,

lib 7. cap. 1. fol. 44. that every freeman without the assent of his heir might dispose of a reasonable part of his lands with his daughter in frank-marriage, for the advancement of his blood, or to any servant in recompence of his service, or in frankalmoigne to any religious house to have divine prayers made for him. But all this he ought to do in health, and not in extremity of sickness, to the end that such gifts should not be made more out of rage and fury of mind, than of good discretion, and so his gift might exceed measure. But if any such gift which was made in time of sickness shall be good and firm in law, the consent and confirmation of his next heir was requisite to it. Also if a man who had lands by descent, had issue many sons, he could not have given any of this land to any of his younger sons without the consent of the eldest, to the end that the father, who for the most part bore most affection to the youngest son should not disinherit the eldest. But of his land which he had acquired by his own purchase, he might have given a part to his younger sons; and if he had not any issue, he might have given all of it to whom he pleased. And all this appears in Glanvile, by which it appears, that the ancient common law did (always) respect the heir at common law. Then in the case at bar, forasmuch as by the judgment of the common law on the like words in a conveyance, it would be but an estate for life, the remainder to their children for life, thence it follows, that the intent and not the words only of the devisor ought to make it an estate-tail in this case. Then this intent ought to be manifest and certain, and so expressed in the will: and in this case no such intent appears; for peradventure his meaning was to agree with the rule of the law; and therefore this difference was resolved for good law, that if A. devises his lands to B. and to his children or issues, and he hath not any issue at the time of the devise, that the same is an estate-tail; for the intent of the devisor is manifest and certain that his children or issues should take, and as immediate devisees they cannot take, because they are not *in rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate, therefore there such * words shall be taken as words of limitation, *scil.* as much as children or issues of his body; for every child or issue ought to be of the body, and therewith agrees a case, Trin. 4 Eliz. reported by Serjeant Bendloes, where the case was, that one devised land to husband and wife, "and to the men- [* 17 b.]

children of their bodies begotten," and it did not appear in the case that they had any issue male at the time of the devise; and therefore it was adjudged that they had an estate-tail, to them and the heirs males of their bodies: but if a man devises land to A. and to his children or issue, and they then have issue of their bodies, there his express intent may take effect, according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary. And therefore in such case, they shall have but a joint estate for life. But it was resolved, that if a man, as in the case at bar, devises land to husband and wife, and after their decease to their children, or the remainder to their children; in this case, although they have not any child at the time, yet every child which they shall have after, may take by way of remainder, according to the rule of the law; for his intent appears that their children should not take immediately, but after the decease of Rowland and his wife.

ENGLISH NOTES.

The Lords in *Clifford* v. *Koe* (H. L. 1880), 5 App. Cas. 447, 43 L. T. 322, 28 W. R. 633, considered that the rule in *Wild's Case* was so long settled that they were not at liberty to depart from it. Indeed, in the earlier case of *Byng* v. *Byng* (H. L. 1862), 10 H. L. Cas. 171, 31 L. J. Ch. 470, 7 L. T. 1, 10 W. R. 663, the House of Lords had given effect to the rule.

The rule has however been modified by the provisions of the Wills Act 1837, (1 Vict. c. 28), s. 26. This section has been set out, together with the more important authorities, in the notes to No. 1, *Fletcher* v. *Smiton*, p. 673 *ante*. The effect is that the resolution in *Wild's Case*, which is contained in the second paragraph of the rule, is so far altered that the children would take "the fee simple or other the whole estate or interest which the testator had power to dispose of by will," unless a contrary intention appeared in the will.

The principle embodied in the first clause of the rule applies to a will made after the passing of the Wills Act, 1837; *Clifford* v. *Koe*, *supra*.

The rule in *Wild's Case* applies to a devise of an equitable interest as well as to a legal devise: *Underhill* v. *Roden* (1876), 2 Ch. D. 494, 45 L. J. Ch. 266, 34 L. T. 227, 24 W. R. 574.

The operation of the rule in *Wild's Case* is not excluded by the addition of the words "for ever" after the words "children or child;" *Davie* v. *Stevens* (1780), Dougl. 321, *Roper* v. *Roper* (Ex. Ch. 1867), L. R. 3 C. P. 32, 37 L. J. C. P. 7. A devise to A., and "to

his children in succession" will confer an estate tail upon A: *Earl of Tyrone* v. *Marquis of Waterford*, (1860), 1 De G. F. & J. 613, 29 L. J. Ch. 470, 6 Jur. N. S. 567. Again the addition of words of limitation to a gift to the parent and children, where there are children at the date of the devise, will create a joint estate in fee in the parent and the children: *Oates* d. *Hatterley* v. *Jackson*, (1743), 2 Stra. 1172.

The existence of a power of appointment, or of a power to settle the property given, will not exclude the rule: *Seale* v. *Barter*, (1801), 2 Bos. & P. 485, 5 R. R. 676: *Clifford* v. *Koe*, (H. L. 1880), 5 App. Cas. 447, 43 L. T. 322, 28 W. R. 633.

The rule will yield to a contrary intention expressed in the will. The leading authority is *Buffar* v. *Bradford*, (1741), 2 Atk. 220. There the devise was of a share "to my niece — Buffar, and the children born of her body." There was another gift in an event mentioned of a further share: "when the time of possession comes" such part shall go to Mrs. Buffar and her children, because they will have then four of the eight parts. Mrs. Buffar had no children at the date of the will, and predeceased the testator leaving issue. Lord HARDWICKE, L. C. found in the words "when the time of possession comes" an indication that the rule in *Wild's Case* should be excluded. In *Grieve* v. *Grieve*, (1867), L. R. 4 Eq. 180, 36 L. J. Ch. 932, 16 L. T. 201, 15 W. R. 577, the testatrix devised as follows: "to my nieces Louisa and Emily I leave my house at Clifton after my sister's death, and to their children, and if they have not any to their brother William and his children . . . The furniture to go with the house." It was held that the gift of the furniture was a sufficient reason for excluding the rule in *Wild's Case*, in that if the nieces had taken an estate tail in the realty, the furniture would have vested absolutely in them.

Words of distribution will in general exclude the rule. *Bowen* v. *Scowcroft*, (1837), 2 Y. & C. Ex. 640, 7 L. J. Ex. Eq. 25. So where there was a devise to one "and the issue of her body, as tenants in common, but in default of such issue, or being such if they should all die under 21 and without leaving issue," over, the parent who had never had any children, was held to take an estate for life. *Doe* d. *Davy* v. *Burnsall*, (1794), 6 T. R. 30, 3 R. R. 113, and a similar view was taken of an analogous limitation in *Doe* d. *Gilman* v. *Elvey*, (1803), 4 East, 313, 1 Smith 94, 7 R. R. 579. There the devise was "to my son Henry Gilman and to the issue of his body lawfully begotten or to be begotten, his, her or their heirs, equally to be divided if more than one; and if my said son . . . shall have no issue of his body living at his decease" over. In *Doe* d. *Gilman* v. *Elvey*, it was pointed out by LAWRENCE, and LE BLANC, J. J., that

the words "his, her or their heirs" were to be referred to the issue, and a similar construction was adopted by LEACH, V. C., in *Jeffrey* v *Honywood*, (1819), 4 Madd. 399.

So too where there have been children born at the date of the devise, the Court has seen from expressions used, that the rule in *Wild's Case* should be excluded, and has construed a gift to parent and child or issue as conferring an estate tail upon the parent: *Wood* v. *Baron*, (1801), 1 East 259; *Byng* v. *Byng*, (H. L. 1862), 10 H. L. Cas. 171, 31 L. J. Ch. 470, 7 L. T. 1, 10 W. R. 663.

The case of *Roper* v. *Roper*, (Ex. Ch. 1867), L. R. 2 C. P. 32, 37 L. J. C. P. 7, has been regarded as establishing that a child *en ventre sa mère*, is not a child in esse within the second branch of the rule in *Wild's Case*. There the devise was a gift in remainder "unto my daughter Mary the wife of Alexander Roper, to her and her children for ever." At the date of the making of the will and of the death of the testator, Mary Roper was *enceinte* of a daughter, who was born after the death of the testator but died in early infancy. The plaintiff was the eldest son of Mary Roper and claimed as heir in tail, and the defendant was a devisee claiming under the will of Mary Roper. In the Court of Common Pleas, (36 L. J. C. P. 270), it was held that Mary took an estate tail, not by reason of *Wild's Case*, but by reason of the words "to her and to her children for ever," the words "to her" being surplusage, if the words "and her children" were words of purchase. This view was assented to in the Exchequer Chamber, but that Court also held that the use of the word "children" in the plural, excluded the idea that the unborn daughter was to take an estate jointly with the mother, to the exclusion of after born children. It appears from the report in the Law Journal, (37 L. J. C. P. 9), that LUSH, J., asked: "Has it been held that a child in embryo is within the rule in *Wild's Case?*" and the late Mr. Joshua Williams was not able to furnish any direct authority. The judgment of the Exchequer Chamber was delivered after consideration, and it seems probable that if that Court had intended to decide the question thus pointedly raised during the argument, it would have done so in unambiguous terms, but there is nothing in the judgment, which was delivered by KELLY, C. B., decisive of the question.

AMERICAN NOTES.

The principal case is cited in 1 Jones on Real Property, sect. 216, and in Schouler on Wills, sect. 555, and is the basis of the article on "Issue," in 11 Am. & Eng. Enc. of Law, p. 868.

This doctrine was explicitly followed in *Nightingale* v. *Burrell*, 15 Pickering (Mass.), 104.

No. 5. — Wild's Case. — Notes.

In *Hilleary* v. *Hilleary's Lessees*, 26 Maryland, 274, there was a devise to T. H. and his children forever; but in case of his death before L. H., leaving no children or issue, to S. H., his heirs and assigns forever. T. H. entered, conveyed to D. C. and took a deed from D. C., and on the same day devised to his wife for life, remainder to his sisters. T. H. afterward died during the life of L. H., without issue. *Held*, that T. H. took not a fee-tail, but a fee-simple conditional, and that the estate passed by executory devise to S. H. Citing *Anderson* v. *Jackson*, 16 Johnson (N. Y.), 382.

In *Miller's Lessee* v. *Hart*, 12 Georgia, 357, there was a devise in trust for S. H. during his life and to any children he might have, and if he should die without children, then to be sold and divided. S. H. never having had any children, held that he did not take an estate tail. The Court said: "Under these circumstances, it is contended for the defendant in error, and in the suit below, that this devise created an estate tail in *Spencer* v. *Hart*, which by the Statute of this State, is converted into an absolute fee in the first taker. And in support of this position, *Wild's Case* (6 Reports 17) is relied on. The rule there established, we take to be this, that where lands are devised to a person and his children, and he has no children at the time of the devise, the parent takes an estate tail. And the reason assigned for this doctrine is, that the intent of the devisor is manifest and certain that the children (or issue) should take, and as immediate devisees they cannot take, because they are not *in rerum natura*, and by way of remainder, they cannot take, for that was not his (the devisor's) intent, for the gift is immediate; therefore, such words shall be taken as words of limitation. *Richardson* v. *Yardley*, Moore, 397; Plow, 519; 1 Bulstr. 219; 2 Bos. and Pull. 485; *Parkman* v. *Bowdoin*, 1 Sumner, (U. S. Circuit), 359. We do not intend to controvert this proposition. Respectable authority might be cited however to show that under a devise to A. and his issue, it seems to have been taken for granted that the issue took by way of remainder. *Doe ex dem. of Duey* v. *Burnsall*, 6 Durnf. & E. 30; *Burnsall* v. *Davy*, 1 Bos. and Pull. 215; *Doe ex dem. Gillman* v. *Elvey*, 4 East, 313.

"And in the case of *Heron* v. *Stokes*, 1 Drury & Warren, 107, that eminent Judge Sir Edward Sugden, suggested that the more natural construction of a gift to one and his children, *there being no children in esse at the time*, and that which he would have adopted in the absence of authority the other way, would be to hold it to be a good gift to the parent for life, with remainder to the children.

"That the intention of testators, in ninety-nine cases out of a hundred, would have been furthered by adopting the suggestion of the Irish Chancellor, instead of adhering to the rule of construction in *Wild's Case*, we entertain no doubt; still we feel ourselves bound to decide in conformity with this often recognized rule, which has been constantly followed as law, from Lord Coke's day down to the present period. *Buffar* v. *Bradford*, 2 Atk. 220; *Singer* v. *White*, Willes' R. 348; *Wharton* v. *Gresham*, 2 W. Black. R. 1083; *Cook* v. *Cook*, 2 Vern. R. 545; *Oats* v. *Jackson*, 7 Mod. R. 439; *King* v. *Melling*, 1 Ventr. R. 231; *Hughes* v. *Sayer*, 1 P. Wms. R. 534; *Darie* v. *Stevens*, Doug. R. 321; *Hodges* v. *Middleton*, *Ibid*, 430; *Seal* v. *Barton*, 2 Bos. and Pull. Rep. 485; *Broadhurst* v. *Morris*, 2 B. & Adolph. R.

"Passing by then many of the subjects discussed or alluded to in the argument, involving, as they do, the most abstruse and profound, not to say perplexed, of all the questions brought before the courts of justice, depending, as they do, upon considerations and distinctions, highly technical, artificial, and refined, upon this most difficult branch of the law, we think the cause before us may be disposed of upon a principle, in respect to which all concur, and which is, indeed, distinctly enunciated in one of the resolutions in *Wild's Case*. It is as follows: 'But it was resolved, that if a man devise land to husband and wife, *and after their decease*, to their children, in this case, although they have not any child at the time, yet any child which they may have after, may take by way of remainder, according to the rules of law; for his intent appears, that their children should not take immediately, but after the decease of the parents.' *Wild's Case*, 6 Co. Reps. 17.

"Mr. JARMAN, in his work on Wills (2 Vol. 315), says that 'it is now admitted on all hands, that a devise to A. and his wife, *and after their death to their children*, gives an estate for life to the parents, with remainder to their children; and that the notion that such a bequest creates an estate tail, is wholly untenable.' Indeed, counsel concede this doctrine. Let us then apply this rule to the case at bar."

In *Carr* v. *Estill*, 16 B. Monroe (Kentucky), 309, there was a devise to "M. B. D. and her children." At the time of the devise M. B. D. had no children. Afterward she had a child. *Held*, that M. B. D. took an estate for life and the child the remainder. The Court said: "By our law an estate tail is converted into a fee simple; so that this rule of construction would give to Mary Baker Didlake an absolute fee in the land, and any children which she might thereafter have would be cut off, and could take no interest under the devise. This English rule of construction was adopted in order to effectuate the intention of the testator. For as it is said, 'the intent is manifest and certain that the children should take, and as immediate devisees they cannot take, because they are not in *rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate, and therefore such words shall be taken as words of limitation.' Now, although the words abstractly and literally import an immediate gift, not only to the devisee *in esse* but to his or her children also; yet if there be no children at the time, does it necessarily follow, as seems to have been supposed, that it was not the testator's intent that the children should take by way of remainder? We think not. But whatever may have been the legitimacy of such a conclusion in England, where in general more precision and particularity were observed in the creation of remainders than in this country, we are of opinion that with us it does not necessarily follow, that because the words literally and abstractly import an immediate gift, it was not the intention of the testator to give a remainder interest to the children. In general, the word 'children' is a word of purchase and not of limitation, and as it was acknowledged by the jurists of England that the word, in its present connection, manifested a certain intent on the part of the testator, that the children should take under the devise, and as they would do so there, if the word was construed to be a word of limitation, and not a word of purchase, it was

natural and easy for the English Judges to make an exception to the general acceptation of the word, and so construe it as to render the estate devised an estate tail; and as this was a convenient mode of giving effect to the intention of the testator, the courts of England adopted it, without perhaps bestowing much consideration on the question, whether the testator might not have intended to give a life estate to the person *in esse*, remainder to the children, which might equally have effectuated his intention. However this may be, it is clear that they adopted their rule of construction to promote the intention of the testator. And our law having converted estates tail into absolute *fee simple* estates, it is equally clear that if we adopt the same rule of construction, the acknowledged intention will be frustrated and defeated, as the children could then take nothing under the devise. In order, therefore, to effectuate the acknowledged and manifest intention of the testator, it is obvious that a different rule of construction must be resorted to in this State."

Precisely the same was held in *Turner* v. *Ivie*, 5 Heiskell (Tennessee), 222, in precisely the same circumstances. The Court said: "But it is insisted for defendants, that if the rule in *Shelley's Case* is not applicable to the cause at the bar, then it falls within and is governed by the rule in *Wild's Case*. The doctrine of *Wild's Case* is, that 'where lands are devised to a person and his children, and he has no child at the time of the devise, the parent takes an estate tail.' 6 Rep. 17; 2 Jarman on Wills, 307. This is not a rule of property, as in *Shelley's Case*, but a rule of construction. Because the rule in *Shelley's Case* was a rule of property, and was received in this State as part of the common law, it was recognized and enforced until it was abolished by the act of 1852. But the rule in *Wild's Case* being only a rule for constructing wills, resorted to in specific cases to carry out the manifest intention of testators, it can have no other weight than as a judicial precedent. We are aware of no case in our own State, nor have we been referred to any, in which the rule has been recognized even as a rule of construction. Nor can we see how it could be adopted as a rule of construction, since the abolition of estates tail by the act of 1784, and indeed it was emphatically repudiated by the reasoning of Judge Haywood in the case of *Claiborne* v. *Lewis*. The rule is, that the word 'children,' which is properly a word of purchase, shall be construed to be a word of limitation, in order that thereby an estate tail may be created to carry out the intention of the testator. We are asked, in the case before us, to declare the word 'children' to be a word of limitation, and thereby by construction to make the daughter of testator a tenant in estate tail, when by our statute the estate tail is forbidden and abolished as a canon of property. To do this, would be to make a mere arbitrary rule of construction prevail over a positive statutory rule of property."

In *Parkman* v. *Bowdoin*, 1 Sumner (U. S. Circ. Ct.), 359, there was a devise to A. for life, and after her death to her second son B., and to his lawfully begotten children in *fee simple* forever; but in case he should die without children lawfully begotten, to the other son of A., C., and to his lawfully begotten children in *fee simple* forever. At the time of making the will, B. had no children. *Held*, that B. took a fee-tail, with remainder to C. on an indefinite failure of issue of B. Story, J., observed: "Now it is plain that as James

had no children at the time, they could not take immediately, by way of *descriptio personarum*, as joint tenants with their father, a *fee simple;* and therefore we are driven to construe the word "children" as words of limitation and not of purchase. And this is in conformity to the rule laid down in *Wild's Case* (6 Co. R. 17), which has been constantly recognized as law down to our day." And the Court adjudged that the second resolution in the *Wild Case* applied, observing: "Indeed, *Wild's Case* itself presented the very point, if there had been any distinction between the case of a devise of an immediate estate in possession and such a case in remainder; for there the question arose upon a devise in remainder, after an estate to the testator's wife for life. And this last resolution puts the case expressly on the ground that the children were to take after the decease of their parents, and not immediately with them." This is a learned treatment of the subject up to 1833.

No. 6. — KING *v.* BURCHELL.

(CH. 1759.)

RULE.

A condition attempting to fetter the right of a tenant in tail to enlarge his estate into a fee simple, is repugnant to the estate limited, and void.

King v. Burchell.

1 Eden, 424–434 (s. c. Ambler, 379).

Estate tail.— Power to bar.— Conditions in restraint of this Power.

[424] Devise of an estate at A. to I. H. for life, remainder to the issue male of I. H. and to his and their heirs, share and share alike; and for want of such issue, to the issue female of I. H. and to her and their heirs, share and share alike; and for want of such issue, over: of an estate at B. to I. H. for life; remainder to the issue male of his body, and to their heirs; and for want of such issue, over; with a proviso to charge the premises for such person as would take next in remainder, in case I. H. or his issue alienate, &c.; I. H. had two daughters, and suffered a recovery of the estate at B.; held, that he took an estate tail, and that the proviso was repugnant to the estate.

[*425] John Blunt, by his will, bearing date the 26th of October 1731, devised his estate at Hunton and Linton, * in the county of Kent, to his cousin, John Harris, to hold the same during the term of his natural life, and from and immediately after the determination of that estate, he gave the same to the issue male of his cousin, John Harris, lawfully begotten, and to his and their heirs, share and share alike, and for want of such issue,

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then he gave the same to the issue female of his cousin John Harris, lawfully begotten, to her and their heirs, share and share alike, if more than one; and for want of such issue, then he gave the same unto his cousin, William King, his heirs and assigns for ever.

The testator taking notice that he had covenanted to settle £50 per annum on his wife, devised certain premises in Maidstone to her, to hold to her as part of her jointure, for and during her natural life, and from and immediately after the decease of his wife, he gave and devised the same unto his cousin, John Harris, for life; and from and immediately after the determination of that estate, unto the issue male of the body of his cousin, John Harris, lawfully to be begotten, and to their heirs; and for want of such issue to his cousin, William King, his heirs and assigns for ever.

The testator then inserted the following proviso: "Provided always, and my mind and will is, that the several bequests and limitations of the premises in Hunton, Linton, and Maidstone, so devised, bequeathed, and limited, unto John Harris; and such issue male and female, is upon this special condition, that if he, the said John Harris, or his issue, or any or either of them, shall at any time or times hereafter alienate, mortgage, incumber, or otherwise commit any act or deed whatsoever, whereby to alter, change, or defeat the same bequests and limitations, or any of them hereinbefore limited and appointed of the said premises, that then, and in such case, he, the said John Harris, and all and every
* such other person or persons so alienating, mortgaging, [* 426]
or otherwise incumbering, altering, changing, or defeating
the same bequests, or any of them, shall pay or cause to be paid, and I do hereby charge the said premises with the payment of £2000 unto such person or persons, and his and their heirs who might, could, should, or ought next to take by virtue or means of any of the bequests, devises, or limitations. hereinbefore by me given, devised, or bequeathed."

The testator died in 1738. John Harris had issue male, which died in the life of the testator. In Trin. Term, 24 & 25 Geo. II. he suffered a recovery of the premises. He afterwards died, leaving the defendants, Sarah, the wife of Burchell, and Mary, the wife of the defendant, Harridge, his daughters and co-heiresses.

This was a bill to have the sum of £2000 paid to the plaintiff as a charge arising upon barring the estate tail.

No. 6. — King v. Burchell, 1 Eden, 426, 427.

The Solicitor General, and Wilbraham, for the plaintiff.

Three questions arise out of this case. 1st. Whether John Harris was tenant for life, or in tail, under the will of John Blunt?

2dly. What is the effect of the recovery suffered by John Harris?

3dly. What is the force of the condition? And 1st, Whether it is good or not in point of law, and 2dly, whether it is barred by the common recovery.

1. The estate is expressly given to John Harris only for life; the additional words, after the words of limitation, are a strong indication of his intention, that in case John Harris had issue male, they should take the fee, but if he had no issue male, that it should go over. There are two sets of cases, under each of which the first taker has been held to take only an estate for life, and both of them will apply to the present case. The first are where [* 427] there are words superadded to the words of * limitation, in which case, whether the words of limitation be in the singular or plural number, the first taker is only tenant for life, as in *Archer's case*, 1 Co. Rep. 66. *Clarke* v. *Day*, Mo. 593, &c. *Lisle* v. *Gray*, 2 Lev. 223. *Legate* v. *Sewell*, Raym. 278. The next class of cases are where the word issue has been held to be a word of purchase, and not of limitation, *Luddington* v. *Kime*, 1 Salk. 224. Lord Raym. 203. *Backhouse* v. *Wells*, Stra. 731. Those cases in which it has been considered as a word of limitation are only such where the intent of the testator, that the issue should not take by purchase, has been strongly marked. In the present case it does not. The intent is to be collected from the whole will taken together; as one part gives light to another. John Harris could not by any construction be entitled to more than an estate for life under that clause; not only as the superadditional words must be rejected, but because the first taker of the inheritance would take the whole, when the testator meant that it should be divided: another reason is, because there is a subsequent limitation to the issue female, which must be rejected, too.

The present case is like *Luddington* v. *Kime*, having a double contingent remainder, with this difference only, in that case it was expressed, in this it is implied. They are all contingent uses, and concurrent. If issue male, they are to take; if none, then according to the first clause, issue female; and then the remainderman: in the latter clause the issue female are left out.

2dly. As to the effect of this recovery. If John Harris is tenant for life, it is a forfeiture of the estate, and in that case, if the remainders are vested, the next in inheritance is entitled; if they are contingent, the contingency is destroyed, and as the remainder in fee cannot be in abeyance, the heir at law of the grantor is entitled. *Carter* v. *Barnardiston*, 1 P. W. 505. The inheritance pending * the contingency of a remainder [* 428] descends to the heir. *Beck's case*, Lit. Rep. 159. S. C. *Boreton* v. *Nicholls*, Cro. Car. 363, Fearne, C. R. 352.

3dly. As to the condition, whether it is good or not at law. One point is observable in all these kinds of conditions, *viz.* whether they are to restrain a rightful or a tortious alienation: for they must not be repugnant to the nature of the estate given; *Corbet's case*, 1 Co. Rep. 83. *Mildmay's case*, 6 Co. Rep. 40. *Portington's case*, 10 Co. Rep. 35. *Richel's case*, Co. Lit. 377, *a*. But the present condition is not so. For, considering John Harris as tenant for life, the destroying the contingent uses is a tortious act. Tenant for life of a trust estate cannot do it since the case of *Penhay* v. *Hurrell*, 2 Vern. 370. The court will support conditions to restrain tortious acts where they are not repugnant to the estate. Such a condition as the present is of use: it is to charge with £2000. It would be of great use, supposing tenant for life was also entitled to the reversion in fee, with intermediate remainders. Considering John Harris to be tenant in tail, the condition is also good, for though a condition is not good to restrain tenant in tail from suffering a recovery, yet a condition not to alien is good, a covenant by tenant in tail not to suffer a common recovery is good. *Collins* v. *Plummer*, 1 P. W. 104. This is not a case of a restraint, it is an alternative: that is, if you bar the entail, you shall pay, and the estate shall be charged with £2000. A charge of a gross sum, or of an annual payment out of an estate tail, to take place at a future day, would be good, if charged at the time of the creation of the estate. This is no more: it is to take place on the happening of an event.

As to the point, whether the condition is barred by * the [* 429] recovery. The distinction is taken in *Page* v. *Hayward*, 1 Mod. 108, 2 Lev. 28, that where a condition runs with the land, it is not barred by a common recovery, but a collateral condition is. The present is of the former kind.

The Attorney General, *Sewell and Webb*, for the defendants.

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The plaintiff insists that John Harris took an estate for life, but whether for life, or in tail, that the proviso conditional was good. As to what estate John Harris took, it is clear that it was an estate tail. Superadded words have the effect of constituting an estate tail only in those cases where the prior words of limitation are in the singular number, as in *Archer's case*, *Clarke* v. *Day*, &c. or where there are other words so very strongly expressive of the testator's intent only to give an estate for life, that they control the operation of law. The present is most like the case of *Goodright* v. *Pullyn*, 2 Lord RAYM. 1437, there the subsequent words were held not to be sufficient to alter the force of the prior words of limitation. In *Wright* v. *Pearson*, 1 Eden, 119, the same. It may be objected, that the distinction between those cases and the present is, the word used in both of them was heirs, but, however, in a will, greater latitude of expression is always given, and issue has been held as operative, as a word of limitation, as heirs. As to *Luddington* v. *Kime*, it is no authority here, that devise being penned in a very extraordinary manner. In the present case, if these words are to be considered as words of purchase, this absurdity will follow, that if the eldest son of John Harris had died in his lifetime, leaving issue male, the estate would have survived, and gone from him. Another argument against construing the present as words of purchase, may be [* 430] * taken from the proviso. It would be ridiculous to suppose that the testator meant to give an unalienable estate to John Harris, and at the same time clog the devise of it with a charge, in case of his alienation.

As to the proviso, it is void *ab initio*. It is to restrain what is incident to an estate tail, and therefore void, as it would otherwise introduce a perpetuity. *Jervis* v. *Bruton*, 2 Vern. 251, *Poole's case*, cit. Moor, 809, 810. But even, if the condition is not void in itself, yet, being a subsequent charge, it is barred by the recovery, which the case of *Benson* v. *Hudson* sufficiently proves.

The Solicitor General in reply.

Issue was originally a word of purchase, and, in its technical sense, was uniformly considered as such. If the testator's intent, however, requires it, it may be made a word of limitation, but not unless absolutely necessary. Here the sense requires it to be used as a word of purchase, because of the words of limitation superadded. *Shelley's case*, 1 Co. Rep. 95, *b.*, which, if the prior words

are not construed words of purchase, are inoperative. As to *Wright* v. *Pearson*, that was determined on the whole context, there was no evidence of testator's intent. *Goodright* v. *Pullyn*, was the same, except that it had no clause for trustees to preserve contingent remainders. In *Higgins* v. *Dowler*, 1 P. W. 98, *Stanley* v. *Leigh*, 2 P. W. 686, *Gower* v. *Grosvenor*, Barn. Ch. Rep. 54, the words default of heirs, or want of heirs, in a case of personal estate, will constitute a contingent remainder, and though there happens to be no instance of a similar rule in real estate, yet, from necessity of construction, there may. As to the objection, that the proviso conditional supposed an estate tail, the answer is, that the proviso may be reconciled to an estate for life; for though the father could not, the issue might alienate, and the son, in whom the fee attached upon birth, alienating, as against his issue, would charge the estate. As to the [*431] condition to charge on alienation, though a condition cannot restrain a tenant in tail from suffering a recovery, yet such a charge may be imposed by way of alternative: that is, tenant may bar the estate, or not, as he pleases; if he does, it shall be chargeable with £2000.

The Lord KEEPER.

[After stating the case], Upon this will, and state of the facts, the first question made by the counsel for the plaintiff, was, whether John Harris, under this will, took an estate for life, or in tail? The first argument was, that issue, technically, is a word of purchase, and words of limitation being added, the devise was to the issue of John Harris, after his death, in fee; and it was compared, among other cases, to *Luddington* v. *Kime*, Salk. 224.

But the true answer to that is, 1st. that there is no technical word in a will; if the testator's intent be plain, the court will modify and effectuate his expressions. 2dly, That the case has no resemblance to *Luddington* v. *Kime*, because there the remainder was expressly contingent "to A. for life, and in case he have any issue male, to such issue male, and his heirs for ever: and if he die without issue male, then to B. and his heirs for ever." There the context necessarily supplies "without (having) issue male."

And to make the word issue a word of purchase in that will, the court held, that issue was to be taken there as *nomen singulare* because the inheritance was annexed to the word issue. Here it is expressly used in the plural number, "to his issue and their

heirs." So that, if he intended the issue to take as purchasers, he intended them to take as joint tenants; and if John Harris had ten sons, and the youngest survived, the nine elder, and
[* 432] * their issue, should be disinherited, which is an intent too absurd to be supposed.

It is manifest to me, that the testator intended the word issue as a word of limitation. Because he intended that John King should take the estate for want of issue male of John Harris, whenever that default of issue happened; and there is not a colour to say, in grammatical, critical, or liberal construction, that there is any period to which that want of issue is restrained. And here is a plain limitation of the whole fee in particular estates and remainders.

But then it is said, here are words of limitation superadded to the word issue, and if issue is taken as a word of limitation, the words, "and their heirs," are nugatory.

It is true, that the best construction of deeds and wills, is to give every word an effect, if it can receive it consistently with other parts of the deed or will. And therefore, in the case of *Backhouse* v. *Wells*, where the devise was "to B. for his life only, and from and after his decease, then to the issue male of his body lawfully to be begotten, if God shall bless him with any, and to the heirs male of the body of such issue; and for default of such issue, remainders over." There was the negative word, only, and issue was collocated, so as to import *nomen singulare*, and the court was at liberty to take it as a limitation to the first and every other son of such issue. But in the case of *Shawe* v. *Weigh*, where issue was used in the plural number, in *Legate* v. *Sewell*, where heirs was used in the plural number, and, in both cases, words of limitation superadded; the courts were of opinion, that the first limitation carried an estate tail; and yet the latter words of limitation were, by that construction, rendered of no effect.

And there is not a case in the books where issue or heirs
[* 433] have been used in the plural number, and words of * limitation added, that they have been taken as words of purchase, but, on the contrary, heir, in the singular number, has, and issue may, from the context, be construed words of limitation.

But, in the present case, I think the proviso conditional is a plain declaration of the testator himself, that he had given John Harris an estate tail, and that he intended to restrain him from a

legal dominion over it. "If the said John Harris, or his issue, or any or either of them, shall at any time hereafter alienate, mortgage, incumber, or otherwise commit any act or deed whatsoever, whereby to alter, charge, or defeat the limitations; then, and in such case, &c." Now, how could John Harris charge or incumber the limitations subsequent, if the testator had given him only an estate for life?

Wright v. *Pearson*, 1 Eden, 119, Trin. 1758, determined by me, * was, in my opinion, a much stronger case than [*434] the present; for there, after a limitation for life, the next limitation was to support contingent remainders; and that, too, was a case of a trust, and I was strongly pressed with the authority of *Bagshaw* v. *Spencer*. I was, after the best consideration I could give it, and after ransacking all the precedents, of opinion, that it was the limitation of an estate tail. I have revised my notes, and find it was argued, and treated in every respect like the present case. There was, as I remember, an appeal to the House of Lords, which was deserted, and therefore the acquiescence of the bar in that judgment, is what makes it, after mature consideration, a considerable authority with me, though it was a judgment of my own.

I am therefore of opinion, for the reasons mentioned, and upon the authorities cited, that John Harris took under this will an estate tail.

The only remaining question is, whether a man can give an estate tail, and by annexing a proviso conditional not to alien, charge the estate upon alienation of tenant in tail, with such sum of money as he thinks proper? And I can no more think of saying any thing upon that question, than, if it were made one, whether, if a person should purchase an estate in fee simple, it would be descendible to heirs female?

Bill dismissed. But, as the testator's will is very inaccurate, without costs.

ENGLISH NOTES.

The rule must be qualified by excepting from its operation Crown grants falling within 34 & 35 Hen. VIII. c. 20. These will be dealt with later in the present note.

The principle of the ruling case is confirmed by the decision of the Court of King's Bench, sitting as a Court of Error, in *Hayes* d. *Foorde* v. *Foorde*, (1770). 2 W. Bl. 698. There the devise was a gift

in remainder "to the heirs males of my brother Nicholas Foorde's sons and to any of their heirs males, during their lives (of which none of them are tenants any longer, nor shall it be in any of their powers to sell, dispose or make away any part or the whole of it)" with remainder over. The Court held that this gift vested an estate tail in the nephew, and that the words within brackets were inoperative. In *Bradley* v. *Peixoto*, (1797), 3 Ves. 324, 4 R. R. 7, 9, Lord Alvanley, M. R. said: "A condition that a tenant in fee shall not alien, is repugnant; and there are many other cases of the same sort; *Piers* v. *Winn*, 1 Vent. 321; Pollexf. 435. The report in Ventris is very confused; but it appears clearly from the report of this case in Pollexfen, as well as from many other cases, that the Court meant to say, that where there is a gift in tail with condition not to suffer a recovery, the condition is void." The principal case was followed by Lord Alvanley, in *Mainwaring* v. *Baxter*, (1800), 5 Ves. 459. There a term was limited to trustees to raise a sum of money for the benefit of the persons disappointed by an alienation of a tenant in tail. And to these authorities may be added the observations of Lord Penzance, in *Dawkins* v. *Lord Penrhyn*, (H. L. 1878), 4 App. Cas. 51, 48 L. J. Ch. 304, 39 L. T. 583, 27 W. R. 173, and the authorities referred to in Knowle's argument in *Doe* d. *Atkyns* v. *Horde*, (1757), 1 Burr. 60, 84.

In *Chapman* v. *Brown*, (1863), 9 Jur. (N. S.) 995, 9 L. T. 6, the will contained a clause to the effect that the interest of any beneficiary who should make any assignment, appointment or other disposition of, or charge upon his interest, should be "forfeited and never accrue." A tenant in tail in consideration of two annuities, assigned his interest under the will. It was held that the assignment created no forfeiture, as the clause could not apply to either his estate tail, or the corpus of certain accumulations directed by the will, as a clause prohibiting the alienation of those interests would be void; and that the clause could not apply to the income, as the right to the income was consequential upon the right to the corpus.

This seems a convenient place for considering some of the more important cases relating to the operation of the Fines and Recoveries Act (3 & 4 Will. IV. c. 74).

The exercise of the power to bar an estate tail, operates by way of enlargement of the estate, and does not create a new interest: *Lord Lilford* v. *Attorney General*, (H. L. 1867), L. R. 2 H. L. 63, 36 L. J. Ex. 116, 16 L. T. 184, 15 W. R. 595.

The operative part of the 15th section of the Act is in these terms: "Every actual tenant in tail, whether in possession, remainder, contingency or otherwise, shall have full power to dispose of, for an estate

in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous Act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons, including the King's Most Excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this Act authorized to be made." The right to bar an estate tail as against the Crown is thus qualified by section 18: "Provided always that the power of disposition hereinbefore contained shall not extend to tenants of estates tail, who, by [34 & 35 Hen. VIII. c. 20], or by any other Act, are restrained from barring their estates tail, or to tenants in tail after possibility of issue extinct." The Statute of Henry VIII. applies to gifts and grants, by the Crown to a subject, of "manors, meases, lands, tenements, rents, services and hereditaments, to them and to their heirs males of their bodies, or to the heirs of their bodies lawfully begotten . . . to the intent that recompense for the service of such donees should not only be a benefit for their own persons, but a perpetual profit and commodity to and for their heirs coming of their bodies." The Act of Henry VIII. only applies to gifts and would not apply to a purchase for value of lands for an estate tail from the Crown; *Earl of Nottingham* v. *Lord Monson* (1631), Dy. 32 a, pl. 1 *in marg.* So where a person conveyed lands in fee to the Crown, to the intent that they should be regranted in tail, the transaction was held to be outside the statute; *Johnson* v. *Earl of Derby*, Piggot, Recov. 201. The case of *Duke of Grafton* v. *London & Birmingham Railway Co.* (1838), 5 Bing. N. C. 27, 6 Scott, 719, 8 L. J. C. P. 47, is an authority that a gift out of the mere bounty of the Crown does not fall within the restraining words of the Statute of Henry VIII. The gift in that case was one of the many made by Charles II. to or for the benefit of his illegitimate children. The case was sent out of Chancery for the opinion of the Court of Common Pleas, and no final judgment was ever delivered, but a certificate merely returned. The Court perhaps intended to follow the earlier case in the Court of King's Bench, presided over by Lord Mansfield, of *Perkins* d. *Vowle* v. *Sewell* (1768), 4 Burr. 2223, 1 W. Bl. 654. The report in Burrow is very unsatisfactory, omitting the reasons given, which are, however, to be found in Blackstone. In *Perkins* v. *Sewell*, it appeared that William Dexter, being tenant in

fee of the premises, enfeoffed Henry, Earl of Derby, afterwards Henry IV., to hold to him and his heirs. Afterwards the King by Letters Patent under the Duchy Seal of Lancaster, in 7 Henry IV., reciting the feoffment, and that Margaret, the wife of John Milton, was granddaughter and heir of William Dexter, and had petitioned the King to be fully reinfeoffed thereof, the King expressed his will that it should be done as law, good faith, and conscience required, and of his special grace gave and granted the premises to the said John Milton, and Margaret his wife, and the heirs of the body of Margaret to be holden as of the King and his heirs, Dukes of Lancaster, as of the Duchy of Lancaster, in chief forever; with remainder to the King and his heirs, Dukes of Lancaster, on failure of issue of Margaret. This grant was twice confirmed by Queen Elizabeth. The question was whether a recovery by an heir in tail enlarged the estate as against the Crown. Lord Mansfield is reported, by Blackstone, to have said: "It is certain, that the preamble of a Statute cannot restrain the enacting part of it, where the enacting part is clearly larger than the preamble. But in this case, the estates mentioned in the enacting part clearly refer to those mentioned in the preamble, by the word 'such,' which runs through the whole. It must therefore be admitted, that, in order to obtain the protection of the statute of Henry VIII. the estate tail must be of the gift or provision of the King, by way of reward. As for the services, which are the consideration of such gift, those must at a distance of time be presumed, and need not be proved. To take it out of the Statute, you must show that it is not of the gift, or provision of the King. And, in the present case, it is plainly not so, upon the face of it. The petition is founded upon no other consideration, than that Elizabeth Milton was cousin and heir (*sic*) of Dexter, who enfeoffed the Earl of Derby. No merits are mentioned; notwithstanding the statute of 4 Hen. IV. c. 4, was then recent. The King himself states, that he was bound to make the grant by law, good faith, and conscience. What the circumstances of fact were, cannot now be discovered; whether a defeasance, a condition, or a use, or anything else: Nor is it material. It is enough, that the King has recited generally, that he was bound to do it. It cannot therefore be a gift." The Statute of Henry IV. referred to in the foregoing extract was a statute limiting the power of the Crown to make gifts of lands. The Statute was not reprinted in Ruffhead's edition of the Statutes, as that author considered that the operation of the Act was restricted to the reign in which it was passed. Prior to the Act of Henry VIII. a recovery barred the issue in tail, but not the Crown, in the cases falling within the mischief of the Statute: Bro. Ab. tit. "Taile," pl. 41.

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The object of sections 15 and 18 of the Act is to reproduce by a deed the operation of a recovery. But for the words "including the King's Most Excellent Majesty, his heirs and successors," in section 15, it would have been impossible to enlarge the estate in such a case as this: A., tenant in tail, remainder to B. in fee. Death of B. intestate and without heirs in the lifetime of A., and before A. disentails. Here the Crown would take the fee by Escheat, and recoveries being abolished (section 2 of the Statute), the Crown would, but for the words above quoted, be entitled on the failure of the issue of A. Before the statute, the law stood on a similar footing; *Wiseman's Case* (1585), 2 Co. Rep. 15, Moore, 195; *Cholmley's Case* (1595), 2 Co. Rep. 50, Moore, 342. A provision whereby, in events provided for, the limitations are transposed, and a subsequent tenant is to succeed in priority to estates which were originally anterior to his, is a "defeasance" within section 15, and if before the events contemplated happen a disentailing deed is executed, the person who was to take in priority will be barred. *Millbank* v. *Vane* (C. A. 1893), 1893, 3 Ch. 79, 62 L. J. Ch. 629, 68 L. T. 735. A recovery would have had a similar effect. *Earl of Scarborough* v. *Doe* d. *Savile* (Ex. Ch. 1836), 3 A. & E. 897, 6 L. J. Ex. 270.

An example of the barring of an estate tail in remainder is afforded by *Allgood* v. *Blake* (Ex. Ch. 1872), L. R. 8 Ex. 160, 42 L. J. Ex. 101. There the limitations were to one for life, remainder to his first and other sons in tail male, with limitations over in strict settlement, remainder to the tenant for life in tail, remainder over. The tenant for life while in possession executed a disentailing deed. The intermediate limitations failed, and a person claiming under his devisee in fee was held entitled to the property. A similar power existed before the Act: *Smith* d. *Richards* v. *Clyfford* (1787), 1 T. R. 738, 1 R. R. 384. There lands stood limited to A., for years determinable on a life, remainder to B. for life, remainder to the first and other sons of B. in tail, remainder to the heirs of B. in tail. A. and B. joined in a lease and release to make a tenant to the præcipe, and suffered a recovery. It was argued that this was a forfeiture of the life estate, but this contention was rejected because there was a legal subject, the remainder in tail to B., for the recovery to work upon.

The power of a tenant in tail, whose estate was contingent to bar his estate, did not exist prior to the Act. Preston Conv. 142, Sugden R. P. Stat. 192.

Section 20 of the Fines and Recoveries Act is in the following terms: "Nothing in this Act contained shall enable any person to dispose of any lands entailed in respect of any expectant interest which he may have as issue inheritable to any estate tail therein."

Prior to this enactment a mere grant without more by a person entitled in expectancy as issue under the limitation, of an estate tail, would not have bound the persons claiming under the same line of descent as the grantor. *Wivel's Case*, Hob. 45; *Goodtitle* d. *Faulkner* v. *Morse* (1789), 3 T. R. 365, 1 R. R. 719; *Doe* d. *Blacksell* v. *Tomkins* (1809), 11 East 185, 10 R. R. 467. But a fine levied by a person who afterwards became heir would have been an estoppel: *Helps* v. *Hereford* (1819), 2 B. & Ald. 242, 20 R. R. 416. To bind the collateral heirs by a fine, the land must have descended by virtue of the entail upon the cognisor or his heirs; *Bradstock* v. *Scovell* (1636), Cro. Car. 434. The effect of the section is to take away the power of a person who had only an expectancy as issue inheritable to a tenant in tail to deprive, by way of estoppel or otherwise, his own issue of their possibility of succeeding according to the statute *de donis*.

The right of the tenant in tail to bar is made subject to the consent of the protector of the settlement, where there are estates prior to that of the tenant in tail, who seeks to enlarge his estate. The provisions relative to protectors are contained in sections 22–46 of the Fines and Recoveries Act. The consent of the protector is given at the time of or prior to the execution of the disentailing assurance, and is given by the disentailing deed or by a distinct deed executed on or before the same day (ss. 42 & 43). The consent is irrevocable (s. 44). It has apparently never been decided whether a contract under seal by the protector would amount to a consent; the utmost that can be said is that it would probably be regarded as equivalent to a consent: see *Bankes* v. *Small* (C. A. 1887), 36 Ch. D. 716, 56 L. J. Ch. 832, 57 L. T. 29, 35 W. R. 765.

Where there are joint protectors, and one dies, the office becomes vested in the survivor; *Bell* v. *Holtby* (1873), L. R. 15 Eq. 178, 42 L. J. Ch. 266, 28 L. T. 9, 21 W. R. 321.

A person who is protector of the settlement may bar an estate tail to which he is entitled in remainder; *Allgood* v. *Blake* (Ex. Ch. 1872), L. R. 8 Ex. 160, 42 L. J. Ex. 101.

Where the consent of the protector is required, but is not obtained, to the execution of a disentailing assurance, the deed only passes a base fee. The tenant in tail may however by the execution of a subsequent assurance "enlarge the base fee into a fee simple absolute": Fines and Recoveries Act, s. 19. The tenant in tail can exercise the power given by this section, although he has parted with a base fee to a purchaser for value: *Bankes* v. *Small* (C. A. 1887), 36 Ch. D. 716, 56 L. J. Ch. 832, 57 L. T. 292, 35 W. R. 765. Where the tenant in tail is owner of a base fee, and the remainder or reversion in fee in the same lands becomes vested in him, and the inter-

mediate limitations fail, the base fee does not merge, but is *ipso facto* enlarged into as large an estate as a tenant in tail, with the consent of the protector if any, might have created by any disposition under the Act, if the remainder or reversion were outstanding in another person: Fines and Recoveries Act, s. 39. The law before the Statute is thus stated in *Roe* d. *Crowe* v. *Baldwere* (1793), 5 T. R. 104, 2 R. R. 550: "The operation of a fine and a recovery on questions of this kind is very different. If a tenant in tail, with a reversion in fee to himself, levy a fine, the effect of that on the estate tail is creating a base fee; and that becomes merged in the other, and lets in all the incumbrances of the ancestor, which has frequently happened in practice from such a person being ill advised to levy a fine instead of a recovery. Generally speaking, when two estates unite in the same person in the same right, the smaller one is merged in the other, except in the case of an estate tail and a reversion in fee, which may exist together; in such a case, by the operation of the statute *de donis*, the estate tail is kept alive, not merged by the reversion in fee. Whether the recovery extend the estate tail, or, as more accurately stated by TRACY, J. in *Lord Derwentwater's Case*, it be a conveyance excepted out of the statute *de donis*, it is immaterial to consider; though I observe that in *Martin* v. *Strachan* Lord Chief Justice LEE, adopted the latter expression; and by the recovery the tenant in tail may dispose of the fee. . . . *Martin* v. *Strachan*, . . . ought to put the question in a state of repose, because that case was very ably discussed here, and the judgment of this Court was afterwards confirmed in the House of Lords. According to that case, it stands thus; the common recovery puts an end to the estate tail; the estate immediately afterwards becomes an estate in fee; and the party, whose estate is converted into a fee, if he took the estate tail as a purchaser, must take the fee as a purchaser; or if he took the estate tail by descent, must take the fee also by descent as from the same ancestor."

Section 40 of the Fines and Recoveries Act provides: "Every disposition of land under this Act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition, if his estate were an estate at law in fee simple absolute; provided nevertheless, that no disposition by a tenant in tail shall be of any force either at law or in equity, under this Act, unless made or evidenced by deed." A declaration of trust is not such a form of disposition as will satisfy the section; *Green* v. *Paterson* (C. A. 1886), 32 Ch. D. 95, 56 L. J. Ch. 181, 54 L. T. 738, 34 W. R. 724. No particular form of conveyance is however necessary: *Nelson* v. *Agnew* (1871), Ir. R. 6 Eq. 232. In practice it is customary to express that the deed is made with the

object of enlarging the estate tail, and of defeating all remainders and interests to take effect upon the determination or in defeasance of the estate enlarged, or to make the conveyance of the lands freed from those estates.

There is a danger in making a direct conveyance at common law, for if the grantee does not execute the deed and afterwards disclaims, the deed is not effectual to bar the entail; *Peacock* v. *Eastland* (1870), L. R. 10 Eq. 17, 39 L. J. Ch. 534, 22 L. T. 706, 18 W. R. 856. Where, however, the deed operates under the Statute of Uses, and the grantee to uses is not an executing party, and subsequently disclaims, the deed is effectual: *Re Dudson's Contract* (C. A. 1878), 8 Ch. D. 628, 47 L. J. Ch. 632, 39 L. T. 182, 27 W. R. 179; *Nelson* v. *Agnew*, *supra*.

It is not necessary that the disposition by a tenant in tail should be absolute, it may be "by way of mortgage or for any other limited purpose": Fines and Recoveries Act, s. 21. This section is subject to the proviso, "that if the estate created by such disposition shall be only an estate *pour autre vie*, or for years absolute or determinable, or if, by a disposition under this Act by a tenant in tail of lands, an interest, charge, lien, or incumbrance shall be created without a term of years absolute or determinable, or any greater estate for securing or raising the same, then such disposition shall in equity be a bar only so far as may be necessary to give full effect to the mortgage, or to such other limited purpose, or to such interest, lien, charge, or incumbrance, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected." The object of this section was to put an end to such questions as arose in *Jackson* v. *Innes* (H. L. 1819), 1 Bligh, 104, 20 R. R. 45, namely whether a mortgage operated as a resettlement: see *Plomley* v. *Felton* (P. C. 1888), 14 App. Cas. 61, 58 L. J. P. C. 50, 60 L. T. 193.

The disentailing assurance must be enrolled in the Enrolment Department of the High Court "within six calendar months after the execution thereof": Fines and Recoveries Act, s. 1; Rules Supreme Court, 1883. Order 60, rule 9. Where the consent of the protector is given by a separate deed, that deed must be enrolled in the same place "either at or before the time when the assurance shall be enrolled": Fines and Recoveries Act, s. 46. The want of enrolment cannot be supplied: *Bankes* v. *Small* (C. A. 1887), 36 Ch. D. 716, 56 L. J. Ch. 832, 57 L. T. 292, 35 W. R. 765, to be referred to hereafter.

One of the most important sections in the Fines and Recoveries Act is section 47, which is in the following terms: "In cases of dispositions of lands under this Act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands

under this Act by tenants in tail thereof, the jurisdiction of courts of equity shall be altogether excluded, either on behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution either of the powers of disposition given by this Act to tenants in tail, or of the powers of consent given by this Act to protectors of settlements, and the supplying under any circumstances of the want of execution of such powers of disposition and consent respectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement which in a court of law would not be an effectual disposition or consent under this Act; and that no disposition of lands under this Act by a tenant in tail thereof in equity, and no consent by a protector of a settlement to a disposition of lands under this Act by a tenant in tail thereof in equity, shall be of any force unless such disposition or consent would, in case of an estate tail at law, be an effectual disposition or consent under this Act in a court of law." This section does not exclude the jurisdiction of a court of equity to rectify, on the ground of mistake, a deed of resettlement enrolled as a disentailing assurance under the Act: *Hall-Dare* v. *Hall-Dare* (C. A. 1885), 31 Ch. D. 251, 55 L. J. Ch. 154, 54 L. T. 120, 34 W. R. 82. The governing words of this section are "In cases of dispositions under this Act," and a court of equity has jurisdiction to grant specific performance of a contract to execute a disentailing assurance, but the section prevents a court of equity from treating a contract as an equitable disposition binding on the issue in tail, or those entitled in remainder: *Bankes* v. *Small*, *supra*. There a tenant in tail in remainder executed a disentailing assurance without the consent of the protector, and conveyed, with the concurrence of a subsequent tenant in tail, certain lands to the plaintiff. The conveying parties covenanted with the plaintiff that they "and every person having or claiming any estate, right, title, or interest in or to the said premises or any of them through or in trust for them or either of them will at all times, at the costs of the said W. R. Bankes, his heirs and assigns, execute every such assurance, and do every such thing for the further or more perfectly assuring all or any of the said premises to the use of the said W. R. Bankes, his heirs and assigns, as by the said W. R. Bankes, his heirs and assigns, shall be reasonably required." The tenant for life died, and on the refusal of the tenant in tail to execute a disentailing assurance, the action was brought for specific performance of the covenant, and specific performance was decreed. The judgments of the Court of Appeal contain no reference to *Hilbers* v. *Parkinson* (1883), 25 Ch. D. 201, 53 L. J. Ch. 194, 49 L. T. 502, 32 W. R. 315, which was

cited in argument. There a married woman became entitled to an estate tail in land, and the trustees of her settlement sought to get a conveyance of the property as being bound by a covenant to settle after acquired property, but the contention failed. In the subsequent case of *Mills* v. *Fox* (1887), 37 Ch. D. 153, 57 L. J. Ch. 56, 57 L. T. 792, 36 W. R. 219, *Hilbers* v. *Parkinson* seems to be treated by STIRLING, J., as qualified to some extent by *Bankes* v. *Small*, *supra*. *Mills* v. *Fox* was a case of the specific performance of representations prior to marriage. A fund, representing the purchase money of lands taken compulsorily, had been left out of the settlement. The married woman was tenant in tail of the lands, and had executed a disentailing assurance subsequently, and the fund, being still in Court, was ordered to be paid by the trustees. The following is the material part of the judgment of STIRLING, J.: "It was further said that, at the date of the order and of the marriage, Mrs. Fox was simply tenant in tail of the fund; that the Court could not have ordered her after her marriage to execute a disentailing deed of the fund, for which proposition *Hilbers* v. *Parkinson* was cited; and that the circumstance that she has in fact executed a disentailing deed ought not to prejudice her. If she had not executed the disentailing deed, it may be that I should have found it necessary to inquire to what extent a court of equity will actively interfere to enforce the making good of representations, and whether in so interfering it will order the execution of a disentailing deed; and in dealing with the latter point the principles laid down in the recent case of *Bankes* v. *Small* . . . would have to be regarded."

As regards supplying enrolment, the following passages from the judgment of COTTON, L. J., in *Bankes* v. *Small*, *supra*, should be borne in mind: "Views have been expressed by the Courts, and also by counsel of great eminence, which are in accordance with the views which I have expressed, and even if there were more doubt on the true construction of the section, I think it would be wrong for us, in a case which concerns the title to real estate, to give an opinion contrary to the views so expressed. The first I refer to is the view of Lord ST. LEONARDS, in his book on the Real Property Statutes in 1852. He says: 'It cannot be too strongly impressed upon purchasers, that their title will depend upon the legal validity of the dispositions under the statute,' that is the Fines and Recoveries Act: 'nothing can be supplied, no defect can be made good so as to make the attempted deed effectual.' If the instrument, for example, be not a deed, or being a deed be not enrolled in the proper Court in due time, it will be absolutely void, and equity cannot set it up. And although equity, notwithstanding the stringent clauses in the Act, will still be able to

compel a seller to make a new valid conveyance, yet that could not be enforced against the issue, nor could it be enforced against a protector. No purchaser can be deemed safe unless the deeds are properly enrolled, and he should not part with his money until that is done': Mr. Hayes . . . expresses himself to the same effect, so again does Lord St. Leonards, in his book on Vendors and Purchasers, and Mr. Dart . . . expresses the same opinion, though not so fully or pointedly." The rest of the judgment contains a reference to the cases pointing in the same direction. An enrolment cannot be supplied in the case of a disentail of copyholds: *Green* v. *Paterson* (C. A. 1886), 32 Ch. D. 95, 56 L. J. Ch. 181, 54 L. T. 738, 34 W. R. 724.

The provisions respecting the disentail of copyhold are contained in sections 50–54 of the Fines and Recoveries Act. Unless there is a custom to entail, a gift which would create an estate tail in socage lands will create a fee simple conditional in copyhold lands: *Doe* d. *Spencer* v. *Clark* (1822), 5 B. & Ald. 458, 1 Dowl. & Ry. 44, 24 R. R. 457. The enrolment is made by entry on the Court Rolls; Fines and Recoveries Act, s. 54. The enrolment cannot be supplied: *Green* v. *Paterson* (C. A. 1886), 32 Ch. D. 95, 56 L. J. Ch. 181, 54 L. T. 738, 34 W. R. 724.

Section 71 of the Fines and Recoveries Act provides that lands directed to be sold, where the proceeds are to be invested in the purchase of lands to be settled, are to be treated as subject to the same estates as the lands to be purchased, with a necessary modification in the case of copyholds, and that money subject to be invested in the purchase of lands to be settled is to be treated as if freehold lands had been purchased. The preponderance of authority seems to favour the view that a disentailing assurance must be executed, before a fund in Court representing entailed lands will be paid out to a tenant in tail: *Re Butler's Will* (1873), L. R. 16 Eq. 479; *In re Norcop* (1874), 31 L. T. 85; *Re Broadwood's Settled Estates* (1875), 1 Ch. D. 438, 24 W. R. 108; *Re Reynolds* (C. A. 1876), 3 Ch. D. 61, 35 L. T. 293, 24 W. R. 991. The cases are decisions of Lord Selborne, L. C., Bacon, V. C., Jessel, M. R., and James and Mellish, L. J. J., respectively. The decisions which are opposed to this view will be easily found on reference to these cases, and were pronounced by Lord Hatherley, Knight-Bruce, and Turner, L. J. J., and Malins, V. C. There are conflicting decisions of Kindersley, V. C., on the question; *Re Tylden's Trust* (1863), 8 L. T. 631, 11 W. R. 869; *Nottley* v. *Palmer* (1865), L. R. 1 Eq. 241. Where the property is small the Court will dispense with the execution of a disentailing assurance, *Re Tylden's Trust, supra.*

Where the tenant in tail is a lunatic, the Court sitting in Lunacy

may authorize the Committee to execute a deed disentailing the lands: *In re Pares, Lillingstone* v. *Pares* (C. A. 1879), 12 Ch. D. 333, 41 L. T. 574, 28 W. R. 193. The Court, however, in general will not exercise the power of enlarging the estate so as to defeat the limitations, further than is required for the benefit of the lunatic: *In re Pares* (C. A. 1876), 2 Ch. D. 61, 24 W. R. 619. The statutory provisions under which the Court had acted in both these cases are reproduced by sections 120 and 123 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5). By s. 120, — "The judge may by order, authorize and direct the committee of the estate of a lunatic to . . . (*inter alia*) exercise any power or give any consent required for the exercise of any power where the power is vested in the lunatic for his own benefit, or the power of consent is in the nature of a beneficent interest in the lunatic." And by s. 123, it is enacted that any surplus moneys arising from any sale, mortgage, or other disposition made under the powers of the Act, shall belong to the estate of the lunatic as if the disposition had not been made.

The concurrence of the husband is required to every disposition by a married woman tenant in tail, and the deed must be acknowledged: Fines and Recoveries Act, s. 40. This provision applies to a disposition of property in which a married woman has an estate tail settled to her separate use, but the concurrence of the husband is good although he is a bankrupt and although if the deed had not been executed he might have become entitled as tenant by the courtesy; *Cooper* v. *Macdonald* (C. A. 1877), 7 Ch. D. 288, 47 L. J. Ch. 373, 38 L. T. 191, 26 W. R. 377. In the case of a woman married after 1882, or where the property vests in her in interest after that date, neither concurrence nor acknowledgment is necessary; *Re Drummond and Davies* (1891), 1891, 1 Ch. 524, 60 L. J. Ch. 258, 64 L. T. 246, 39 W. R. 445. Where the deed requires to be acknowledged, the acknowledgment need not precede the enrolment: *Ex parte Taverner* (1855), 7 De G. M. & G. 627, 25 L. J. Ch. 45, 1 Jur. N. S. 1194.

By the joint effect of the Fines and Recoveries Act, and the Statute 11 Geo. IV. and 1 Will. IV. c. 47, s. 11, an infant tenant in tail may be ordered to execute a disentailing assurance of lands sold for payment of the testator's debts; *Radcliffe* v. *Eccles* (1836), 1 Keen, 130. Before 2 & 3 Vict. c. 60, there were conflicting decisions whether a mortgage was authorized: *Smethurst* v. *Longworth* (1837), 2 Keen, 603, 7 L. J. Ch. 18; *Holme* v. *Williams* (1839), 8 Sim. 557. This Act settled the question in the affirmative.

The provisions contained in sections 55–73 of the Fines and Recoveries Act respecting the disentail of lands vested in the bankrupt are incorporated in the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 56. The power to disentail is exercisable by the trustee in bankruptcy.

No. 6. — King v. Burchell. — Notes.

AMERICAN NOTES.

In some of the United States it has been held that *Luddington* v. *Kime*, 1 Salk. 234, Ld. Raym. 203, has not been overruled, and that superadded words of limitation will change the word "issue" into a word of purchase. *Shreve* v. *Shreve*, 43 Maryland, 382; *Way* v. *Gest*, 14 Sergeant & Rawle (Penn.), 40. In 2 Minor's Institutes, 404, it is laid down: "Where the limitation of the freehold to the ancestor is followed by a limitation to his heirs, but accompanied by words of qualification or superadded limitation: *e. g.*, grant to A. for life, remainder to the heirs of A. now living; or remainder to the heirs of A. share and share alike, as tenants in common; or remainder to the sons of A. and their heirs; or remainder to the heir of A. and the heirs male of the body of such heir; or remainder to such persons as shall at the life tenant's death answer the description of heirs at law of the life tenant — in all these cases the subsequent words of limitation are in general words of purchase, creating a remainder in the party to whom the limitation is made, which will be vested if the person is ascertained, and contingent if he is not ascertained." Supported by *Taylor* v. *Cleary*, 29 Grattan (Virginia), 452, 453; *Boykin* v. *Ancrum*, 28 South Carolina, 486; 13 Am. St. Rep. 698; *Dott* v. *Willson*, 1 Bay (So. Car.), 457; *Mills* v. *Thorne*, 95 North Carolina, 362; *Warners* v. *Mason*, 5 Munford (Virginia), 242.

But if there is a clear intention that the persons who are to take the so-called remainder are the heirs or heirs of the body of the first taker the Rule in *Shelley's Case* still applies in spite of the superadded words of modification. *Moore* v. *Brooks*, 12 Grattan (Virginia), 135, 143; *Hall's Exec'r* v. *Smith*, 25 *ibid.* 70, 72; *Andrews* v. *Lowthrop*, 17 Rhode Island, 60 ("for his natural life and after his decease to his heirs, their heirs and assigns forever"); *Osborne* v. *Shrieve*, 3 Mason (U. S. Circ. Ct.), 391. In the last case the point is very learnedly examined by Story, J. There A. devised to his son, "I. S. and his male heir, and to *his heirs* and assigns forever; but if it should so be that I. S. should depart this life, leaving no *male heir* lawfully begotten of his body as aforesaid," then to testator's grandson W. O. in fee. *Held*, that I. S. took an estate tail with remainder over to W. O. on the indefinite failure of the issue of I. S. The principal case is cited and relied on, with *Jesson* v. *Wright*, 2 Bligh, 1, *ante*, p. 714. In *Doty* v. *Teller*, 54 New Jersey Law, 163, 33 Am. St. Rep. 670, devise to wife for life and after her death to a devisee named, "and to his heirs entail the same forever," was held to vest the fee simple in the devisee's children on his death: "Any expressions in the will denoting an intention to give the devisee an estate of inheritance descendible to his, or some of his lineal, but not collateral heirs, have always been regarded as a sufficient devise of a fee tail." . . . "Correct and technical words have never been considered essential."

In *Craig* v. *Warner*, 5 Mackey (District of Columbia), 460, 60 Am. Rep. 381, it was said: "At common law an estate tail in the ancestor must descend as such to the issue; therefore an express devise to the latter of a fee simple amounts to an explanation which is conclusive that the devisor has not used the word 'issue' in that sense which would make it a term of limita-

tion to the ancestor, whereby they would inherit a smaller estate than the one which he has given them. Since the word 'issue' is of variable meaning, and we are to accept that meaning which the testator chooses, an express devise of a fee simple forbids us to adopt a meaning which would give the issue an estate with which the actual devise to them is inconsistent. This is clear on principle and is established by authority." Citing *Luddington* v. *Kime*, 1 Salk. 224 ; Ld. Raymond, 203.

" Mr. Tudor, in his notes to Leading Cases on Real Property, 499, expresses the opinion that *Loddington* v. *Kime* may be considered as overruled by Lord Keeper HENLEY'S decision in *King* v. *Burchall*, 1 Eden, 424. But that does not seem to have been his lordship's own opinion, for he sought to distinguish *Loddington* v. *Kime*; and Mr. Fearne (p. 163) has shown that *King* v. *Burchall* was not only to the effect that the will did not intend to give a fee simple to the issue. Of course it would follow in that case that there was no devise inconsistent with an estate tail in the ancestor. Undoubtedly there is a considerable line of English cases in which it was held that the word 'heirs' superadded to the words 'heirs of the body' or 'issue,' did not prevent the latter from being construed as words limiting an estate-tail; but we think that these cases decided no more than this: that these superadded words, although sufficient if taken alone to give a fee-simple to the issue, meant in connection with the context heirs of like kind with the heirs already mentioned, namely heirs of the body. Of course it would follow in that case that there was no devise to the issue of an estate inconsistent with an estate-tail in the ancestor. But no such construction can be adopted when the testator expressly declares that the devise to the 'issue' is of a 'fee-simple.' Properly, the only question open to consideration in cases of superadded words is, whether the limitation to issue is actually of a fee-simple, or is to heirs of a like kind with the 'issue' or 'heirs of the body' already mentioned in the will. When the superadded words are used in the latter sense they are merely superfluous. And this seems to be all that is settled by the cases referred to.

" But whatever may be said of these cases, this question has, for us, been authoritatively decided in *Daniel* v. *Whartenby*, 17 Wall. 639, where the superadded words were 'heirs and assigns forever.' The principle there recognized is, that where it is clear that a fee-simple is devised to the issue, that word will not be understood to have been used in a sense which would give an estate-tail to the ancestor."

No. 7. — DUNCOMB *v.* DUNCOMB.

(1695.)

No. 8. — HOOKER *v.* HOOKER.

(1733.)

RULE.

"It is not the uncertainty of ever taking effect in possession that makes a remainder contingent; for to that every remainder for life or in tail is and must be liable; as the remainderman may die, or die without issue, before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." Fearne, Contingent Remainders, p. 216.

Duncomb v. Duncomb.

3 Levinz, 437.

Remainder. — Vested.

Estate for life to W., remainder to J. S. and his heirs for the life of W., remainder to the heirs male of the body of W., — the wife of W. shall not be endowed: —

The estate to J. S. being an intervening vested estate and not a possibility.

Dower, and upon *nunquam seisie que dower* pleaded, and thereon a special verdict, the case was, William Duncomb tenant for life, the remainder to J. S. and his heirs for the life of William, the remainder in tail to William, viz. to the heirs males of his body, the remainder to George Duncomb the now tenant. William married the demandant and died without issue, and whether the demandant should be endowed? was the question; viz. whether the remainder to J. S. and his heirs for the life of William Duncomb be such an interposing estate between the life of William and the remainder to the heirs of his body, that the wife should not be endowed? And for the demandant it was said, that the whole estate was really in William, and the remainder to J. S. for

the life of William was no more than a possibility; so that if William had committed a forfeiture, J. S. might take advantage thereof for preservation of remainders. But in the mean time the whole estate is executed in W. D. as in *Lewis Bowles's Case* [11 Co. Rep. 80], the whole estate-tail was executed in the father 'till the birth of the first son; and though by this possibility the estate for the life of William is not merged, yet the estate-tail is executed to such a purpose that the wife shall be endowed, as 50 E. 3, 4, 5. Tenant in tail after possibility of issue extinct, with a remainder to him in general tail, marries a second wife; she shall be endowed, though both estates stand distinct in the husband. But the Court upon the first argument hastily gave judgment for the tenant.

Hooker v. Hooker.

Lee temp. Hardwicke, 13–17.

Remainder. — Contingent.

[13] Where a remainder in tail or fee comes to or descends on tenant for life, either by his own act, or the operation of law, the two estates are so consolidated, that it should seem the intermediate contingent estates are destroyed; or, if they do open on the contingencies happening, they are suspended till that time, and the wife of the tenant for life, with such contingent remainders, shall have dower.

A question in dower sent by the Court of Chancery for the opinion of this Court.

The case was this: William Hooker the elder and *ux'*, and William Hooker the younger and *ux'*, by their deed dated the 12th of July, 1699, covenanted to levy a fine to the use of the conusees in fee; the fine was levied, and afterwards the conusees by lease and release convey to Young and Goadvoy for the use of William Hooker the elder for life, and to his wife if she survive, then to William Hooker the younger for life (who was the son and heir apparent of William Hooker the elder), remainder to his first and other sons in tail, remainder to his daughter in tail, remainder to Hooker the elder in fee, with power to Hooker the younger to settle on any other wife. William Hooker the elder and his wife died without other issue in the lifetime of William Hooker the younger, whose wife also died. He had two other wives, and the last is the plaintiff, and he being dead without issue, the question is, whether this last wife be entitled to dower in these lands?

No. 8. — Hooker v. Hooker, Lee t. Hard. 13, 14.

Bellfield, Serj. The question will depend on what estate Hooker the younger had at the death of Hooker the elder; for by the deed it is plain he took only an estate for life, but apprehends that the remainder in fee descending and coming to him on the death of Hooker the elder, the plaintiff will be plainly entitled to her dower.

Lord HARDWICKE, Ch. J. It did not descend to him.

Bellfield, Serj. Thinks it will be the same, for both estates were so consolidated as to make him tenant in fee; but it has been objected that though the estates were consolidated, yet that they might open again to let in the contingent remainders, as was held in *Lewis Bowles's Case*, 11 Co. Rep. 79; and therefore that Hooker the younger was in effect but tenant for life, and consequently that the plaintiff his widow can be no way entitled to dower in these lands; but says, the reason of *Lewis Bowles's Case*, was because all the claims appeared by the same deed, but here this is a matter entirely *dehors* the deed; besides, as Hooker the younger died without issue, there never was any occasion to open the estates, and by his death the contingency is entirely determined, but apprehends the contingent remainder was destroyed on the death of Hooker the elder, and that the fee falling on the estate for life could not but drown the estate for life so as to stop the contingent remainders, which, as they could not take effect on
* the death of Hooker the elder, never should afterwards. [* 14] Cites *Kent* and *Harpool*, Vent. 306, T. Jones, 76, 77.

The case is not truly stated, but the point adjudged proves the same thing; it was error of a judgment out of the King's Bench in Ireland; Harpool being seised in fee conveyed to the use of himself for life, remainder to his eldest son for life, remainder to the first and other sons of that son in tail, remainder to himself in fee; the father died before the first son was born; and whether the descent of the reversion in fee to the son did prevent the contingent remainder, was the question. The estate by some act of the father was forfeited to the Crown, and the first son claimed under the intail; but it was held he had no right, and that they need not consider the statute from whence the forfeiture arose; for it was clear that the contingent remainder was destroyed by the consolidation of the estate for life, and the remainder in fee: it was argued that it was not because the inheritance came to the son by act of law; and the opinion in *Cordall's Case* in Cro. Eliz. 315, pl. 10, was cited, but

No. 8. — Hooker v. Hooker, Lee t. Hard. 14, 15.

Twisden took it sorely, and said it was shaking the foundation of all estates.

Insists on this as a case in point, but admitting there might be an opening thinks the fee was so far executed as to entitle the wife to dower; estates in dower are very much favoured in law; the wife of a man seised of a defeasible or base fee shall be endowed till the estate is defeated; so is *Seymor's Case*, 10 Co. Rep. 95; if a disseisor dies seised, the widow shall be endowed as long as the estate continues.

Fazakerley *c cont'*. The question will be, whether the husband had such an estate in these lands as would in all events entitle the wife to dower; it cannot be controverted but the father in this case has made his son a purchaser, and that a man may make his heirs purchasers if he parts with the whole estate. Cites *Mitton* and *Twiford* (a case not elsewhere mentioned).

Apprehends the present case very different from the case of *Kent* and *Harpool*, Vent. 306, because there the fee was vested in the grandfather, and therefore descended to the tenant for life as his heir, and so merged that estate; but this case is not so.

In *Wiscot's Case*, 2 Co. Rep. 60, the distinction is taken where the fee and the estate for life are limited by one and the same conveyance, and where they come in by different titles; as if a man makes his estate to three and to the heirs of one of them, there one of them hath the fee, yet the jointure doth continue; for [* 15] all is but one entire * estate created at one time; this plainly shows that an estate for life is not to be merged in a remainder in fee, if the different titles arise from the same deed as they do in the present case.

In *Plunket* and *Holmes*, T. Raym. 30, it is said, though the fee descends it shall not confound the estate for life, but there shall be a *hiatus* to let in the contingency when it happens; so was *Lewis Bowles's Case*, where notwithstanding the estates were consolidated, yet it was held that they should open to let in the contingent remainders.

If the husband in this case had left a son, nay, if the son had been born after his death, it must have defeated the estate in dower; or if the child had died, should the estate have been revived; as to the case of the disseisor, his estate is to be considered in law as a rightful estate, at least till the contrary is made appear.

It might as well be said that the wife of an heir to whom an executory devise is made should be endowed.

Lord HARDWICKE, Ch. J. Suppose the contingency on the executory devise never happened.

Fazakerley. If such a contingent limitation should entitle persons in dower, or by the curtesy, it would let in the greatest confusion to estates.

In the case of *Boothby* and *Vernon*, 9 Mod. 147, which was in Chancery, Mr. Vernon devised to his sister for life, who was his heir-at-law, and to the heirs of her body, but if she had none, then remainder over; now there the estate descended to her till the contingency, for there was no one else could take, and yet they would not let the husband be tenant by the curtesy.

By 1 Rol. Abr. 676, Let. F. If A. seised in fee of lands covenants to stand seised thereof to the use of himself and his heirs till C. his middle son takes a wife, and after to the use of C. and his heirs; A. dies, by which it descends to B. the elder son of A., who has a wife and dies, and after C. takes a wife; it seems the wife of B. the elder son shall not be endowed of the said estate of her husband, because his estate is ended by an express limitation.

There are cases where it has been held, that if there be a possibility of another estate to take effect, it shall defeat the estate in dower. So is 1 Rol. Abr. 677, pl. 6.

* Besides, here is no possibility that the issue of the mar- [* 16] riage in this case should take by descent or inheritance, they could only take under the deed by purchase, and then the rule in Co. Lit. 1 a., may be considered: if a woman taketh a husband seised of such an estate, so as by the possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit such estate, she shall have her dower, otherwise not.

Lord HARDWICKE, Ch. J., asks why the issue could not take by descent of the reversion.

Fazakerley. If they could, yet of a reversion a wife cannot be endowed; apprehends, therefore, that the estate in the present case is such an estate as a woman cannot be entitled to dower; for the case of *Kent* and *Harpool*, Vent. 306, which is urged by Mr. Serjeant Bellfield not to be parallel to this case, because the fee there descended upon the estate for life, was in the last argument denied by Mr. Justice REEVES to be law: he said it was founded on

Wood and *Ingersole*, Cro. Jac. 260, which in *Fortescue* and *Abbot*, 2 Lev. 202, is resolved not to be law; he insisted that the case of *Plunket* and *Holmes* was strong for the defendant, and that so was *Archer's Case*, Cro. Eliz. 315, directly in point. See the former argument *per tot'*.

Bellfield, Serj. In reply, urges, that Fazakerley's arguments insinuate as if the intent of the parties were to govern; but taking it to be so, it cannot be presumed but that at the time of making the deed it was well known that William Hooker, Jr., would be heir to his father, and that *eo instante* on the death of the father the estate would be consolidated, allowing *Plunket* and *Holmes*, and *Boothby* and *Vernon*, both to be law, yet apprehends they will not affect or come up to the present case.

If the contingent remainder in this case had not been destroyed by the fee's falling upon the estate for life, admits that the issue must have taken by purchase; but as that estate is defeated, and as a contingent remainder once destroyed can never revive, the issue shall take by inheritance as heirs-at-law to their father; the rule in Co. Lit. will not prevail.

Lord HARDWICKE, Ch. J. The general questions in this case are, 1st, Whether the contingent remainder was destroyed by the reversion in fee falling on the estate for life; and 2dly, Admitting that it was not, and that there might be an opening, whether this possibility would destroy the dower?

[*17] * Is inclined to think the remainder is destroyed; the collecting the intent of the parties by any subsequent act *dehors* the conveyance ought not to be taken into consideration, and therefore to say any other matter than what appears upon the face of the conveyance to have been in the contemplation of the parties, cannot be of any weight. *Kent* and *Harpool* was a very strong case.

In *Pusefoy* and *Rodgers*, 2 Sand. 380, the express opinion of HALE and the Judges was, that the purchasing the remainder in fee by the tenant for life totally destroyed the contingent remainder, and that it could never be let in again though the particular estate was revived.

But supposing it were not so, and that there was a possibility of the estates' opening in this case to let in the contingent remainder, yet does not think it would defeat the dower.

The distinctions in the law-books are, that where a remainder

comes in it shall work no wrong; does not find that any of the books say, that if the estates opened during the tenancy in fee, that the wife would not be endowed; in *Cordall's Case*, Cro. Eliz. 316, it is said that it was resolved the estate-tail in that case was not executed for the probability of the mesne estate that might interpose, and that therefore as it was always disjoined during the life of the tenant in tail, his wife could not be endowed; but in 2 Sand. 336, this case is denied to be law; and has seen a note of a like case in the Common Pleas, where it was likewise denied to be law by BRIDGMAN.

But thinks the judgment in *Duncomb* and *Duncomb*, 3 Lev. 437 (p. 803 *ante*), was right, though Mr. Justice LEVINZ seemed even to doubt these. In 50 Edw. III. 4, 5, it was held that the wife of a tenant in special tail after possibility, as who had the remainder to him in tail general, should be endowed notwithstanding the tenancy in special tail, and thinks therefore that the present case is a proper case for the wife to have her dower; finds the books generally so, and that there are no cases against it but *Cordall's Case*, which has several times been denied to be law; and if my brothers are satisfied, I would not put the parties to the expense of a further argument.

PAGE, J. Here is nothing but a possibility which has never happened, nor can now happen, to distinguish this estate from an estate in fee, therefore thinks the wife plainly entitled to dower.

PROBYN, J. The distinctions taken in this case may be allowed, and yet the widow be entitled to dower; besides, it is impossible now the contingencies ever should happen.

* LEE, J. *Kent* and *Harpool* is to me a very strong case; [* 18] the words of the book are a vesting *sub modo*, but here there is an actual limitation to the right heirs, which makes the estate vested, and if an absolute vesting there never can be an opening to let in the remainder, but is an utter destruction of it.

Lord HARDWICKE, Ch. J. The case of *Boothby* and *Vernon* does not come up to this case, for the wife there was but a bare tenant for life with a possibility to her issue.

Cur'. All clear of opinion that the widow in this case is entitled to dower.

Judgment for the demandant.

ENGLISH NOTES.

Having borrowed the definition of Fearne, to found the rule, it seems fitting to preface this note with the criticisms to which that rule has been subjected.

The earliest in point of date is that of the late Mr. Austin (Jurisprudence, p. 895). His observations are as follows: —

"Now I cannot help thinking that this test of a vested remainder is fallacious.

"For we may imagine a contingent remainder which is presently capable of taking effect in possession, in case the preceding estate were presently to end.

"For example: If land be given to A. for life, and, in case B. survive A., to B. in fee, B. has a contingent remainder; for it is uncertain whether B. will survive A. And yet the estate of B., so long as B. lives, is presently capable of taking effect in possession, in case A's. estate presently determines. For if A. were now to die, leaving B. him surviving, B's. estate would not only become vested by the happening of the given contingency, but by the happening of the same event would also take effect in possession; that is to say, B. would become entitled to a present or perfect right coupled with a right of present enjoyment or exercise.

"The present capacity of taking effect in possession, if the possession were now to become vacant, will not then distinguish a vested from a contingent remainder; inasmuch as there are contingent as well as vested remainders to which the same capacity is incident."

These observations are somewhat hypercritical. What Fearne obviously meant to convey was that death at a particular time was not necessarily a contingency in the sense that that word is applied to a contingent remainder. But it does not involve the assertion that death or survivorship may not be the condition upon which a remainder is made to depend. A somewhat analogous difficulty presented itself to Cicero in dealing with a technicality of his own law, the gentile relationship (Cic. Top. 6). He overcame that difficulty by resorting to exclusions: — "Gentiles sunt qui inter se eodem nomine sunt: non est satis; qui ab ingenuis oriundi sunt: ne quidem satis est; quorum majorum nemo servitutem servivit: abest etiam nunc; qui capite non sunt deminuti; hoc fortasse satis est." Fearne seems to have adopted a similar mode of definition. In both cases it is necessary to read the passage as a whole, and not to regard the condition as necessarily excluded because it is common to both. Fearne's position seems to be this. "I premise that death at a particular moment is not necessarily a contingency in the technical sense

in which the word 'contingent' is used when we speak of a 'contingent remainder.' Assume that the remainder is expressly made to depend on a contingency, it is necessary to consider also what will be the result of the determination of the particular estate by some contingency other than that upon which the remainder is expressly made to depend. The criterion is, if, in the latter case, all the conditions for the gift taking effect are fulfilled, it is a vested remainder, otherwise it is contingent." So that if survivorship is made the contingency, it is necessary to consider the effect of the destruction of the particular estate by merger, feoffment, fine or the like. These means of destroying a contingent remainder, it is true, no longer exist, but it is impossible to correctly understand this branch of the law without some acquaintance with the old law, nor has the abolition of these means affected the principles upon which the law depends.

Mr. Challis (Real Property Law, p. 64, 2nd ed.) says: "The doctrine laid down by Fearne in the foregoing passage is almost universally true; though it is possible to imagine a case which would impose some qualification. For example, a limitation in a deed to the use of A. for life, with remainder to the use of his heir, and the heirs male of the body of such heir. In such a case, the heir of A. would take by purchase, because the words of limitation superadded to the word heir would prevent the application of the Rule in *Shelley's Case*, and during the life of A. this estate tail would be a contingent remainder, although the heir apparent or presumptive for the time being would always be ready, during his ancestor's lifetime, to step into the possession if it became vacant. The above cited language does not apply to the case of a person claiming by purchase as heir in remainder expectant upon the estate for life limited to his ancestor, during his ancestor's lifetime; such a remainder being contingent, because the heir's claim is liable at any time to be defeated by his ceasing to be heir, either, if he is heir apparent, by his own death in the ancestor's lifetime, or if he is only heir presumptive, also by the birth of a prior heir."

The answer in this case also seems to be that survivorship is by the express or implied language of the limitation supposed made a condition to the right to the estate, and that estate might formerly have been defeated as previously mentioned before the condition was fulfilled. This criticism, like Austin's, seems to err in assuming that the prior estate can only determine in the manner in which it is, by the express language of the instrument, made determinable. But the illustration put by Mr. Challis will not itself hold good universally. For if A. be illegitimate and a bachelor, then Fearne's definition, even on the narrowest interpretation, will hold good until two conditions upon

which it is not made expressly to depend are fulfilled, — the marriage of A., and the birth of a child.

When Fearne wrote his well-known work on contingent remainders, it was not only necessary that a vested legal freehold estate should precede a legal freehold contingent remainder, but that some such preceding freehold estate should subsist and endure, until the time when the contingent estate vested, or, as was sometimes shortly said, that there should be a sufficient estate of freehold to support it; otherwise a contingent remainder might be destroyed by the act of the owner of the preceding freehold estate, or by acts in the law. This rule was subject to the apparent exception of a remainder which vested in a posthumous child: *Reeve* v. *Long* (H. L. 1695), 1 Salk. 227, confirmed by 10 & 11 Will. III. c. 16, and see the observations of Lord Kenyon, Ch. J., on this case and statute in *Doe* d. *Lancashire* v. *Lancashire* (1792), 5 T. R. 49, 60, 2 R. R. 535, 539. To prevent destruction it was sufficient that the remainder was so limited as to vest the very instant that the particular estate determined. Thus if an estate were limited to B., during the life of A., with remainder to the heirs of the body of A., this would be a good limitation by way of remainder: 1 Inst. 298*a*, 378*b*.

It is essential to the limitation of a valid contingent remainder first, that certain matters of form should be observed, and in the next place, that the contingency upon which the limitation is made to depend should not offend against certain rules of law. These are reduced to rules in chapters 3 and 2 respectively of Fearne's Contingent Remainders.

And first as to matters of form: —

I. Wherever an estate in contingent remainder amounts to a freehold, some vested estate of freehold must precede it, and this is the case whether the limitation is by way of conveyance at common law, or by estates executed by the statute of uses. The principal authorities cited by Fearne are *Chudleigh's Case* (1595), 1 Co. Rep. 120; *Goodright* v. *Cornish* (1694), 1 Salk. 226; *Doe* d. *Mussel* v. *Morgan* (1790), 3 T. R. 763; *Davis* v. *Speed* (1693), 4 Mod. 153, 12 Mod. 38, affirmed Show P. C. 104. A limitation which would formerly have failed for want of a sufficient estate of freehold to support it may now take effect as an executory limitation by 40 & 41 Vict. c. 33, which is set out at length in a subsequent part of this note. But it is conceived that this statute has not affected the rule of construction in the text, and that the principle stated in *Doe* d. *Scott* v. *Roach* (1816), 5 M. & S. 482, 17 R. R. 405, would apply, namely, that whether a devise operates by way of contingent remainder or of executory devise is not a question of the testator's intention, but of its legal operation (the intention having first to be ascertained).

II. There is no necessity for a preceding freehold to support a contingent remainder for years. As pointed out by Fearne, *Corbet* v. *Stone* (1653), T. Raymond, 140, the only authority cited by him, does not cover the whole ground. *Corbet* v. *Stone* is also reported, 6 Bac. Ab. 665, 7th ed. Tit. Remainder, generally accepted as the work of Chief Baron GILBERT, but that report does not conclude the question. Upon principle, however, the view above stated is sound, for a vested estate of freehold limited after a term of years, is a present interest and not a remainder: *Else* v. *Osborn* (1717), 1 P. Wms. 387, 2 Vern. 754; *Bates* v. *Bates* (1698), 1 Ld. Raym. 327, Lutw. 729. The case of copyholds seems to supply an analogy, for there the contingent remainders were supported not by the particular estate in the copyhold, but by the interest which was in the lord: *Habergham* v. *Vincent* (1793), 2 Ves. Jr. 204, 209, 5 T. R. 92; *Stansfield* v. *Habergham* (1804), 10 Ves. 273, 282, 7 R. R. 409, 415. Again, if a rent were granted to one for the life of another, with a remainder over, and the grantee died in the lifetime of the *cestui qui vie*, the terre-tenant would, prior to 29 Car. II. c. 3, and 14 Geo. II. c. 20, have held the land discharged from the rent, and the remainder would have been supported by this interest in the land: *Salter* v. *Boteler* or *Butler* (1602), Yelv. 9, 10, Moor, 664.

A present right of entry taking precedence of the remainder and actually existing when the contingency happened would have been sufficient to support the remainder, but a mere right of action was not sufficient The question is discussed at length in Fearne, but ceased to be of importance after the Statute of Limitations, 3 & 4 Will. IV. c. 27, s. 39, which enacts: "No descent cast, discontinuance or warranty, which may happen or be made, shall toll or defeat any right of entry or action for the recovery of land." It may however be pointed out that the doctrine of descent cast did not apply where the person having a right of entry was under disability or out of the realm: Litt. 1, 3, c. 6. It was also necessary that the disseisor should have had five years' peaceable possession before the descent was cast upon his heir: 32 Hen. VIII. c. 33.

Where the estate was limited by way of use, and was afterwards divested and turned to a right, it was requisite to the execution of the subsequent contingent uses, that either the *cestui que use* under some preceding vested use, or that the feoffees or their heirs should enter, in order to revest the estates: Fearne, 289. In the limitation of common law estates to one for life with a contingent remainder over, whatever had not been disposed of would have reverted to the grantor or feoffor, and he could have entered in right of his estate. Prior to the Statute of Uses, the feoffee to uses would have been in an anal-

ogous position to a trustee, and his estate would have supported the contingent limitations. After that statute the legal mind became much exercised in following the legal estate where there was a limitation of uses to one for life remainder to his first and other sons in tail, remainder over in fee. Here the use to the tenant for life and the contingent remainderman in fee exhausted the fee, yet it was necessary to support the contingent limitations in tail. One answer to the difficulty was by ascribing to the feoffees or releasees to uses a *scintilla juris*, as it was called, which fed the contingent uses as they arose. The other was by holding that the seisin to serve them was *in nubibus*, *in mare*, *in terra*, or *in custodia legis*. The question has however been set at rest by an Act passed at the instigation of Lord St. Leonards, 23 & 24 Vict. c. 38, section 7 of which provides: "Where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder whether expressed or implied, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seisin originally vested in the person seized to the uses, and the continued existence in him, or elsewhere of any seisin to uses or *scintilla juris*, shall not be deemed necessary for the support of or to give effect to future or contingent or executory uses, nor shall any such seisin to uses or *scintilla juris* be deemed to be suspended, or to remain or to subsist in him or elsewhere."

These various terms of art were reproduced by Sir George Rose in composing his celebrated epitaph on Preston: —

> "Stern death hath cast into abeyance here
> A most renowned conveyancer.
> Then lightly on his head be laid
> The sod, that he so oft conveyed.
> In certain faith and hope he sure is
> His soul, like a *scintilla juris*,
> *In nubibus* expectant lies,
> To raise a freehold in the skies."

The first statutory alteration of the law was effected by 7 & 8 Vict. c. 76, s. 8, which abolished for a time contingent remainders, but this Act was repealed by 8 & 9 Vict. c. 106. By section 8 of the latter statute it is enacted: "A contingent remainder, existing at any time after the 31st day of December, 1844, shall be, and, if created before the passing of this Act, shall be deemed to have been, capable of taking effect, notwithstanding the determination, by forfeiture, surrender or merger, of any preceding estate of freehold, in the same manner in all respects, as if such determination had not happened."

The same Statute (8 & 9 Vict. c. 106) provides, s. 4, that after the 1st Oct. 1845, a feoffment shall not have a tortious operation, so that independently of s. 8 this cause of forfeiture would have ceased to exist. *Archer's Case* (1597), 1 Co. Rep. 66*b*, was an instance of this kind of forfeiture. A fine or recovery suffered by a tenant for life would also formerly have operated as a forfeiture of the estate and a destruction of the contingent remainder. *Lloyd* v. *Brooking* (1673), 1 Vent. 188; *Doe* d. *Dary* v. *Burnsall* (1794), 6 T. R. 30, 3 R. R. 113; *Burnsall* v. *Dary* (1798), 1 Bos. & P. 215; *Doe* d. *Gilman*, v. *Elvey* (1803), 4 East, 313, 1 Smith, 94, 7 R. R. 579. This cause of forfeiture was abolished by the Fines and Recoveries Act (3 & 4 Will. IV. c. 74), s. 2. A tenant for life cannot execute a disentailing assurance under that statute: *Slater* v. *Dangerfield*, No. 4, p. 759, *supra*.

A surrender by a tenant for life of copyholds did not destroy a contingent remainder, for here the freehold, which was in the lord, supported the estate, but where the tenant for life took an enfranchisement, the contingent remainder was destroyed: *Roe* d. *Clements* v. *Briggs* (1812), 16 East, 406.

Upon a similar reasoning there could be no destruction of a contingent remainder, where the estate was equitable, the legal estate outstanding in third parties being sufficient to support the limitation; *Astley* v. *Micklethwait* (1880), 15 Ch. D. 59, 49 L. J. Ch. 672, 43 L. T. 58, 28 W. R. 811; *In re Freme*, *Freme* v. *Logan* (1891), 1891, 3 Ch. 167, 60 L. J. Ch. 562, 65 L. T. 183, 39 W. R. 696.

As a comparatively recent case in which the operation of merger destroyed a contingent remainder limited before 8 & 9 Vict. c. 106, see *Egerton* v. *Massey* (1857), 3 C. B. N. S. 338, 27 L. J. C. P. 11.

By the Contingent Remainders Act (40 & 41 Vict. c. 33), it is enacted: "Every contingent remainder created by any instrument executed after the passing of this Act, or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation." It is not quite clear how far this Act has been affected by the restriction placed upon executory limitations by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39). Section 10 of this Act, which applies to executory limitations contained in instruments coming into operation after the 31st December, 1882, enacts: "Where there is a

person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period of time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of 21 years, of the class on default or failure whereof the limitation over was to take effect."

Since the passing of the Contingent Remainders Act, it has been customary to omit a limitation to trustees to preserve contingent remainders, but, as pointed out by the late Mr. Joshua Williams, there is one limitation by way of contingent remainder which would not be preserved by the operation of the Statute. "A gift to the first son of B. who shall attain the age of twenty-one years is valid as a springing or shifting use or executory devise, when not preceded by an estate of freehold to turn it into a contingent remainder. But . . . a gift to the first son of B. who shall attain the age of twenty-four years is void for remoteness, when not preceded by a particular estate of freehold. When so preceded it is . . . a good contingent remainder; but if the preceding estate which supports it should determine naturally before any son of B. should attain twenty-four, then this remainder will still fail, and can derive no support from the recent Act." Williams, Real Property, 371, 15th ed. The estate limited to trustees to preserve contingent remainders was a trust estate, and a Court of Equity would interpose to prevent them from concurring with the owner of the particular estate in defeating the contingent limitations: *Biscoe* v. *Perkins* (1813), 1 Ves. & B. 485, 12 R. R. 279.

III. No particular estate of freehold is required to support an equitable estate in contingent remainder, where the fee is immediately vested in the trustees: *Chapman* v. *Blisset* (1735), Cas. *temp.* Talbot, 145. Indeed a legal estate outstanding is sufficient to support a contingent remainder, *Astley* v. *Micklethwait* (1880), 15 Ch. D. 59, 49 L. J. Ch. 672, 43 L. T. 88, 28 W. R. 811; *In re Freme*, *Freme* v. *Logan* (1891), 1891, 3 Ch. 167, 60 L. J. Ch. 562, 65 L. T. 183, 39 W. R. 696.

IV. The estate supporting and the remainder supported must both be created by one and the same deed or instrument. 1 Inst. 143; *Key* v. *Gamble* (1679), T. Jones, 123, 124; *Snowe* v. *Cutler* (1665), 1 Lev. 135, T. Raym. 162, Sid. 153. The rule would, it is apprehended, be satisfied where the one estate was limited in a will and the other in a codicil: *Hayes* d. *Foorde* v. *Foorde* (1770), 2 W. Bl. 698.

The contingency upon which a gift is made to depend must not be obnoxious to some rule of law. Thus a limitation by deed to a bastard

not *in esse* is in general void: *Blodwell* v. *Edwards* (1596), Cro. Eliz. 509. There is a *dictum*, however, that a provision for an illegitimate child already begotten may be made by deed: *Re Shaw*, *Robinson* v. *Shaw* (1894), 1894, 2 Ch. 573, 63 L. J. Ch. 770, 71 L. T. 79, 43 W. R. 43. This would bring cases on deeds in agreement with those on wills, where a gift to an illegitimate child of which a woman is enceinte is valid: *Gordon* v. *Gordon* (1816), 1 Mer. 141, 12 R. R. 88; *Evans* v. *Massey* (1819), 8 Price 22, 22 R. R. 691. The subject is discussed, and the later authorities referred to, in *Re Hastie's Trusts* (1887), 35 Ch. D. 728, 56 L. J. Ch. 792, 57 L. T. 168. Again, a limitation dependent upon the settlor's bankruptcy would be void. *Higginbotham* v. *Holme* (1812), 19 Ves. 88, 12 R. R. 146. But this is restricted to a settlement of the bankrupt's own property; *Ex parte Hodgson* (1812), 19 Ves. 206, 12 R. R. 171; *Ex parte Wreford* (1892), 1892, 1 Q. B. 872, 66 L. T. 353, 40 W. R. 430. Property of a settlor may be limited so as to determine on an involuntary alienation, as in the case of an execution; and where property is so settled, the trustee in bankruptcy will be ousted if his title accrues after the forfeiture: *Re Detmold*, *Detmold* v. *Detmold* (1889), 40 Ch. D. 585, 58 L. J. Ch. 495, 61 L. T. 21, 37 W. R. 442.

So too a limitation on a contingency which is too remote is invalid. Thus a limitation to an unborn child for life, followed by a remainder to an unborn child of that unborn child as purchaser is void: *Whitley* v. *Mitchell* (C. A. 1890), 44 Ch. D. 85, 59 L. J. Ch. 485, 38 W. R. 337: *In re Frost*, *Frost* v. *Frost* (1890), 43 Ch. D. 246, 59 L. J. Ch. 118, 62 L. T. 25, 38 W. R. 264. It is only right to point out that the soundness of these decisions has been challenged first by Mr. John Vaizey in 6 Law Quarterly Review, 410, and by an anonymous contributor to the Solicitors' Journal (34 Sol. J. 343). Without in any way entering into the relative values of the two views, it seems fitting to state that the grounds of objection are supported by a reference to decisions and text books. The rule contended for by the objectors is that enunciated by Preston in arguing *Mogg* v. *Mogg* (1812), 1 Mer. 654, 664: "A gift to an unborn child for life is good if it stops there: but, if a remainder is added to his children or issue as purchasers, it is not good, unless there be a limitation of the time within which it is to take effect." That is introducing the rule against perpetuities, which renders void a gift which does not vest during a life or lives in being and a term of 21 years, as a term in gross with a period added for gestation where gestation exists: *Cadell* v. *Palmer* (H. L. 1833), 1 Cl. & Fin. 372, Tudor's Lead. Cas. Conv. 424. It may also be stated that the rule in *Whitley* v. *Mitchell* is there laid down as a remnant of the rule against double possibilities, a rule established in an age which

discovered that there could not be an use engrafted on or engendered of an use. Butler, who is relied on as an authority in *Whitley* v. *Mitchell*, himself states: "The expression of a possibility upon a possibility, which in the language of Lord Coke, cited in this place, is never admitted by intendment of law, must not be understood in too large a sense. A remainder to the son of A., who first or alone shall attain twenty-one, is so far a possibility on a possibility, as it depends for its effect on the happening of two possible events, that A. shall have an eldest or only son, and that such son may attain twenty-one; but the validity of such a remainder is unquestionable: Fearne, Cont. Rem. 251, Butler's note.

Again, a contingency inconsistent with the estate limited would be void. Of this character would be a remainder contingent upon a tenant in tail enlarging his estate: *King* v. *Burchell* (1759), No. 6. p. 782, *ante*. It is to this principle that Butler refers a shifting of the property under a name and arms clause: Fearne, Cont. Rem. 253, Butler's note. The following are the most recent decisions on this clause: *In re Finch, Abbiss* v. *Burney* (C. A. 1880), 17 Ch. D. 211, 50 L. J. Ch. 348, 44 L. T. 437, 29 W. R. 449; *In re Cornwallis, Cornwallis* v. *Wykeham-Martin* (1886), 32 Ch. D. 388, 55 L. J. Ch. 716, 54 L. T. 844. An attempt to fetter the right of a tenant in fee to alien is void: *Re Dugdale, Dugdale* v. *Dugdale* (1888), 38 Ch. D. 176, 57 L. J. Ch. 634, 58 L. T. 581. But it seems that an estate in fee may be limited with a restriction on the power of alienation as regards persons: *Doe* d. *Gill* v. *Pearson* (1805), 6 East, 173, 2 Smith, 295, 8 R. R. 447. As a corollary, where an estate previously limited is made to cease before its natural expiration, the condition will be void; but where a remainder is made to vest in a person, and the enjoyment is postponed until after the determination of the estate previously limited, the condition will be good. *Cogan* v. *Cogan* (1594), Cro. Eliz. 360, is an example of the former; *Colthirst* v. *Bejushin* (1550), Plowd. 23, of the latter. In *Cogan* v. *Cogan*, the contingent limitation was intended to determine the particular estate, and to transfer the property to another, but it is clear that where the contingent limitation is to operate as an enlargement of the particular estate it will be good: *Goodtitle* d. *Winckles* v. *Billington* (1781), Dougl. 725, *Lord Stafford's Case* (1610), 8 Co. Rep. 74.

AMERICAN NOTES.

There seems to be no difficulty in applying this Rule if the remaindermen are designated by name. *Doe* v. *Considine*, 6 Wallace (U. S. Sup. Ct.), 458; *Hudson* v. *Wadsworth*, 8 Connecticut, 359; *Andrews* v. *Lowthrop*, 17 Rhode Island, 60; *Black* v. *Williams*, 51 Hun (New York), 280; *Hoover* v. *Hoover*, 116

Nos. 7, 8. — Duncomb v. Duncomb; Hooker v. Hooker. — Notes.

Indiana, 498; *Lehndorf* v. *Cope*, 122 Illinois, 317; *Mercantile Bank* v. *Ballard's Assignee*, 83 Kentucky, 481; *Wallace* v. *Wallace*, Virginia, ; *Kennard* v. *Kennard*, 63 New Hampshire, 303.

Or if they are designated by description, and persons are in being answering that description, during the continuance of the particular estate. *McArthur* v. *Scott*, 113 United States, 340; *Sager* v. *Galloway*, 113 Penn. State, 509; *Andrews* v. *Lowthrop*, 17 Rhode Island, 60; *McDaniel* v. *Allen*, 64 Mississippi, 417.

A learned commentator, in 20 Am. & Eng. Enc. of Law, p. 843, observes: "It is therefore submitted that in order that a remainder may vest in interest, not only must it be capable of taking effect in possession at any moment the possession may become vacant, but there must also be some certain and determinate person *in esse* and ascertained who answers the description of the remainder-man at some time during the continuance of the particular estate and not merely at its determination."

"And where the limitation is so framed that the persons to take as remaindermen under the description are determined the very instant the particular estate expires, the question arises, whether in the absence of any collateral contingency, a person who would have answered the description if he had survived the life tenant, takes a contingent remainder or a vested remainder subject to being divested in the event of his death before the life-tenant."

Many cases hold that a remainder is necessarily contingent when it is impossible, until the death of the life-tenant, to tell who are entitled to take under the description. As where remainder is to such children as may then be living: *Colby* v. *Duncan*, 139 Massachusetts, 398; *Hunt* v. *Hunt*, 37 Maine, 333; *Teets* v. *Weise*, 47 New Jersey Law, 154; *Mercantile Trust & Deposit Co.*, 71 Maryland, 166; *Dean* v. *Nicholas*, 15 Ohio L. Journ. 278; *Paul* v. *Frierson*, 21 Florida, 529; *Grier* v. *McAfee*, 82 North Carolina, 187; *Augustus* v. *Seabolt*, 3 Metcalfe (Kentucky), 155; *White's Trustee* v. *White*, 86 Kentucky, 602.

Thus it has been held in case of devise to A. for life, and at his death to his eldest male heir: *Alverson* v. *Randall*, 13 Rhode Island, 71, or to the oldest surviving son in fee: *Robertson* v. *Wilson*, 38 New Hampshire, 48. Or to the heirs of a husband and wife who had the life estate: *Richardson* v. *Wheatland*, 7 Metcalf (Mass.), 169; *Knight* v. *Weatherwax*, 7 Paige (N. Y. Chancery), 182; *Reinders* v. *Koppelmann*, 68 Missouri, 482. Or to children surviving the life-tenant: *Roundtree* v. *Roundtree*, 26 South Carolina, 450; *Olney* v. *Hull*, 21 Pickering (Mass.), 311; *Woelpper's Appeal*, 126 Pennsylvania State, 562. So also *Vinson* v. *Vinson*, 33 Georgia, 451; *Roberts* v. *Ogbourne*, 37 Alabama, 178; and cases cited by Randolph and Talcott, in 2 Jarman on Wills, pp. 616, 617.

Other courts follow the rule introduced by the New York Statutes, copied in many other States, that an estate is vested "where there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate," under which it has been adjudged that where the remainder-men are determined upon the expiration of the life-estate, one who would answer that description if he survived the

life-tenant takes a vested interest, subject to divestiture if he dies before him. *Moore* v. *Littel*, 41 New York, 66, three judges dissenting. (Compare *Dana* v. *Murray*, 122 New York, 604.)

This statute was deemed by Chancellor KENT to express fully and accurately the common-law definition of a vested remainder. 4 Com. 202. And on this eminent authority it was said in *Croxall* v. *Shererd*, 5 Wallace (U. S. Sup. Ct.), 288: "Where an estate is granted to one for life, and to such of his children as should be living after his death, a present right to future possession vests at once in such as are living, subject to open and let in after-born children, and to be divested as to those who shall die without issue." So held in *Kumpe* v. *Coons*, 63 Alabama, 452; *Smith* v. *West*, 103 Illinois, 332 (compare *Siddons* v. *Cockrell*, 131 Illinois, 653); *Davidson* v. *Koehler*, 76 Indiana, 398 (compare *Hoover* v. *Hoover*, 116 Indiana, 498); *Cruger* v. *Heyward*, 2 Desaussure (So. Car.), 94. In *Croxall* v. *Shererd*, *supra*, the Court said, approving Kent's opinion: "The struggle with the Courts has always been for that construction which gives to the remainder a vested rather than a contingent character. A remainder is never held contingent when, consistently with the intention, it can be held to be vested. If an estate be granted for life to one person, and any number of remainders for life to others in succession, and finally a remainder in fee simple or fee tail, each of the grantees of a remainder for life takes at once a vested estate, although there be no probability, and scarcely a possibility, that it will ever, as to most of them, vest in possession."

Some leading cases of vested remainders are *Nodine* v. *Greenfield*, 7 Paige (N. Y. Chancery), 544; 34 Am. Dec. 363; *Bentley* v. *Long*, 1 Strobhart Equity (So. Car.), 43; 47 Am. Dec. 523; *Burleigh* v. *Clough*, 52 New Hampshire, 267; 13 Am. Rep. 23 (a learned examination); *Gibbens* v. *Gibbens*, 140 Massachusetts, 102; 54 Am. Rep. 453 — "At the decease of my wife, all my estate, real and personal, shall go to and be equally divided among my children, the issue of a deceased child standing in the place of a parent;" *Avery* v. *Everett*, 110 New York, 317; 6 Am. St. Rep. 368, followed in *Davis* v. *Laning*, 85 Texas, 39; *Mercantile Bank* v. *Ballard's Assignee*, 83 Kentucky, 481; 4 Am. St. Rep. 160; *Bruce* v. *Bissell*, 119 Indiana, 525; 12 Am. St. Rep. 436; *L'Etourneau* v. *Henquenet*, 89 Michigan, 428; 28 Am. St. Rep. 310; *Kent* v. *Church of St. Michael*, 136 New York, 10; 32 Am. St. Rep. 693; *Chapin* v. *Crow*, 147 Illinois, 219; 37 Am. St. Rep. 213, citing *Moore* v. *Littel*; *Ducker* v. *Burham*, 146 Illinois, 9; 37 Am. St. Rep. 135; *Gindrat* v. *Western Railroad*, 96 Alabama, 162; 19 Lawyers' Rep. Annotated, 839; *Jones* v. *Knappen*, 63 Vermont, 391; 14 Lawyers' Rep. Annotated, 293; *Wengerd's Appeal*, 143 Penn. State, 615; 13 Lawyers' Rep. Annotated, 360.

And some leading cases of contingent remainders are, *Stump* v. *Findlay*, 2 Rawle (Penn.), 168; 19 Am. Dec. 632; *Matter of Ryder*, 11 Paige (N. Y. Chancery), 185; 42 Am. Dec. 109; *Craig* v. *Warner*, 5 Mackey (District of Columbia), 460; 60 Am. Rep. 381; *Haward* v. *Peavey*, 128 Illinois, 430; 15 Am. St. Rep. 120; *Coggin's Appeal*, 124 Penn. State, 10; 10 Am. St. Rep. 565; *Starnes* v. *Hill*, 112 North Carolina, 1; 22 Lawyers' Rep. Annotated, 598, quoting the language of the Rule.

No. 9. — Cole v. Levingston, 1 Vent. 224. — Rule.

The doctrine of *Moore* v. *Littel, supra*, was reaffirmed in *House* v. *Jackson*, 50 New York, 165. Mr. Washburn characterizes the doctrine as "equally remarkable" with that of *Hall* v. *Nute*, 38 New Hampshire, 422; *Hayes* v. *Tabor*, 41 *ibid.* 521. There a devise to A. for life, and on his death to B., was adjudged contingent, because A.'s estate might be forfeited or merged in his lifetime. Mr. Gray speaks of these last two cases as "inexplicable observations of an able and learned but eccentric court," without precedent or following (Perpetuities), and Mr. Washburn condemns them. Of the New York doctrine, the latter says that most other courts regard the remainder in *Moore* v. *Littel* as contingent. (2 Real Property, 548, note.)

No. 9. — COLE *v.* LEVINGSTON.

(K. B. 1673.)

No. 10. — HOLMES *v.* MEYNEL.

(K. B. 1682.)

No. 11. — DOE *d.* WATTS *c.* WAINEWRIGHT.

(K. B. 1793.)

RULE.

ESTATES may arise by implication.

Cross-remainders will be implied in a devise from the terms of a gift over.

In the case of a deed, where the limitations are of the legal estate, cross-remainders can only be created by express words, but no technical precise form of words is necessary to create that estate.

Cole v. Levingston.

1 Vent. 224, (s. c. 2 & 3 Keb. *passim*).

Deed. — Cross-remainders not implied.

In Ejectment, upon a long and intricate special verdict (the Chief Justice said, Never was the like in Westminster Hall) these following points were resolved by the Court, and declared by Hale as the opinion of himself and the rest of the Judges.

First, That where one covenants to stand seised to the use of A. and B. and the heirs of their bodies, of part of his land, and if they die without issue of their bodies, then that it shall remain,

&c., and of another part of his land to the use of C., D. and E. and the heirs of their bodies, and if they die without issue of their bodies, then to remain, &c. that here there are no cross-remainders created by implication, for there shall never be such remainders upon construction of a deed, though sometimes there are in case of a will. 1 Roll. 837.

Secondly, As this case is, there would be no cross-remainders if it were in a will, for cross-remainders shall not rise between three unless the words do very plainly express the intent of the devisor to be so; as where black acre is devised to A., white acre to B. and green acre to C. and if they die without issue of their bodies *vel alterius eorum;* then to remain; there by reason of the words *alterius eor'*, cross-remainders shall be, Dyer 330. But otherwise there would not; *Gilbert* v. *Witty* and others, 2 Cro. 655. And in this case, though some of the limitations are between two, there shall be no cross-remainders in them, because there are others between three, and the intent shall be taken to be the same in all.

Holmes v. Meynel.

T. Raymond 452—456 (s. c. 1 T. Jones, 172).

Devise. — Estate by implication. — Cross-remainders.

Of the demise of Francis Meynel of the moiety of the manors of Meynel-Langley and Kirk-Langley 300 messuages, 500 acres of land, 200 acres of meadow and 500 acres of pasture in Meynel-Langley and Kirk-Langley. Upon not guilty pleaded, the jury find a special verdict, *viz:* —

That one Isaac Meynel was seised in fee entirely as well of the manor of Meynel and Kirk-Langley, as of all the tenements in the declaration, 2 November, 1675, made his will in writing thus: — "I give and devise all my lands in Meynel and Kirk-Langley in the county of Derby, unto my two daughters Elizabeth and Anne Meynel, and their heirs, equally to be divided betwixt them: and in case they happen to die without issue; then I give and devise all the said lands to my nephew Francis Meynel, eldest son of my brother William Meynel deceased, and to the heirs male of his body and for want of such issue, to William Meynel, brother of the said Francis, and the heirs male of his body, the remainder to Godfrey Meynel, brother of the said Francis and William in tail male, the remainder to John, brother of the said Francis, William

and Godfrey in tail male; and for want of such issue I give and devise the said lands to the next heir male of the name and family of the Meynels," and died without issue male, having issue Elizabeth, now defendant, and Anne, his two only daughters, who entered and became seised *prout Lex, etc.* Anne died without issue, Francis the lessor of the plaintiff entered.

And if for the plaintiff, for the plaintiff, etc.

After several arguments at the bar, the Court by the mouth of the Chief Justice gave judgment for the defendant. I had prepared my argument, as the rest of the judges had done; but in regard we were all unanimous, it was thought needless for us all to argue. My argument follows.

In this case two points have been raised.

* 1. What estate Elizabeth and Anne have by this will? [* 453]

2. Whether upon the death of Anne without issue Francis in remainder takes anything?

As to the 1st, I conclude that Elizabeth and Anne have several estates-tail by moieties; for though the devise be to them and their heirs in the beginning, yet when the will afterwards says, And if they die without issue, it shows that (heirs) was intended heirs of their bodies: so it has been construed in grants. 5 H. 5, 6*a*. Lands granted to man and his wife *aliis hæredibus* of the husband, if the heirs of the husband and wife shall die *sine hæredibus de se*, the husband and wife had an intail. *A fortiori* in a will, 2 Cro. 448. *King* versus *Rumbal*, where many books are cited, and Bridgman 1 *Pell* versus *Brown;* so that as to this point, 'tis not much denied on either side.

As to the 2nd point. I conceive Francis takes nothing upon the death of Anne, but that her part remains to her sister by way of a cross-remainder.

1. I take notice that the main design and intent of the testator was, that in the first place he would take care of his own children, and then look after the continuation of his own name and family; for first he gives to his daughters, and afterwards the remainders to his nephews, then to the next heir male of the name and family of the Meynels, following herein the law of nature, and the ordinary course of the world.

That this was the intent appears by the words of the will. 1. In case (they) die without issue, *i. e.* both of them, 'tis not they or either of them. 2. All the said lands, which intends both parts, and

not a moiety; and all cannot pass till both are dead without issue. And if the testator had been asked, what he meant by the lands going to his nephew after the death of his daughters without issue, he would have answered, that he should have the lands when both of his daughters should be dead without issue, and not before.

2. This intent consists with the rules of law, for 'tis a general rule, That a will shall never be construed by implication to disinherit the heir-at-law, unless such implication be necessary, and not only constructive and possible, 13 H. 7, 17, Br. Devise 52. A man devised his goods to his wife and after the decease of his wife, his son and heir shall have the house wherein his goods are; the son shall not have the house during the wife's life; for though [* 454] it be not * expressly devised to the wife, yet by his intent it appears, that the son shall not have it during her life, and therefore it is a good devise to the wife by implication, and the devisor's intent, but if it were a devise to a stranger after the death of the wife, the heir shall have it during the wife's life, because it is not a devise to the wife by a necessary implication.

Hill 20 and 21 Car. 2, *C. B. Gardiner* versus *Sheldon*, Vaughan 295, William Rose made his will thus: My will and meaning is, that if it happens that my son George, Mary and Katherine my daughters, do die without issue of their bodies, then all my freehold shall come, remain and be to my nephew William Rose and his heirs for ever. Resolved, the son and daughters had no estate by the will, and so are the books of Moore, 7 pl. 24 and 123 pl. 269, 2 Cro. 74 and 75, *Horton* versus *Horton*.

In our case here is no necessary implication that Francis must take immediately after the death of Anne without issue, for Elizabeth is still alive, and he is not to have the land till the devisor's daughters shall die without issue.

2. Had the testator set forth at length the cross-remainders, this question had been out of doubt. Now he being *inops consilii*, we ought by construction to make his words answer his intent, appearing in other parts of the will, as near as may be.

As for authorities we must not expect many in case of a will, for the old books cannot have any unless of a devise by custom, which is rare; and every case upon a will stands upon its own legs, according to the penning thereof; yet Mich. 32, Eliz. C. B. 4 Leon. 14 pl. 51, is direct in the point. The case was: A. seised of lands had issue two sons, and devised part to his eldest in tail, and the

other part to his younger in tail, with this clause in the will — That if any of his sons died without issue, that then the whole land should remain to a stranger in fee — and died; the sons entered into the lands devised to them respectively, and the younger died without issue, and he to whom the fee was devised entered; and adjudged that his entry was not lawful, and that the eldest son should have the land by the implicative devise.

As to the cases objected, which are, 2 Cro. 655, *Gilbert* versus *Witty*. A devise of three several messuages to three several children, Provided if all my said children shall die without issue of their bodies, then all the said messuages shall * remain to my wife and her heirs, and two died. Resolved the wife shall have the two parts. [* 455]

Resp. That differs much from this case, because there are three devises, in which case cross-remainders will be more difficultly settled; for whether the survivors shall be joint tenants for life with several inheritances, or tenants in common in tail, would be perhaps some question, as appears by the report of the same case. 2 Roll., Rep. 281. But in our case no such difficulty can arise.

Object. Pasch. 12, Jac. C. B. *Johnson* versus *Smart*, 2 Roll. Abr. 416 F. pl. 3. A devise to two for their lives, remainder to their two sons, equally to be divided and to their heirs, and each of them to be the other's heir; and if they both shall die without issue, the remainder to another; one dies, his share shall go to the remainder-man.

Resp. This case cannot be law, because 'tis apparent that each of them was to be the other's heir which is as plain a cross-remainder as can be. 2. This case was received by Roll. from some other hand, and it is reported in a private report to be quite another case; but 'twas upon evidence in a trial at bar, in a case of a surrender of a copyhold, and not a devise; and Roll. could not be a reporter at that time, for 'twas before he came to study the law. And each to be the other's heir makes a cross-remainder. Br. Devise 38, Done 44, Pet. Br. 94, *b.* pl. 431.

Object. Dyer 326 *a*. *Huntley's case*, which was, that he being seised of two houses, one in St. Michael Queenhith and the other in St. Michael Flesh-Shambles, which last parish was laid to the parish of Christ Church in London, and devises that house in St. Michael Flesh-Shambles to his wife for life, the remainder to a woman and her brother, and the heirs of their bodies, and for

default of such issue, to the right heirs of the devisor; the brother dies without issue; the sister hath issue, and dies; and whether the entire house shall go to the issue, or only the moiety, and the other moiety to the heir of the devisor, was the question.

Resp. Though this question is put in the book, yet I find no argument of it; and that case will differ from this, in regard there the particular estates were not limited to the children, but to strangers and so intrenches not upon the rule in 13 H. 7, whereby an heir is disinherited. And Dyer seems to intimate that the pleading of the case was more insisted upon than this point; for he puts the stress of the case to lie upon the pleading, that [* 456] the house lay in the * parish of Christ Church, whereas the will says in St. Michael Flesh-Shambles, without averment of the union of those parishes. And 1 And. 21, says, the stress of the case was upon the apportionment of rent.

As to *Justice Windham's case* [5 Co. Rep. 7*b*.], 'tis not to our purpose, because that is the case of a deed, which must be taken strongest against the grantor: here it is the case of a will, the construction whereof is to be made according to the intent of the devisor.

And so upon the whole matter, in regard the words make against the plaintiff, and the intent makes for the defendant, I conceive judgment ought to be given for the defendant.

Doe d. Watts v. Wainewright.

5 Term Reports, 427-431, (2 R. R. 634).

Deed. — Cross-remainders by informal words.

[427] The limitations in a deed were to trustees to the use of A. and B. for their lives, remainder to the use of the child or children of B. in tail as tenants in common; "and in case any such child or children should die without issue of his, her, or their bodies, then the part of such child should be and remain to the use of the *surviving* child or children of B. and the heirs of his, her, or their bodies issuing, and in case *all* the said children should die without issue," &c. then to A. in fee: held that the deed created cross-remainders between the children of B.; and that on the death of one without issue, his share vested in a surviving child and the heir of one deceased, as tenants in common.

On the trial of this ejectment for a sixth part of the manor of Grafton, and other lands, in Oxfordshire, a special case was reserved for the opinion of this Court.

No. 11. — Doe d. Watts v. Wainewright, 5 T. R. 427, 428.

By indentures of lease and release bearing date the 30th and 31st of July 1718, the release being of three parts, and made between Mary Marner widow, and Richard Abell and Elizabeth his wife, of the first part; Mary Abell and Robert Abell, son and daughter of Richard and Elizabeth Abell, of the second part; and W. Billers and E. Edwards, of the third part; Mary Marner and Richard Abell, in consideration of love and affection, granted and released unto Billers and Edwards, and to their heirs, the manor or lordship of Grafton, and divers lands, &c. (in the release particularly described), in the county of Oxford, to hold unto Billers and Edwards, and their heirs, to the following uses, viz. as to one *moiety to the use of Mary Marner for [*428] life, and as to the other moiety, as also to the moiety limited to Mary Marner for her life; from and after her decease to the use of Richard Abell and Elizabeth his wife, for their lives, and the life of the longest liver of them; and from and after the decease of the survivor of them to the use of Mary Abell for her life; and from and after her decease to the use of such child or children as Mary Abell should thereafter have, as tenants in common (if more than one), and the heirs of their several bodies issuing: "And in case any such child or children should die without issue of his, her, or their body or bodies issuing, then the part or parts of him, her, or them so dying without issue, should be and remain *to the use of the surviving child or children* of the said Mary Abell, and the heirs of his, her, or their respective bodies issuing, and so *toties quoties* as any of the said children should die without issue till there should be only one child left; and in case *all* the said children should die without issue, or if the said Mary Abell should have no issue of her body, then to the said Robert Abell, his heirs and assigns for ever." Mary Abell married John Wainewright; and they are both long since dead, leaving issue three children, namely, John, Mary, and Robert Wainewright. Mary, the daughter, married Reader Watts, and, having survived him, died several years ago, leaving issue John Watts, the lessor of the plaintiff, her eldest son, and two other children. John Wainewright, the son, died on the 20th of June, 1792, unmarried, and without issue, and without having levied a fine or suffered a recovery of his part of the said manor, &c. leaving his brother (the defendant) Robert Wainewright and the lessor of the plaintiff, his deceased sister's eldest son, surviving him.

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Williams for the lessor of the plaintiff, after stating the question to be, Whether the share of John Wainewright, who died without issue, vested in his surviving brother Robert the defendant exclusively? or, Whether in him and the lessor of the plaintiff as tenants in common in tail? contended for the latter proposition. However at first this may appear to be an attempt to raise cross-remainders by implication, yet upon further consideration it will be found that cross-remainders are here limited, in express, though not perhaps in formal, terms; and the only question is, What is meant by the words "*surviving child or children,*" used in that part which creates the cross-remainders? Now, in order to effectuate the manifest intent of the settlors, these words must be taken to extend to the several branches of Mary Abell's children, [* 429] and consequently to include the lessor of the plaintiff, who stands in the place of his mother, who was one of the daughters of Mary Abell. It must be remembered that this was a permanent family provision for M. Abell, the daughter of one of the settlors and her children, and the issue of those children. None were to be preferred, but all were to take alike. It is clear that it could not have been the intent of the settlors that there should be any right of survivorship between the children of M. Abell in exclusion of any of their respective issues, because the limitation is to them and their issue in tail. Then, to prevent any doubt which might have arisen, cross-remainders were created by express words in case of the death of any of M. Abell's children without issue. And the estate is not to vest in any surviving child until *all* the children of M. A. are dead without issue. Suppose this had been a cross-remainder in a will, there could have been no doubt, because the intent, which is so evident, would have governed the construction. And though there be a difference as to cross-remainders between a deed and a will, in the latter of which they may be implied, though not in the former, yet in this respect there is no difference; for here cross-remainders are expressly created; the Court are not required to supply words of limitation; but the question arises on the construction of the words used. That construction must be the same, whether the words arise in a will or a deed, especially a deed to uses like the present; in both cases the Courts will put such a construction on the words as will best effectuate the intent of the parties, unless it be contrary to any rule of law. Now here the intention was perfectly legal,

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and there is no necessary technical way of expressing it. *Beresford's case*, 7 Co. Rep. 40. *Lisle* v. *Gray*, Sir T. Jon. 114. 2 Lev. 223. 2 Atk. 90. *Osgood* v. *Strode*, 2 P. Wms. 257. [He was then stopped by the Court.]

Wainewright, *contrà*. The Court will not raise cross-remainders by implication in this case; 1st, because the instrument in which it is attempted to be done is a deed; 2dly, because there are more than two parties between whom such cross-remainders must be raised, if at all; and, 3dly, there is no apparent intent to raise them upon the face of the deed. First, the case of *Cole* v. *Levingston*, 1 Ventr. 224 (No. 9 p. 821, *ante*), is express, that there never shall be cross-remainders by implication upon construction of a deed, though sometimes they are implied in cases of wills. In *Twisden* v. * *Lock*, Ambl. 663, Lord CAMDEN said he was [* 430] clear that there could not be cross-remainders by implication in a deed: but that being the case of articles executory before marriage, it was held that they might be implied to effectuate the apparent intent. But this is the case of a settlement executed after marriage, in which the Court will not indulge themselves in so great a latitude. The settlement here is voluntary, and must be construed like all other deeds. 2dly, In the same case of *Cole* v. *Levingston* it is said, that even in the case of a will, cross-remainders shall not be raised between more than two, unless the words do very plainly express the intent of the devisor to be so; and Dyer, 330, is to the same effect. In *Gilbert* v. *Witty*, Cro. Jac. 656, Doderidge, J. was of opinion that there could not be cross-remainders by implication between several. In *Pery* v. *White*, Cowp. 777, and *Phipard* v. *Mansfield*, Cowp. 797, Lord MANSFIELD admitted that even in cases of wills the presumption of law was against raising cross-remainders by implication between more than two, unless there were strong circumstances of intention to rebut that presumption. Now here the cross-remainders, if raised at all, must be between three. 3dly, There are no circumstances here to evince the intent of the settlors to raise cross-remainders. This is a settlement after marriage, and therefore to be construed more strictly than articles before marriage, which are considered as rough draughts of what is intended to be afterwards perfected, and reduced into legal form. There is no hardship upon any party, because the issue of each child of M. Abell will take what belonged to his parent. The words "surviving child or children" of

M. Abell must be confined to her own immediate offspring. But at least it is ambiguous; and the defendant being the heir at law of the deceased child, the Court will be still less inclined to raise any implication or presumption against him.

Lord KENYON, Ch. J. — This case does not involve any question respecting the raising of limitations by implication, because the deed, on which the question arises, contains express limitations by way of cross-remainders, not indeed in the formal language used by conveyancers, but in terms sufficiently denoting that it was the intention of the parties to the deed that there should be cross-remainders as to some of the children. Therefore all the cases, which were cited by the defendant's counsel to show that [* 431] cross-remainders in a deed cannot be raised * by implication, may fairly be laid out of the case; because this case, when considered, does not resolve itself into any question of that kind. No technical precise form of words is necessary to create cross-remainders; it is sufficient to say that there shall be cross-remainders, though in the verboseness of conveyancers an abundance of words is generally introduced in deeds for this purpose. Here the single question arises on the meaning of the word "surviving," which, indeed, is the only word that distresses the case. But, taking the whole context together, I do not think that that word renders the case doubtful. The fair construction of that word, standing in this context, is that on the death of one child without issue that portion shall go to the surviving line of heirs, and not merely to one child surviving; it must go to the surviving children in their own persons, if living, or, if dead, to their issues. And in putting this construction I do not think we proceed on conjecture merely; for the conclusion of this sentence is, "And in case *all* the said children should die without issue," then the remainder is limited to R. Abell in fee. We cannot give effect to the word "all," without determining that there must be cross-remainders, not only as long as the individual children, but as long as the several lines of those children, exist. Therefore the share of J. Wainewright, which went over on his death without issue, went to the only surviving child and the heirs of the body of the other child, who was at that time dead, having left issue, as tenants in common. The whole context requires this construction, and the last clause cannot be satisfied with any other.

ASHHURST, J. — I entirely agree with my Lord that, according

to the construction of this deed, the portion of the child dying without issue was to go over, not merely to the surviving children, but to the surviving children and to the surviving heirs of the children who were dead. This manifestly appears to have been the intention of the parties from the last sentence; for the ultimate limitation is only to take effect on the death of *all* the children without issue.

BULLER, J. and GROSE, J. declared themselves of the same opinion. *Postea to the Plaintiff.*

ENGLISH NOTES.

"It has been very properly admitted in the argument, that in the case of a deed, cross-remainders cannot be implied. That rule, which was established in *Cole* v. *Levingston*, has never been departed from since, and we should be removing the landmarks of real property, if we were to bring that rule into question," *per* Lord KENYON, Ch. J. *Doe* d. *Tanner* v. *Dorvell* (1794), 5 T. R. 518, 2 R. R. 662. The same principle is again applied in *Doe* d. *Fouquett* v. *Worsley* (1801), 1 East, 416, 6 R. R. 303, and *Bainton* v. *Bainton* (1865), 34 Beav. 563. As a consequence of the rule, the limitation of cross-remainders will not be carried beyond the express terms of the deed. Thus where cross-remainders were to arise on death under 21 without issue, they were held not to arise where the child attained 21: *Meyrick* v. *Whishaw* (1819), 2 B. & Ald. 810, 21 R. R. 501; *Levin* v. *Weatherall* (1819), 1 Brod. & B. 401, 21 R. R. 669. Cross-remainders may apply to accruing as well as to original shares: *Doe* d. *Clift* v. *Birkhead* (1849), 4 Ex. 110, 18 L. J. Ex. 441, where *Edwards* v. *Alliston* (1827), 4 Russ. 78, 6 L. J. (O. S.) Ch. 30, was dissented from.

Before proceeding to consider the various circumstances under which cross-remainders will be implied in wills, it must be premised that the expression of opinion in *Cole* v. *Levingston*, the first principal case, that there is a greater difficulty in presuming cross-remainders among three or more than between two, can only be accepted, if at all, with very many qualifications. The question practically comes to this: Did the testator intend by the gift to dispose of the estate as a whole? *Doe* d. *Gorges* v. *Webb* (1808), 1 Taunt. 234, 9 R. R. 754.

Where the testator shows an intention that the estate shall go over as a whole, cross-remainders will be implied, whatever may be the number of persons designated in the original gift. *Doe* d. *Gorges* v. *Webb, supra; Maden* v. *Taylor* (1878), 45 L. J. Ch. 569. And in *Powell* v. *Howells* (1868), L. R. 3 Q. B. 654, 37 L. J. Q. B. 294, the Court construed words importing a failure of issue "of any of them," in the sense "of all of them," in order to give effect to the rule in *Doe* d. *Gorges* v. *Webb.*

Another rule is that stated in *Hannaford* v. *Hannaford* (1871), L. R. 7 Q. B. 116, 41 L. J. Q. B. 62, by Cockburn, C. J., citing Jarman: — "First, that under a devise to several persons in tail, being tenants in common, with a limitation over for want or in default of such issue, cross-remainders are to be implied among the devisees in tail: secondly, that this rule applies whether the devise be to two persons or a larger number, and though it be made to them 'respectively.'"

Forrest v. *Whiteway* (1849), 3 Ex. 367, 18 L. J. Ex. 207, differed from *Holmes* v. *Meynel*, the second principal case, in that the gift was a devise of a joint estate for lives, with several inheritances. Cross-remainders were however implied.

Doe d. *Cock* v. *Cooper* (1801), 1 East 229, 6 R. R. 264, is distinguishable from *Hannaford* v. *Hannaford*, on the ground that the limitation to the issue was read in the sense of heirs of the body: see *Slater* v. *Dangerfield*, No. 4, p. 759, *ante*. In *Doe* d. *Cock* v. *Cooper*, property was devised to R. for the term only of his natural life, with remainder to his issue as tenants in common; but in case R. should die without issue, remainder over. This was held to give R. C. an estate tail, and accordingly cross-remainders could not be implied between the issue of R.

The more recent decisions point to the conclusion that an express gift of cross-remainders in one event will not preclude the Court from implying cross-remainders in another: *Vanderplank* v. *King* (1843), 3 Hare 1, 12 L. J. Ch. 497, (Wigram, V. C.); *Atkinson* v. *Barton* (1861), 3 De G. F. & J. 339, 31 L. J. Ch. 410, (Turner, L. J.); *Coates* v. *Hart* (1863), 3 De G. J. & S. 504; *Re Clark* (1863), 11 W. R. 871. The case of *Atkinson* v. *Barton* was reversed in the House of Lords, but this reversal was not regarded by Lord Hatherley, in *Re Clark*, as amounting to a dissent from the view expressed by Turner, L. J. The contrary view is supported by *Rabbeth* v. *Squire* (1859), 4 De G. & J. 406, 28 L. J. Ch. 565, (Chemsford, L. C. affirming Romilly, M. R.)

Cross executory limitations of personal estate are not implied so as to divest interests which have vested under a previous limitation: *Skey* v. *Barnes* (1816), 3 Mer. 335, 17 R. R. 91.

In the case of executory trusts, cross-remainders will be inserted for the purpose of giving effect to the apparent intention: *Phillips* v. *James* (1865), 2 Dr. & Sm. 404; (L. J. J. 1865), 3 De G. J. & S. 72, 12 L. T. 685, 13 W. R. 934.

In *Re Hudson*, *Hudson* v. *Hudson* (1882), 20 Ch. D. 406, 51 L. J. Ch. 455, 46 L. T. 93, 30 W. R. 487, Kay, J. after a review of the authorities, held that the following rules were established: —

Nos. 9–11. — Cole v. Levingston; Holmes v. Meynel: Watts v. Wainewright. — Notes.

I. Cross executory limitations in the case of personal estate like cross-remainders of real estate, are only implied to fill up a hiatus in the limitations, which seem from the context to have been unintentional.

II. They cannot be implied — as cross-remainders could not — to divest an interest given by the will.

III. The existence of other express cross limitations between different persons does not prevent the implication.

IV. Where express cross limitations are in favour of the very persons to whom the implied cross limitations would convey the property, that circumstance is of weight in determining the intention.

Where there is a devise to the heir of the testator after the death of a named person, the law gives to that person an estate for life by implication: *Gardner* v. *Sheldon* (1672), Vaughan, 259, Freeman, K. B. 11; Tudor's Lead. Cas. Conv. 625, 3rd ed. The reason assigned is that the heir cannot be disinherited except in express terms or by necessary implication: *Right* d. *Mitchell* v. *Sidebotham* (1781), No. 2 of "Descent" 9 R. C. 289, Dougl. 730. The devise to the heir after the death of a person is regarded as an expression of intention that the heir shall not take until that event happens. Where, however, there is a devise to a stranger after the death of a named person, the heir will take by descent until the event happens: *Aspinall* v. *Petvin* (1824), 1 Sim. & St. 544, 2 L. J. (o. s.) Ch. 121, 24 R. R. 222. An estate for life will not be given by implication, where persons are joined with the heir at law in the gift: *Ralph* v. *Carrick* (C. A. 1879), 11 Ch. D. 873, 48 L. J. Ch. 801, 40 L. T. 505, 28 W. R. 67.

A bequest of personalty to the next of kin after the death of a named person will raise a similar implication, unless persons are joined with the next of kin as objects of the gift: *Ralph* v. *Carrick*, *supra*. In the case of personalty it has been held that where the gift is to some only of the next of kin, an estate by implication will not arise: *Re Springfield*, *Chamberlain* v. *Springfield* (1894), 1894, 3 Ch. 603, 64 L. J. Ch. 201. The analogous question will only arise in the case of realty where the devise is to co-parceners, who together are but one heir: *Doe* d. *Gill* v. *Pearson* (1805), 6 East, 173, 2 Smith, 295, 8 R. R. 447; *Evans* v. *Evans* (C. A. 1892), 1892, 2 Ch. 173, 61 L. J. Ch. 456, 67 L. T. 152, 40 W. R. 465, *per* LINDLEY, L. J.

Where, however, there is a residuary gift, the implication will not arise, whether the will deal with land, *Horton* v. *Horton* (1606), Cro. Jac. 74, or personalty, *Stevens* v. *Hale* (1862), 2 Dr. & Sm. 22, 27.

Where there was a devise of real estate in trust to receive the rents and profits during the lives of the testator's four daughters and to pay the same to the survivor and the children of such as should die, and

after the decease of the survivor of the daughters, upon trust to sell and divide the proceeds among their children, it was held that the daughters took estates for life: *Saunders* v. *Lowe* (1775), 2 W. Bl. 1014.

Where there is a bequest to several jointly for life with a gift over upon the death of the survivor, the income of the bequest will be payable to the survivor in the meantime: *Townley* v. *Bolton* (1832), 1 My. & K. 148, 2 L. J. Ch. 25. But where the life interests are interests in common, there is no survivorship, but the personal representatives of the deceased beneficiaries will take until the gift over takes effect: *Jones* v. *Randall* (1819), 1 Jac. & W. 100, 20 R. R. 237; *Bryan* v. *Twigg* (1867), L. R. 3 Ch. 183, 37 L. J. Ch. 249.

A devise to one for life, with a gift over on his death without children, gives no interest to the children by implication unless there be some context assisting that construction: *Scale* v. *Rawlins* (H. L. 1892), 1892, A. C. 342, 61 L. J. Ch. 421, 66 L. T. 542.

A devise to one for life with a gift over on failure of his issue, would have conferred an estate tail in realty: *Forth* v. *Chapman* (1719), 1 P. Wms. 663, Tudor Lead Cas. Conv. 682, 3rd ed. The consideration of this subject is postponed to the Notes to *Dawson* v. *Small*, No. 14, p. 847, *post*.

AMERICAN NOTES.

"The test of the existence of cross-remainders is, whether or not there is, in the case of a deed an express limitation, in case of a will an express or implied one, that the whole estate shall go over, together, in entirety, to its final limitation, upon the failure of issue, or in parts as the issue of one or the other of the first takers shall fail; in the former case cross-remainders exist, in the latter they do not." 20 Am. & Eng. Ency. of Law, p. 872; 2 Washburn Real Property, *234; *Picot* v. *Armistead*, 2 Iredell Equity (Nor. Car.), 226; *Seabrook* v. *Mikell*, 1 Cheves (So. Car. Eq.), 80; *Bohon* v. *Bohon*, 78 Kentucky, 108; *Hungerford* v. *Anderson*, 4 Day (Connecticut), 368: "In order to constitute a cross-remainder by necessary implication, there must appear in the will an intention that no person shall inherit any part of the estate, as long or take it by way of remainder, so long as any of the devisees, or any of their issue, to whom it is given, are alive." See *Martin* v. *Lachasse*, 47 Missouri, 591; *Rockwell* v. *Swift*, 59 Connecticut, 289; *Rowland* v. *Rowland*, 93 North Carolina, 214.

The doctrine of the Rule is expressly laid down in 2 Washburn on Real Property, 556, citing *Cole* v. *Levingstone*: and in Randolph & Talcott's edition of Jarman on Wills, p. 344, citing the first two principal cases; 2 Minor's Institutes, p. 432.

Cross-remainders have been implied: Devise to A. and B., their heirs and assigns forever, "but if they should die without issue, over": *Pierce* v. *Hakes*, 23 Penn. State, 231; *Hoxton* v. *Archer*, 3 Gill & Johnson (Maryland), 199.

Nos. 9–11. — Cole v. Levingston; Holmes v. Meynel; Watts v. Wainewright. — Notes.

Devise to A. C. and B., with remainder to survivors if B. and C. leave no heirs: *Wall* v. *Maguire*, 24 Penn. St. 248. Devise to A., B., and C., "neither to sell to any but he or she who is in possession of the remainder and at the decease of the last": *Turner* v. *Fowler*, 10 Watts (Penn.), 325. Devise to A. and B., remainder to their issue and remainder over on death of the survivor: *Seabrook* v. *Mikell*, *supra*. Life estate to widow, remainder to children equally, remainder over in fee if both children should die without leaving heirs of the body: *Allen* v. *Trustees*, 102 Massachusetts, 262. (See *Rodney* v. *Burton*, 4 Harrington [Delaware], 183; *Kerr* v. *Vernor*, 66 Penn. State, 326.) Devise to wife for life, remainder to two granddaughters and their issue in two equal shares, devise over in case they died without issue: *Pierce* v. *Hakes*, 23 Penn. State, 231. Devise to four children, in equal shares, the property not to be sold but to remain in the family forever, and when either dies that share to be equally divided among the rest: *Reber* v. *Dowling*, 65 Mississippi, 259.

Cross-remainders not implied: Devise to two, their "several" shares limited over, on failure of issue of *either*: *Baldrick* v. *White*, 2 Bailey Law (So. Car.), 442; *Fenby* v. *Johnson*, 21 Maryland, 106.

Cross-remainders may exist between any number of persons. *Hall* v. *Priest*, 6 Gray (Mass.), 18 (between eight); *De Peyster* v. *Clendining*, 8 Paige (N. Y. Chancery), 295; *Gordon* v. *Gordon*, 32 South Carolina, 563.

They may be implied in personal property: *Loring* v. *Coolidge*, 99 Massachusetts, 191. So if the legatees of an absolute gift died without issue, over: *Cudworth* v. *Adm'r of Hall*, 3 Desaussure (So. Car.), 256. But not after an absolute legacy or devise in fee: *Fenby* v. *Johnson*, 21 Maryland, 106; *Weyman's Exec'rs* v. *Ringold*, 1 Bradford (N. Y. Surrogate Ct.), 46.

Of *Doe* v. *Wainewright*, the commentator in 20 Am. & Eng. Enc. of Law, p. 872, says it "cannot be relied on as authorizing any very wide departure from the usual form, since the Court, in deciding that case, relied greatly upon the fact that they could not give effect to the word 'all' in the sentence, 'and in case all the said children should die without issue,' in the above limitation, without holding that there were cross-remainders not only as long as the individual children, but as long as the several lives of those children existed. The case therefore stands somewhat upon its own peculiar facts, and can only be relied on as sustaining the position that the usual form is not indispensable."

No. 12. — HOLLIDAY *v.* OVERTON.

(CH. 1852.)

No. 13. — YARROW *v.* KNIGHTLEY.

(C. A. 1878.)

RULE.

WHERE realty is devised to trustees in fee, and the beneficial interest is given without words of limitation, a presumption arises that the testator intended that the beneficiary shall take an interest commensurate with that of the trustee. This presumption will not arise in the case of a conveyance by deed, and in that case apt words of limitation must be used, if it is intended that the beneficiary should take an estate greater than an estate for life.

Holliday v. Overton.

15 Beavan 480–486 (s. c. 21 L. J. Ch. 769).

Deed. — Gift without Words of Inheritance. — Estate for Life only.

[480] By a settlement, made on the marriage of a widow, having children, real estate was conveyed by her to a trustee and his heirs upon trust for her separate use for life, with remainder in trust for her children as tenants in common (omitting the limitation to their heirs), *Held*, that they took life-estates only.

The question now under discussion was, whether, under a marriage settlement, the children took estates for life or in fee. The facts of the case were as follows : —

In 1825, Mary Heathcote, a widow, being about to marry Edmund Drayton, and having children of her first marriage, a settlement of her real and personal estate was executed, whereby after reciting that it was agreed to settle the property for her separate use for life, and, after her decease, for making " the reversion and principal trust a provision for the children of her former marriage (subject, nevertheless, to a power of appointment on the part of Mary Heathcote, by will or testamentary instrument, to be executed in manner thereinafter provided)," she proceeded to convey the property to a trustee, his heirs, executors, administrators, and assigns

No. 12. — Holliday v. Overton, 15 Beav. 480–482.

in trust, for her separate use for life, and, after her decease, in trust for such persons as she by her will, during the intended coverture, should appoint; and in default of such appointment, "in trust for the children of Mary Heathcote, equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants." Mary Heathcote survived her second husband, and died in 1848. There were no children of the second marriage.

*It was on a former occasion held, that she had not [*481] executed the power of appointment (14 Beav. 467); and the question then arose, what estate the children took, there being no limitation to their "heirs." The Court thought that they took for life only; but there being some doubt as to the real terms of the settlement, the case was, with the permission of the Court, re-heard on that point only.

Mr. Lloyd and Mr. Speed, for the plaintiffs, argued, that the children took life estates only.

Mr. Amphlett, on the part of the children, now argued, that they took in fee. He rested his argument on the three following points: —

First. The recital, which may be regarded for the purpose of controlling the operative part of the deed, *Fletcher* v. *Lord Sondes*, 1 Bli. N. S. 144, shows an intention to settle "the reversion and principal" on the children, *i. e.*, that they should take a fee simple; and the settlement being executory, and the estates equitable, there is no need to reform it, but in this Court full operation will be given to it, according to the true intention of the parties.

Secondly. The children of the former marriage are purchasers for value, *Newstead* v. *Searles*, 1 Atk. 265, and in the declaration of the uses to such purchasers, the omission of the word "heirs" will not deprive them of the fee. Littleton likewise says, "that a man shall not have a fee simple by a feoffment or grant without these words 'his heirs.' And yet the law is plain, that if a man had before the Statute of 27 Henry VIII., bargained and sold his land for money without these words 'his heirs,' the bargainee hath a fee simple. And the reason * is, because by [*482] the common law nothing passeth from the bargainor but a use, which is guided by the intent of the parties, which was to convey the land wholly to the bargainee; and forasmuch as the law intends that the bargainee paid the very value of the land, therefore in equity and according to the meaning of the parties, the bargainee had the

fee simple without these words, 'his heirs,' as it is held in 27 Hen. VIII., fol. 5; 4 Edw. VI.; Br. Estates, 78; 6 Edw. VI.; and in the time of Hen. VIII.; Br. Conscience, 25;" *Shelley's Case*, 1 Co. Rep. 100, Shep. Touch. 522.

Thirdly. The estate of the *cestuis que trust* is commensurate with that of their trustees; and, as the trustees take a fee simple, the children's estate is co-extensive: *Moore* v. *Cleghorn*, 10 Beav. 423; *Knight* v. *Selby*, 3 Scott's N. R. 409, 3 Man. & Gr. 92; *Challenger* v. *Shepherd*, 8 T. R. 597.

Mr. Lloyd, in reply. — The settlement is executed, and not executory, and the estate of the children is limited by the plain words of the trust, which cannot be extended by the recital.

Secondly. The children of a former marriage are not within the marriage consideration, or purchasers: *Johnson* v. *Legard*, Turn. & R. 281, 6 M. & S. 60; *Cotterell* v. *Homer*, 13 Sim. 506, and, if they were, they are purchasers, not of the fee, but of the estate for life limited to them by the settlement.

Thirdly. The rule laid down in *Moore* v. *Cleghorn* applies to wills, and has never been extended to the construction of deeds; *Snell* v. *Silcock*, 5 Ves. 469.

The Master of the Rolls said, he would reserve his judgment.

[* 483] * The Master of the Rolls (Sir John Romilly): — On this case, I reserved my judgment on one point only. The question originally raised by the claim was, whether the power given to the wife was one which could be executed by her when not under coverture, and I was of opinion that the words of the deed limited the exercise of the power to the period of coverture. But, in the course of the argument, it appeared, that the gift over in default of appointment was in these words, viz.: — "In trust for the children of Mary Heathcote, equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants," and not containing any words of inheritance, and which therefore, according to the ordinary rule of construction in such cases, would have restricted the interest taken by the children to life-estates. The claim stood over for the purpose of Mr. Amphlett considering whether any distinction could be found, in the circumstances of this case, to alter or prevent the application of the general rule, and accordingly, several arguments and authorities were adduced for this purpose; but, after an attentive con-

sideration of them, I am of opinion, that they do not affect this case.

It was first endeavoured to bring this case within the rule applicable to executory instruments, on the ground that this was a contract to convey the fee, and that the children were purchasers within the contract. There is, however, nothing executory in the frame of this instrument. It is, to all intents, a deed executed, and which does not require any further or additional instrument to give it validity.

It was further contended, that upon the true construction of this instrument, the children must be considered as purchasers, and that, being purchasers, * this gives a construc- [* 484] tion to the declaration of trust, which will vest the fee in these children, without the necessity of employing any words of inheritance for this purpose: Sheppard's Touchstone, P. 522, and a passage in Shelley's case, 1 Co. Rep. 100, were cited to establish this position. The passage in Sheppard's Touchstone is to the effect, that in the case of a purchaser for valuable consideration, a declaration of the use to the purchaser, omitting the word "heir" will not deprive him of the fee. The passage in Coke's Reports is to the same effect. It refers to a case where the words of the instrument are governed by the intent of the parties, for the purpose of showing that a use before the statute of 27 Hen. VIII. was merely regarded as a trust. It is to this effect: "that a man shall not have a fee simple by a feoffment or grant without these words 'his heirs;' and yet the law is plain, that if a man had before the statute of 27 Hen. VIII., bargained and sold his land for money without these words, 'his heirs,' the bargainee hath a fee simple. And the reason is, because by the common law, nothing passeth from the bargainor but a use, which is guided by the intent of the parties, which was to convey the land wholly to the bargainee; and forasmuch as the law intends that the bargainee paid the very value of the land, therefore in equity, and according to the meaning of the parties, the bargainee had the fee simple without these words 'his heirs,' as it is held in," &c.; and then he refers to the Year Books to establish that proposition.

Undoubtedly, if the children mentioned in this settlement could be considered as purchasers within the meaning of that word, as employed in these passages, some argument might be founded on those authorities: * but, in truth, the observa- [* 485]

tion that the children are purchasers within the meaning of the settlement does not advance the argument a single step. They are not purchasers of the fee, or of any estate of inheritance under any contract; but though they are purchasers within the marriage contract, they are merely purchasers of such interest as the settlement gives them, which brings it back to the former question, viz., what the interest is which is given them by that settlement: and this is a mere question of intention.

The case of *Newstead* v. *Searles*, 1 Atk. 265, to which I am also referred, does not advance the case beyond what I have already stated.

It is then attempted to control the limitations contained in the deed by the force of the recitals contained in the deed; but even if this were admissible, it would not advance the argument, for in these recitals there is, in my opinion, nothing leading to the conclusion that the children were to take the fee; on the contrary, the recital is simply for the purpose of making a provision for the children upon the trusts after-mentioned. And this obviously leaves the trusts, &c., to be construed according to such import, as the Court should think the correct one, to be applied to the words employed in them.

The cases of *Challenger* v. *Shepherd*, 8 T. R. 597, *Knight* v. *Selby*, 3 Scott's N. R. 409, 3 Man. & Gr. 92, and *Moore* v. *Cleghorn*, 10 Beav. 423, were all cases of wills where, upon the true construction of the words of the will, the Court held, that the fee passed to the devisee, although the word "heirs" was omitted. But [*486] the * rules applicable to the construction of wills, or of executory instruments, are not in truth, applicable to the present case, which is the simple case of a deed executed, where I am bound by the strict rules which are applicable to a case of that description.

I must therefore hold, that the children take life-estates only under this limitation, in default of the due execution of the power.

Yarrow v. Knightley.

47 L. J. Ch. 874–875 (s. c. 8 Ch. D. 706).

[874] *Will. — Construction. — Devise to Trustees in Fee. — Equitable Interests co-extensive with Legal Interest.*

A testator devised to trustees three freehold houses in trust for the joint benefit of his two daughters; . . . but in case either of his daughters married

No. 13. — Yarrow v. Knightley, 47 L. J. Ch. 874.

and had a child or children, then such child or children should have the mother's share. Both daughters married and died without having had a child: —

Held, affirming the decision of MALINS, V. C., that the daughters took a joint equitable estate in fee simple.

This was an appeal from the decision of MALINS, V. C.

W. S. Yarrow, by his will, dated the 16th of January, 1826, after devising to his executors and trustees five freehold houses, to hold to them, their executors and assigns, upon certain trusts, devised as follows — "I do give in trust to my executors and trustees for the sole benefit of my two daughters, Elizabeth and Sarah Susannah, my three freehold houses Nos. 2 and 21, Cullum Street, in the city of London, and No. 3, St. John's Terrace, Hackney, for their joint benefit; should either of my daughters die and leave no child or children lawfully begotten, then either one of these (*sic*) freehold houses, at the option of the surviving sister, shall be sold, and the money produced after such sale shall be equally divided between the survivor and such of my sons as may be living, share and share alike; but in case either of my daughters should marry and have a child or children, then such child or children lawfully begotten shall have the mother's share of the rents and profits of the three houses after it or their mother's decease; and my will and desire is that the husbands of either of my said daughters shall have no control or benefit in the aforementioned houses and estates whatsoever, nor the rents or profits shall in no way be applyable to their wants, debts or acts, and the receipts of my daughters or my executors only to be a discharge for rents."

The testator died in 1828.

The testator's two daughters survived him. Sarah Susannah married and died in 1852 without having had a child. Elizabeth then sold No. 3, St. John's Terrace, and the proceeds were divided in accordance with the will.

Elizabeth married a Mr. Young, and died in 1874 without having had a child.

This suit was instituted in 1875 to determine whether, in the events which had happened, Elizabeth Young took the fee simple in the houses Nos. 2 and 21, Cullum Street, or whether, on her death, the fee simple descended to W. Yarrow, the son and heir-at-law of W. S. Yarrow, and passed under his will to the plaintiff.

The VICE CHANCELLOR held that the two houses vested in the two daughters as equitable joint tenants in fee, on the ground that the

rule laid down in *Challenger* v. *Sheppard*, 8 T. R. 597, and *Moore* v. *Cleghorn*, 10 Beav. 423, 16 L. J. Ch. 469 (affirmed 17 L. J. Ch. 400) applied, namely, that where lands are devised to [* 875] trustees in fee in trust for a * person, without any words of limitation, the *cestui que trust* takes an equitable interest co-extensive with the legal estate of the trustees, *i. e.*, the fee.

Against this decision parties, who were in the same interest as the plaintiff, and who on the 19th of January, 1878, obtained leave to attend the proceedings, appealed.

Mr. Higgins and Mr. Dauney, for the appellants. — This is a devise to trustees before the Wills Act, and, the devise containing no words of inheritance, we submit it is doubtful whether the trustees took the legal fee. We further contend that the daughters took the estates for life only, with gifts over which have failed. There was, therefore, an intestacy, and the equitable reversion in fee descended to W. Yarrow and passed under his will. We do not dispute the rule settled by *Challenger* v. *Sheppard* and *Moore* v. *Cleghorn*, but we say that that rule must not be extended; and that where you have, as here, a series of equitable limitations carved out of the legal fee, then, if the ultimate limitation fails, there is a resulting trust for the testator or his heir.

They also cited *Re Pollard's Estate*, 3 De Gex, J. & S. 541; *Knight* v. *Selby*, 3 Man. & G. 92; 3 Sc. (N. S.) 409; 10 L. J. C. P. 263; *Frogmorton* v. *Holyday*, 3 Burr. 1618; *Doe* v. *Cundall*, 9 East, 400, Jarman, 3rd ed. II. 249, 251.

Mr. Glasse and Mr. Langley, for the plaintiffs; and

Mr. Bristowe and Mr. Maidlow, for the heir-at-law of Elizabeth Young, were not called upon.

Mr. Pearson and Mr. Hadley, for the trustees of the testator's will.

Mr. Karslake, Mr. Cozens-Hardy and Mr. Everitt, for other parties.

James, L. J. — I am of opinion that the order of the Vice Chancellor should be sustained. Reading the words of the will as you find them, and applying the general rule that has been established by the cases, the gift is clearly of an estate in fee to the beneficiaries. This is settled by *Knight* v. *Selby* and the other authorities that have been mentioned. [His Lordship read the will.] In the first instance, the gift to the daughters standing alone, gave them an equitable estate in fee as joint tenants. Then is there any-

thing in the subsequent limitations to cut down their interest? In my opinion all the subsequent provisions are, upon the true construction of the will, all defeasances, in certain events which have not happened, upon the gift given to the daughters. I therefore entirely agree with the conclusion the VICE CHANCELLOR has come to.

BAGGALLAY, L. J. — I am of the same opinion. If the gift had stopped at the words, "for their joint benefit," then beyond all doubt the daughters would have taken the fee. But then the testator modifies the gift to his daughters in certain events. First, if either of his daughters died and left no child, then one house is to be sold; secondly, if either should marry and have a child or children, then the child or children was or were to have the mother's share. Well, the first event happened, and one of the houses was sold as the will directed. But then the second event did not happen. That being so, the previous gift remains unaffected.

BRAMWELL, L. J. — I am also of opinion that the judgment of the VICE CHANCELLOR ought to be confirmed.

ENGLISH NOTES.

The importance of such cases as *Yarrow* v. *Knightley*, the second principal case, is reduced by the provisions of the Wills Act, 1837 (1 Vict. c. 26), s. 26, to which reference was made in the Notes to *Fletcher* v. *Smiton*, p. 679, *ante*. The converse rule also held good, and the trustee to whom lands were devised took such an estate as would enable him to perform his duties: *Doe* d. *Plager* v. *Nicholls* (1823), 1 B. & C. 336, 2 Dowl. & Ry. 480, 1 L. J. (o. s.) K. B. 124, 25 R. R. 398; *Doe* d. *Shelley* v. *Edlin* (1836), 4 Ad. & El. 582, 5 L. J. K. B. 137; *Doe* d. *Cadogan* v. *Ewart* (1838), 7 Ad. & El. 636, 3 Nev. & P. 197, 7 L. J. Q. B. 177.

The case of *Holliday* v. *Overton*, the former principal case, and the cases which have followed it, must be taken to have overruled the earlier view expressed in some text-books, that an equitable fee could be limited without words of limitation: *Re Whiston's Estate*, *Lovatt* v. *Whiston* (1894), 1894, 1 Ch. 661, 63 L. J. Ch. 273, 70 L. T. 681, 42 W. R. 327.

As regards deeds executed after the 31st Dec. 1881, the following enactment applies: "In a deed, it shall be sufficient, in the limitation of an estate in fee simple, to use the words 'in fee simple,' without the word 'heirs;' and in the limitation of an estate in tail, to use the words 'in tail' without the words heirs of the body; and

in the limitation of an estate in tail male or in tail female, to use the words 'in tail male' or 'in tail female,' as the case requires without the words 'heirs male of the body' or 'heirs female of the body.'" Conveyancing & Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 51.

AMERICAN NOTES.

"The trust, like the legal estate, is descendible, devisable, alienable, and barrable by the act of the parties, and by matter of record. Generally, whatever is true at law of the legal estate is true in equity of the trust estate. The rule in *Shelley's Case* applies alike to equitable and to legal estates; and an equitable estate tail may be barred in the same manner as an estate tail at law, and this cannot be accomplished in any other way." *Croxall* v. *Sherrerd*, 5 Wallace (U. S. Sup. Ct.), 281, a case of a deed of settlement effectuated by a private statute.

In *Badgett* v. *Keating*, 31 Arkansas, 400, it was held that declarations of trust are construed in the same manner as common-law conveyances, and the trust estate is governed by the same rules; the *cestui que trust* is seised absolutely of the freehold in contemplation of a court of equity.

In *Tillinghast* v. *Coggeshall*, 7 Rhode Island, 383, the undivided half of an estate was, at the request of a married woman, purchased by her trustees under a post-nuptial settlement, which included the other half, and was conveyed to the trustees for her sole and separate use for life, and in default of her appointment by will was to be conveyed by the trustees "to her heirs at law, or other persons, in fee simple or in such other estate therein, and in such proportions as they would respectively be entitled to by the statutes then in force in said State of Rhode Island." *Held*, that the wife dying, without appointing, had reserved to herself in the undivided half thus purchased an equitable estate in fee simple, under the rule in *Shelley's Case*, in which her husband had curtesy. The Court said: "In the case before us, the trust is raised neither by a will nor by an agreement before marriage for a marriage settlement, but by a deed of the wife's estate executed by the husband and wife after marriage, for the purpose of directing how, in the contemplated events, the estate should go. In default of an appointment by the will of Mrs. Coggeshall, no other deed or instrument was intended to be executed by her, or by her husband, by way of completing this settlement. The direction to the trustees to convey the remainder to the heirs at law of Mrs. Coggeshall is certain and explicit; and both upon principle and the decided weight of authority, the trust thus created for her heirs was not executory, but executed, in the only sense in which a trust can be. The usual definition of an executory trust, that it is one where something additional is to be done by the trustee is plainly an imperfect one, as pointed out by Lord St. Leonards, in the case of *Egerton* v. *Lord Brownlow*, in 4 House of Lords Cas. 1; for as he observes, in every trust, even in those called executed, there is still something additional to be done by the trustees, before the *cestuis que trust* can obtain the full benefit of the trusts created for their advantage. A trust for B. in fee, and a trust 'to convey to B. in fee,' cannot be substantially distinguished;

since the latter merely expresses what the former implies, and both are quite distinct from a direction to the trustees, to make such a settlement of an estate upon B. as would best insure the continuance of the estate in him and his children. In the former case the limitations are perfect, and nothing is left for the trustee but to execute them as directed; in the latter case they are yet to be made, and the trustee is to make them, so as best to fulfil the intent and carry out the purpose of the settlor. In the former case, the trusts are said to be executed, in the sense of being definite or completely marked out; in the latter case, executory, since no mode of settlement is prescribed, but merely the *intent* or *purpose* of the creator of the trust, to be carried out, as best it may, by a settlement to be made by the trustee. See *Holliday* v. *Overton*, 15 Beavan, 480; *Lassance* v. *Tierney*, 1 Mac. & Gor. 551; *Tatham* v. *Vernon*, 4 Law Times Rep. (N. S.) 531, 633; *Neves et al.* v. *Scott et al.*, 9 Howard (U. S. Sup. Ct.), 196, 211; 2 Story's Eq. Jurisp. § 983, and n. 1: 1 Hill on Trustees, 328, side paging; Adams's Equity, 40, 41, side paging."

"Construing the trusts under consideration as executed trusts, we do not feel at liberty to depart from the long settled rule, that as a court of equity, we must construe them in the same way as legal estates of the like nature would be construed at law, upon the same language. 2 Story's Eq. Jurisp. § 983, and cases cited. As the estate for life reserved by Mrs. Coggeshall for herself, and the estate given by her to her heirs at law are both equitable estates, there seems to be nothing wanting to warrant the enlargement of her estate, under the rule in *Shelley's Case*, into an equitable fee. Fearne on Conting. Rem. 52–57; *Eaton* v. *Tillinghast, Trustee, and others*, 4 R. I. Rep. 276, 280–282."

In *Cushing* v. *Blake*, 30 New Jersey Equity, 689, D. purchased and caused to be conveyed to B. certain lands for the benefit of his intended wife. B. executed a declaration of trust accordingly, binding himself to convey to such persons as she should appoint in writing in her lifetime or by will, and on failure thereof to hold to her heirs, their heirs and assigns forever. There was issue surviving, and no appointment. The husband took curtesy. The Court very exhaustively reviewed the English authorities. The Court said: "Under the rule in *Shelley's Case*, such limitation gives to the wife an estate in fee simple, in which the husband, having issue by her, would be entitled to curtesy, if the estate was a legal estate." Citing *Croxall* v. *Sherard, supra*. The Court held the trust as executed, and that equity would give it no different construction from what it would receive in a court of law. And concluded: "There is a difference, in one respect, between marriage articles and a devise by will. Under the artificial rule in *Shelley's Case*, a gift to the ancestor for life, with a limitation over to heirs, or heirs of the body, creates in him an estate in fee or in tail, and the limitation over is capable of destruction by him, by conveyance or devise if the estate be a fee-simple, or by fine and common recovery if it be a fee-tail. When these technical terms are used in an agreement for a settlement, in view of marriage, the Court will infer from the nature of the agreement, that the parties contemplated provisions for the issue of the marriage, which should not be liable to immediate destruction by the act of the parties, and will direct the settlement to be-

made in such a manner as will prevent the destruction of the limitations over to issue. *Blackburn* v. *Stables*, 2 V. & B. 367 ; *Jervoise* v. *Duke of Northumberland*, 1 Jac. & W. 559 ; *Rochfort* v. *Fitzmaurice*, 2 Dru. & War. 18 ; *Sackville* v. *Viscount Holmesdale*, L. R. (4 H. of L.) 543. But this doctrine of the court is applicable only so long as the agreement for a settlement remains a matter of contract. If the parties have themselves completed the settlement by a deed, complete in itself, and perfect, so that it requires only to be obeyed and fulfilled by the trustees, according to the provisions of the settlement, the trust will be construed in the same manner as similar trusts created for other purposes. *Neves* v. *Scott*, 9 How. (U. S. Sup. Ct.) 196; *Tillinghast* v. *Coggeshall*, 7 R. I. 383; *Carroll* v. *Renich*, 7 Sm. & M. 798. A settlement intended as a final and complete act, and not mere heads and minutes from which to prepare a settlement at a future time, will be construed according to strict legal rules, though the subject of the settlement be equitable property. Atherly on Marriage Settlements, 151 ; 2 Story Eq. Jur. § 983.

" In this case the trusts upon which the trustee was required to hold the estate were definitely and perfectly expressed in the declaration of trust accompanying the conveyance, and he had no duties to perform but to hold and convey accordingly. The trusts are such as are regarded as executed trusts in a court of equity, and the estates created by the trust, and all the incidents connected therewith, are the same as would arise in law upon a legal conveyance expressed in the same language. Among these incidents is the right of the husband to his curtesy estate."

In *Berry* v. *Williamson*, 11 B. Monroe (Kentucky), 245, land was conveyed to a trustee to be by him laid off into lots and sold, and the proceeds invested in lands to be selected by *cestuis que trust*, and to be held by them respectively during their lives, with remainder to their heirs respectively. *Held*, executory, and to give no interest in the lands to be laid off to the *cestuis*. The Court said : " There can be no rational ground for distinguishing between an executory trust created by will and one created by such a deed as this, in which the grantor makes a purely voluntary donation for the benefit of his own descendants." See *Davis* v. *Hardin*, 80 Kentucky, 672, holding that a deed from a husband to a trustee for the benefit of his wife and child and children to be born, creates a life-estate in the wife with remainder to the children. The obvious intention must govern.

In *Brown* v. *Renshaw*, 57 Maryland, 78, a case of a trust deed, it was said : " It is now well settled that the mere power of appointment is wholly ineffective until the power be executed ; and in case of limitation to one for life, with power of appointment, and in default of appointment, to the right heirs, the remainder limited to the right heirs will become an executed fee in the taker for life, under the rule in *Shelley's Case*, subject to be divested by the exercise of the powers."

In *Angell, Petitioner*, 13 Rhode Island, 630, A. with her husband conveyed her land to trustees, to manage and to hold for her sole use and benefit, paying her in their discretion any part of the income, and after her death to convey all to her heirs at law. *Held*, subject to the rule in *Shelley's Case*, and that she took an equitable fee-simple, because her object was to protect her-

No. 14. — Dawson v. Small, L. R., 9 Ch. 651. — Rule.

self, not to benefit her heirs. "Instead of there being a positive rule which excepts an executory trust from the operation of the rule in *Shelley's Case*, the matter stands thus: 'Courts will except from the operation of the strict rule of law those cases of executory trusts in which they can see from the instrument itself that the rule would contravene the intention of the party.'" Citing *Tallman* v. *Wood*, 26 Wendell (New York), 9, 18; *Wood* v. *Burnham*, 6 Paige (N. Y. Chancery), 513, 518; *Jervis* v. *Duke of Northumberland*, 1 J. & W. 539, 549; *Egerton* v. *Earl Brownlow*, 4 H. L. 1; *Tillinghast* v. *Coggeshall*, 7 Rhode Island, 383, 390; *Jesson* v. *Wright*, 2 Bligh, 1, *ante*, p. 714.

No. 14. — DAWSON *v.* SMALL.

(CH. APP. 1874.)

RULE.

THE new rule of construction introduced by the 29th section of the Wills Act (1 Vict. c. 26), as to words importing an indefinite failure of issue, is only applicable where the expression importing a failure of issue is ambiguous.

Dawson v. Small.

L. R. 9 Ch. 651–654.

Wills Act (1 *Vict.* 26), *s.* 29 — "*Die without Issue.*" — *Indefinite failure of Issue.* — *Executory Bequest.* — *Will explained by Codicil.* [651]

A testator, in 1846, gave his residuary real and personal estate to J. S. L. and the heirs male of his body lawfully begotten forever: but in case of his death without heirs male of his body lawfully begot, then the property to go to P. C. L. in the same manner: and if P. C. L. should die without heirs male of his body lawfully begot, then the property to go to J. S. A. in the same manner. By a codicil the testator, after reciting that by his will he had directed that in the event of the death of J. S. L. "without leaving male issue him surviving" the residue of the testator's real and personal estates should go to P. C. L., revoked that bequest, and in the event of the death of J. S. L. "without leaving male issue him surviving," gave the residuary estate to the eldest daughter (if any) of J. S. L.: —

Held (affirming the decision of BACON, V. C.), that sect. 29 of the Wills Act (1 Vict. c. 26) did not apply, and that the gifts over to P. C. L. and J. S. A. were void as to the personalty, as being on an indefinite failure of heirs male, and that the codicil did not alter their effect, and that under the will and codicil J. S. L. took an absolute interest in the personalty, subject only to an executory gift over in favour of his eldest daughter if he died leaving no male issue surviving him.

No. 14. — Dawson v. Small, L. R., 9 Ch. 651, 652.

John Small, by will dated the 18th of June, 1846, gave his residuary real and personal estate to John Small Lowther, and proceeded as follows: — "And it is my express order and will that no part of the real property be ever sold, mortgaged, or alienated by the said John Small Lowther, but that it shall descend free and clear of all incumbrances to the heirs male of his body lawfully begotten forever, and likewise direct that the whole of the personal property that falls to his share by this my will shall be invested either in land or government securities, and that it shall never be called in or the land sold, but the rents and profits to go to the use of the said John Small Lowther and the heirs male of his body lawfully begot forever. But in case of the death of the said John Small Lowther without heirs male of his body lawfully begot, then this legacy to go to his brother, Philip Court Lowther, with the same conditions and restrictions as stated in the [*652] *case of his brother John Small Lowther, and in case the said Philip Court Lowther should die without heirs male of his body lawfully begot, then this legacy to go to John Small Andrew, with the same restrictions and conditions as stated in the case of John Small Lowther."

The testator made two codicils, in the second of which, dated the 8th of August, 1866, the following passage occurred: — "In my said will or codicil I directed that in the event of the death of John Small Lowther without leaving male issue him surviving, the residue of my real and personal estate should go to and be vested in his brother, Philip Court Lowther. Now I do hereby revoke this bequest, and in the event of the death of the said John Small Lowther without leaving male issue him surviving, I give and bequeath the rest, residue, and remainder of my real and personal estate, after the payment of my just debts, funeral, and testamentary expenses, and the legacies given by my said will and codicils, which have not been revoked, to the eldest daughter (if any) of the said John Small Lowther and her heirs and assigns."

By the order of Vice Chancellor BACON, made on further consideration, it was declared that John Small Lowther took an estate tail in the real estate, subject to the interest, if any, of any daughter of his, and an absolute interest in the personalty, and the residuary personalty was ordered to be paid over to him. John Small Andrew appealed.

Mr. Chitty, Q. C., and Mr. Caldecott, for the appellant: —

We say that taking the will alone the gift over is, under s. 29 of the Wills Act (1 Vict. c. 26), a gift over on the death of John Small Lowther without leaving heirs male living at the time of his death, which is not too remote. Even if this would not be so on the will itself, the testator by his codicil puts his own interpretation on his words. There is then as to the personalty a gift over which is not void for remoteness. The gift over to Philip Court Lowther being revoked, that to John Small Andrew is accelerated: *Lainson* v. *Lainson*, 5 D. M. & G. 754; *Craven* v. *Brady* L. R. 4 Ch. 296; *Hutton* v. *Simpson*, 2 Vern. 722; *Fuller* v. *Fuller*, Cro. Eliz. 422: *Hodgson* v. *Ambrose*, 1 Doug. 337; *Avelyn* v. *Ward*, 1 Ves. Sen. 420; *Crozier* v. *Crozier*, 3 D. & War. 373.

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Mr. Eddis, Q. C., and Mr. Torriano, for John Small Lowther.

Mr. Swanston, Q. C., and Mr. Cutler, for plaintiff.

Mr. Chitty, in reply.

Sir W. M. James, L. J.: —

I am of opinion that the order of the Vice Chancellor proceeds on a correct principle, though it requires to be slightly varied. As regards the real estate there is a gift in tail male, as clear a gift of an estate tail as can be made. Then as to the personal estate, the testator directs that it shall be invested in land or government securities, and that the rents and profits shall go to the use of John Small Lowther and the heirs male of his body forever. This is as clear an expression as can be of an intention to create an estate tail; the testator shows that he intended the personalty as well as the realty to go into succession from heir male to heir male, and that heirs male should forever succeed to the property, and that on failure of heirs male of John Small Lowther it should go to Philip Court Lowther on the same conditions. This, so far as relates to the realty, is a good limitation of an estate in tail male to Philip Court Lowther after the determination of the previous estate tail, but as regards the personalty it is too remote, being a gift over on an indefinite failure of issue. Mr. Chitty argued that sect. 29 of the Wills Act applied, and that the gift over was in the event of John Small Lowther dying without leaving heirs male living at his death; but I am of opinion that the Act has no reference to such a case. The Legislature there deals with "die without issue," "die without leaving issue," and similar ambiguous expressions; but here there is no ambiguity, the gift over is on failure of

heirs male of the body. Philip Court Lowther therefore [* 654] takes no interest in the * personalty and John Small Andrew cannot take any. Then the codicil causes a difficulty. It has been urged that the recital in the codicil is an interpretation by the testator of the words of his will, and that we must read it as referring to a failure of heirs male of the body at the death. But supposing that the recital in the codicil is anything more than a mere erroneous reference to the limitation in the will, it only refers to the limitation to Philip Court Lowther and we cannot carry it on so as to alter the whole of the limitations in the will. Then the words of the gift over in the codicil are as plain as the words of the will itself. There is a clear gift over to John Small Lowther's eldest daughter in a particular event. The declaration that John Small Lowther took an absolute interest in the personalty must therefore be varied, by adding that it is subject to an executory bequest over to his eldest daughter if he dies without leaving issue male him surviving, and of course the personal estate cannot at once be paid to him.

Sir G. Mellish, L. J.: —

I am of the same opinion.

ENGLISH NOTES.

The enactment referred to in the rule is in the following terms: "In any devise or bequest of real or personal estate the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise; provided, that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

The leading authority on the rule of construction prior to the Wills Act is *Forth* v. *Chapman* (1719), 1 P. Wms. 663, Tudor, Lead Cas. Conv. 682, 3rd ed. The rules established by this case are: —

No. 14. — Dawson v. Small. — Notes.

I. A bequest of a term to A., and if A. die without leaving issue, remainder over, this is construed as meaning if A. die without leaving issue at his death, and the gift over is good. Words equivalent to issue were sufficient: *Goodtitle* d. *Peake* v. *Pegden* (1788), 2 T. R. 720, 1 R. R. 606. There a term was bequeathed to one and the heirs lawful of him forever, but in case he should happen to die and leave no lawful heir, remainder over, and the limitation over was held to be good.

II. A devise to one for life, and if he die without issue, then to another, conferred an estate tail.

III. That where there was a mixed gift of freeholds and leaseholds, the devise of the freehold operated as a limitation of an estate tail, and the bequest of the leaseholds as a gift of the absolute interest with an executory gift over on death without issue living at the death.

A reading of the 29th section of the Wills Act was given by Lord ST. LEONARDS, in *Re O'Bierne* (1844), 1 Jones & Lat. 352. "That Act, however, contains this provision: 'That in any devise or bequest of real or personal estate, the words "die without issue" (which is the same thing as die without lawful issue) or "die without leaving issue" or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person and not an indefinite failure of his issue.' If the Act had stopped there, this being a gift over in case John should die without issue, which words may import either of the two constructions mentioned in the Act, it is plain that they must be construed to mean a failure of issue at the time of the death of John. But then come the words: 'unless a contrary intention shall appear by the will (1st) by reason of such person having a prior estate tail; or (2dly) of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person, or issue; or (3rdly), otherwise.' If a gift is to a man in tail, and for want of issue over, there the contrary appears; for the whole line of issue is provided for by the antecedent gift; and the words introducing the gift over must refer to the same interest; therefore in such a case, the words 'for want of issue,' mean an indefinite failure of issue. So, if upon the true construction of the will, without making use of any implication arising from the words introducing the gift over, the first taker takes an estate tail, the words will equally import an indefinite failure of issue. But we are not to infer an intention from the use of the very words; therefore, if there be a gift to one for life, and if he dies without issue, over; there a contrary intention does not appear: for in such a case

the supposed estate tail is an estate arising by implication only, from the use of those very words. In the present case, supposing that it were a devise of real estate, John would not take an estate tail except by implication, arising from those very words; therefore the case does not fall within the exception in the Act. Then as to the words 'or otherwise,' there is nothing in this case to show 'otherwise' an intention that John should take an estate tail; for no such intention is to be collected from this will, except from the indefinite use of the words introducing the gift over, and which the Act excludes from consideration." The following passages from the judgment of STUART, V. C., in *Greenway* v. *Greenway* (1859), 1 Giff. 131, also seem to contain matter of general application: "The rule prescribed by the 29th section of the Statute is that the words dying without issue must be construed to mean not an indefinite failure of issue, but a failure of issue living at the death . . . The express exceptions and proviso which are mentioned in the latter part of the section are intended to define the cases in which an intention contrary to this rule may appear by the will." When *Greenway* v. *Greenway*, was before the full Court of Appeal (1860), 2 De G. F. & J. 128, 29 L. J. Ch. 601, the following point, which does not appear to have arisen since, was adverted to in the judgment of the Lord CHANCELLOR (Lord CAMPBELL): "It is, therefore, unnecessary to give (and I abstain from giving) any opinion upon the construction of the 29th section of the Act, as to whether the words 'unless a contrary intention should appear by the will by reason of such person having a prior estate tail,' &c. apply to a gift of personalty or are to be confined to a devise of real estate, in which alone (properly speaking) there can be an estate tail. The legislature may have loosely applied these words to personalty, or may have had reasons for intending a distinction between realty, in which there may be an estate tail, to be cut off by a disentailing deed, and personalty not attended by such incidents."

The 29th section of the Wills Act was not intended to apply where the words did not import an indefinite failure of issue before the Act. Accordingly where the words "dying without issue" are coupled with other conditions as "under 21," the words will still not import an indefinite failure of issue: *Morris* v. *Morris* (1853), 17 Beav. 198, 21 L. T. 190, 1 W. R. 377. So too, dying without issue in the lifetime of another, will still extend to the event of death, and failure of issue, both happening in the lifetime of the named person; *Jarman* v. *Vye* (1866), L. R. 2 Eq. 784, 35 L. J. Ch. 821, 14 W. R. 136. Before the Act, the words, in a gift over on death "above a certain age without issue" were not words importing an indefinite failure of issue; *Glover* v. *Monckton* (1825), 3 Bing 13, 10 Moore 453, 3 L. J. (o. s.) C. P. 189.

No. 14. — Dawson v. Small. — Notes.

The cases in which the words "leaving issue" have been construed to mean "having had issue" do not appear to be touched by the Wills Act. Where there is a gift to a parent and child successively with a gift over on the parent dying without issue, the children take vested interests and this interest is not in general divested by the terms of the gift over; *Maitland* v. *Chalie* (1822), 6 Madd. 243, 23 R. R. 209; *Trehearne* v. *Layton* (Ex. Ch. 1875), L. R. 10 Q. B. 459, 44 L. J. Q. B. 202, 23 W. R. 799. But the question is one of construction, and the rule will not apply where it is plain that the vested gift was in some event to be divested; *Re Ball, Slattery* v. *Ball* (C. A. 1888), 40 Ch. D. 11, 58 L. J. Ch. 232, 59 L. T. 800, 37 W. R. 37.

The following are the cases decided respecting the construction to be put upon various expressions by reason of the 29th section of the Wills Act.

"Lawful issue": — *Re O'Bierne* (1844), 1 Jones & Lat. 352. "I bequeath . . . the remainder of my property to my brothers John and James, to be equally divided; with a request to John, that should he die without lawful issue, the property which I bequeath him shall revert back to my nephews, son of my brother James, provided they are prudent and well-conducted." It was admitted that the words of request were imperative, but it was contended that the gift would leave an estate tail by implication to John, and that, the property being personalty, he took an absolute interest. This view was rejected by Lord St. Leonards, whose gloss upon the statute in this case has been set out at length above.

"Lawful heirs": — *Harris* v. *Davis* (1844), 1 Coll. 416. There the testator directed a freehold house and certain leaseholds "to be kept in hand, and to be let to the best advantage, and the produce to be divided half-yearly to" named persons "or to their lawful heirs, and in case there being no heir, then the share or shares to be divided in equal parts amongst the surviving legatees." The words "lawful heirs" were construed to mean heirs of the body, and the gift over in case there were "no heir" was referred to the same limited class, and it was accordingly held that this was a gift over on an indefinite failure of issue. This decision is supported as regards the construction of the words "lawful heirs" by *Goodtitle* d. *Peake* v. *Pegden* (1788), 2 T. R. 720, 1 R. R. 606, which was not, however, cited in the argument, or referred to in the judgment. But it would seem from the observations of Lord Kenyon, in *Goodtitle* d. *Peake* v. *Pegden*, and Knight, Bruce, V. C., in *Harris* v. *Davis*, that this was a construction rendered necessary by the terms of the will in each of these cases. These decisions do not therefore clash with the opinion intimated by Lord Romilly, M. R., in *Mathews* v. *Gardiner* (1853), 17

Beav. 254, that the word "lawful" prefixed to heirs does not qualify it, just as it makes no difference if you prefix "legitimate" to children, or "credible" to witness. It is no more than is implied in the simple word "heirs." It is very different from a devise to A. and his "heirs lawfully begotten," for there the Court infers, that the estate is to go to A. and to the heirs lawfully begotten of A., which words of limitation would clearly confer an estate tail.

"Child": — *Mathews* v. *Gardiner*, *supra*. There a testator devised to his daughter "to hold to her and her lawful heirs, but in case she shall not happen to leave any child," over. It was held, following *Doe* d. *Smith* v. *Stone* (1818), 1 B. & Ald. 713, 19 R. R. 438, and *Doe* d. *King* v. *Frost* (1820), 3 B. & Ald. 546, 22 R. R. 478, that the words in the gift over were not words importing an indefinite failure of issue.

"Children of his body lawfully begotten": — *Parker* v. *Birks* (1854), 1 Kay & J. 156, 24 L. J. Ch. 117. There the devise was to a nephew and to his heirs and assigns forever, but in case his nephew should die without child or children of his body lawfully begotten, he devised to the children of a niece their heirs and assigns forever on the decease of the nephew that part of his real estate devised to the nephew. This was held to be a devise in fee with an executory devise over.

"Heirs of the body": — *Dawson* v. *Small*, the ruling case.

"Male issue": S. C.; *Re Edwards*, *Edwards* v. *Edwards* (1894), 1894, 3 Ch. 644, 64 L. J. Ch. 179, 43 W. R. 169. In this case the testator made two specific devises to his sons their "heirs and assigns." The will contained the following proviso: "Provided always that in case the said [sons] or either of them shall die without leaving any male issue, then" over. This was held to operate as a devise in fee simple with an executory devise over.

"Issue male lawfully begotten": — *Upton* v. *Hardman* (1874), Ir. R. 9 Eq. 157. The testator in that case bequeathed certain renewable leaseholds to his son subject to the payment of certain debts and legacies and in case the son should "die without male issue lawfully begotten," over. This was held to be an absolute gift with an executory gift over.

"Issue lawfully begotten": — *Greenway* v. *Greenway* (1860), 2 De G. F. & J. 128, 29 L. J. Ch. 601. In this case, however, the gift would irrespective of the 29th section of the Wills Act have operated as a valid gift over, and not have been dependent upon an indefinite failure of issue.

It is now provided by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 10, as regards executory limitations contained in an instru-

ment coming into operation after the 31st Dec. 1882: "where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of 21 years, of the class on default or failure whereof the limitation over was to take effect."

No. 15. — SILVESTER D. LAW *v.* WILSON.

(K. B. 1788.)

RULE.

In order that the rule in *Shelley's Case* shall apply, the estates limited must be of the same quality, *i. e.*, the estate limited to the *præpositus* and the estate limited to the heirs or heirs of the body must be both legal or both equitable.

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2 Term Reports 444–451 (1 R. R. 519).

Statute of Uses. — Rule in Shelley's Case.

A devise to trustees, in trust to receive rents and profits during the life [444] of A.; and that such rents and profits shall be applied for the subsistence and maintenance of the said A. during his life, is not an use executed in A. and cannot unite with a subsequent legal limitation to the heirs of the body of A.

This was an ejectment for certain premises in Halifax in Yorkshire, which was tried before PERRYN, B. at the last York assizes, when a verdict was found for the plaintiff, subject to the opinion of the Court on a case; which stated, that Samuel Wilson, being seised in fee of the premises, by will dated the 1st of April, 1732, duly attested, devised (*inter alia*) as follows: "I give and devise unto John Walton and Timothy Walton, and their heirs, and the survivor of them, and his heirs, all, &c. [the premises, describing them] upon special trust and confidence, that they the said John Walton and Timothy Walton, and their heirs, and the survivor of them, and his heirs, shall stand seised of the said dwelling-houses or

cottages for and during the term of the natural life of John Wilson, my son, to such use and behoof as is hereinafter mentioned, viz., that the said John Walton and Timothy Walton shall yearly and every year during the natural life of the said John Wilson, my son, take and receive the rents, issues, and yearly profits of the said premises: and my will and mind is, and I do hereby order that such rents, issues, and yearly profits, shall be applied for the subsistence and maintenance of the said John Wilson, during his natural life, as aforesaid; and immediately from and after the decease of the said John Wilson, my son, then I do hereby give and devise the said premises unto the heirs of the body of the said John Wilson, my son, lawfully to be begotten; and for default of such issue, then I give and devise the same unto the right [* 445] heirs of me the said Samuel Wilson forever." The * testator died seised, without altering or revoking his will, leaving the said John Wilson his eldest son and heir at law, who afterwards, in Michaelmas Term in the 26th Geo. II. duly levied a fine *sur conuzance de droit come ceo*, &c., of the said premises to Richard Best, the uses of which declared to the use of himself for life, remainder in fee to Richard Best, under whom the lessor of the plaintiff claims. John Wilson died in 1786, leaving the defendant his son and heir at law, who was born in 1755, after the levying of the fine, and who entered, upon his father's death.

Holroyd, for the plaintiff. The question is, Whether John Wilson, the son and devisee, took by the will an estate for life only, or in tail? If the latter, it was barred by the fine, and the lessor of the plaintiff's title is regularly deduced from him. This question depends on another, namely, Whether the first limitation to John Wilson for life be a legal or equitable estate in him; or in other words, whether or not it was a trust executed in him by the statute of uses? The rule in *Shelley's Case*, 1 Co. Rep. 104, has always been adhered to, that where a man by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, "the heirs" are words of limitation of the estate, and not words of purchase. In such case the estate for life is united with the subsequent limitation, and forms an estate in fee or in tail in the first taker. *Doe* v. *Fonnereau*, Dougl. 472, and *Jones* v. *Morgan*, Brown's Ch. Cas. 216. This rule indeed only applies where the first and second limitations are of the same nature, either both

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legal or both equitable estates. Now here it must be admitted, that the second limitation conveys a legal estate: and the question then is, Whether the devise to John Wilson the son, be a trust executed in him or not? By a reference to the cases which have been decided, and the principles there laid down on this subject, it will appear that the trust was executed in the present case. First, considering the principles that have been established. Uses and trusts have been held the same as to the operation of the statute. They have been so considered in a variety of cases, and they are so expressed in the statute itself. And the principle appears to have been this; where by the nature of the trust directed it is not necessary or * requisite that the estate should remain in [* 446] the trustees, in order to carry the purposes of the trust into execution, there the trust is executed by the statute, and the legal estate vests in the *cestui que trust*. *Broughton* v. *Langley*, 2 Salk. 679, Lutw. 816, 1 Eq. Ca. Abr. 383, pl. 3, 2 Ld. Raym. 873; in which case it was also held, that upon the statute of uses as well as in other cases, the intent of the testator cannot control the operation of law, 1 Ventr. 372. The principal question there was, Whether by a devise in trust to permit A. to take the profits for his life, and after, the trustees to stand seised to the use of the heirs of the body of A., an estate-tail was executed in him; and judgment was given that it was; and it was held that that was a plain trust at common law; and what at common law was a plain trust of a freehold or inheritance is executed by the statute, which mentions the word trust as well as use. And there the case of *Burchett* v. *Durdant*, 2 Ventr. 311, *contrà*, was denied to be law. The general principle contended for appears likewise from the case of *Jones* v. *Lord Say & Sele*, 1 Eq. Ca. Abr. 383; and more fully in 8 Vin. 262, and 3 Bro. P. C. 558. There the devise was to trustees to satisfy out of the rents and profits several legacies and devises, and to pay several annuities for lives, and afterwards to pay the surplus into the proper hands of the testatrix's daughter, or such person as she should by writing direct, during her life, and then to the use of the heirs of her body, subject to the payment of the several annuities. It is true that in that case it was held a trust, and not a use executed; but the reasons on which the Court went are much in favour of this being executed. The trustees in that case were to pay legacies and annuities to other persons; they were to reimburse themselves their expenses; they were only to pay over the sur-

plus, and that to the separate use of a married woman; those trusts therefore could not possibly have been executed, unless the legal estate remained in the trustees. But it seems to have been taken for granted in that case, that if the limitation had been to trustees to pay over to another generally, the use would have been executed. This reasoning is fully established by the Lord Chancellor in *Shapland* v. *Smith*. Brown's Ch. Ca. 75, which went on the idea that the trustees were, after deducting rates, taxes, expenses, and repairs, to pay over the surplus only. But even in that case [* 447] the Lord Chancellor was of opinion that the use was *executed.[1] That case shows explicitly that a devise to trustees to pay rents and profits generally is a use executed; and that where the whole profits go to the *cestui que trust*, the land shall go with it. A devise of the profits has always been considered as a devise of the land itself. And it has been repeatedly held, that wherever a person is entitled to the whole beneficial interest, the possession shall follow it; that the right of possession and the right of exclusive enjoyment shall never be disunited; and that where the trustee is but a mere instrument to receive and pay over to the *cestui que trust*, the use or trust shall be executed. This Court will the more readily adopt these principles in all cases, when it is considered that the statute of uses was remedial; and extends in terms to all uses, confidences, and trusts. Now in the present case, the devise limits the estate to trustees, in trust to receive the rents and profits, with a direction that they shall be applied to the subsistence and maintenance of John Wilson for life. It is not said that the trustees shall have the application of them, or that, if they shall, such application is to be at their discretion. But the intention of the testator rather was that the *cestui que trust* should have the rents and profits for his subsistence and maintenance, and that the trustees should pay them to him, to be by him so applied. For unless the contrary be manifest on the face of the will, it must be construed so as to be most beneficial to the *cestui que trust*: he is the object of the testator's bounty: no beneficial interest is given to the trustees. If the testator had intended that the trustees should have a complete power over the application of the profits during the life of his son, he would have expressed himself differently. Instead of saying that the profits

[1] This was read from a manuscript note, and does not appear in the report of it in Brown.

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shall be applied for his subsistence, &c., he would have directed that they should apply them according to their discretion, or words to that effect. If the trustees are to have the application, such injurious consequences will follow as can never be presumed to have been in the intention of the testator. Such a power in trustees would be liable to great abuse, and a great restraint on the *cestui que trust*. It would subject him to the control, perhaps to the caprice, of others; and place him under a perpetual minority or guardianship. The Court will not put him in such a situation, unless they are bound by express words; and there are none such here. It must then be considered that * the [* 448] application of the profits is to be by him; in which case the devise amounts to no more than this, that the trustees shall receive the rents, and pay them over to John Wilson for his subsistence: and then the whole beneficial interest being in him, and the whole profits going to him, the limitation for life is executed in him, according to the doctrine in *Shapland* v. *Smith*, the other cases, and the spirit and letter of the statute of uses. And being executed in him, his legal estate for life united with the subsequent limitation to the heirs of his body, and gave him an estate-tail, which is barred by the fine; and consequently the lessor of the plaintiff is entitled to recover.

Heywood, for the defendant. It was plainly the intention of the testator in this case, that his son should take an estate for life only, and that the issue of that son should take the inheritance. However, the question must turn on the legal effect of the technical words which he has used, and not upon his intent. The legal estate was in the trustees during the life of the son; and then the equitable interest, which he had, cannot be coupled with the subsequent legal limitation to the heirs of his body, so as to execute the trust under the statute, and vest an estate-tail in him. That the first devise to the trustees gave the son only an equitable estate for life appears conclusively from Shep. Touch. 482, where it is said, that where lands are conveyed in trust that the feoffee shall take the profits, and deliver them to the feoffor and his heirs, this trust is not within the statute, nor will the statute execute it. In a note to that passage is cited 1 Eq. Ca. Abr. 383, where three ways are mentioned of creating a trust: 1st, where a man seised in fee raises a term for years, and limits it in trust for A., &c.; for this the statute cannot execute, the termor not being seised. 2dly,

Where lands are limited to the use of A., in trust to permit B. to receive the rents and profits; for the statute can only execute the first use. 3dly, Where lands are limited to trustees to receive and pay over the rents and profits to certain persons; for here the lands must remain in the trustees to answer these purposes. Now this last rule is immediately in point to the present case, and must govern it. And it has been subsequently recognized by Mr. Justice Blackstone (2 Black. Com. 356), who says that where lands are given to one and heirs in trust to receive and pay over the profits to another, this use is not executed by the statute. Now [* 449] here the * trustees are to receive, and pay over, for certain purposes; and unless the legal estate remain in them, those purposes cannot be answered. This is very distinguishable from the case of *Broughton* v. *Langley*, Salk. 679; for there the trustees were to permit the *cestui que trust* to receive the rents and profits, and there was nothing for them to do: and that distinction was expressly taken in the case of *Jones* v. *Lord Say & Sele*, 1 Eq. Cas. Abr. 383, 8 Vin. Abr. 262; where too it was held, that the different interests could not unite. And the same doctrine was held by Lord HARDWICK in *Bagshaw* v. *Spencer*, 1 Ves. 142, where one of the questions was, Whether the testator's nephew took an estate for life or in tail? and it was determined that he took an equitable estate for life only; though the trustees had not so much discretion as to the distribution of the rents and profits as they have in this case; for after debts, &c., paid, the nephew was entitled to one moiety certain of the estate. As to the case of *Shapland* and *Smith*; when it is thoroughly considered, it makes in favour of the defendant. That was a question upon a title which depended on the validity of a recovery against which the master had reported. The question was, Whether a devise in trust to receive the rents and profits, and, after deducting the rates, taxes, and repairs, to pay over to C. S. for life, was executed in C. S. to the heirs of whose body the estate was limited over. Mr. Baron EYRE, and Master HOLFORD, were of opinion that it was, but Master HETT differed; and the CHANCELLOR afterwards concurred with Master HETT'S opinion; and the exceptions to the Master's report were ultimately over-ruled. The trustee's having to receive the rents and profits and pay them over, has uniformly been determined to take the trust out of the statute. And besides in this case the rents and profits are required expressly to be appropriated by

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the trustees to the subsistence and support of the son; and they might be called to account, if they applied them to any other purposes.

Holroyd, in reply. What is said in Shep. Touch. is overruled by the reasoning in *Shapland* v. *Smith*; and though the LORD CHANCELLOR was ultimately of opinion in that case, that the use was not executed, yet there is a manifest distinction between that case and the present; for there the trustees were to do something besides merely receiving and paying the profits over; they were bound to repair, which was the ground of that decision; * otherwise according to what is said by the CHANCELLOR [* 450] the use would have been executed. Besides the CHANCELLOR said, that if it was even a disputed title he would not oblige a purchaser to take. Now this devise is only a direction that the rents should be applied to the subsistence and maintenance of *cestui que trust*, and amounts to nothing more than a general application to his use.

The Court said that they would look into the case of *Shapland* and *Smith*; and the next day,

ASHHURST, J. delivered the opinion of the Court.

We postponed giving our opinion yesterday, not as having ourselves conceived any doubt upon the question; but as the case of *Shapland* v. *Smith* was cited, on the argument of which the CHANCELLOR was said to have thrown out an opinion which might govern this case, in deference to so great an authority, we were disposed to look into that case, before we finally gave our opinion. We have now looked into the case, and from the state of it in Brown's Reports, we do not find anything to shake the former authorities upon this subject. In the case alluded to, the master had reported against a title to an estate which was referred to him: on which the question occurred, Whether the trustees had the legal estate in them or not? He reported against the title, which report was excepted to. The testator had devised to trustees in trust that they should yearly, after deducting rates, taxes, repairs, and expenses, pay the remaining surplus to his brother for life, and after his decease to the use of the heirs of his body. The CHANCELLOR said, that the trustees being to pay taxes and repairs, they must have an interest in the premises, and the legal estate for the life of the brother must be in them: and therefore he confirmed the report. This circumstance making the case still stronger than where

the trustees are to receive and pay over, it was natural for the CHANCELLOR to state it; but he did not deny the authority of the former cases; and as this case did not call for it, it is not likely that he should go out of his way to overturn them. Then taking the former authorities to be unshaken, the case of *Simpson* v. *Turner*, Eq. Cas. Abr. 383, and which is recognized in 2 Bl. Com. 336, is in point to the present. But there seems to be a circumstance in the present case which makes it still stronger; for it is not barely to receive and pay, but the testator directs that such rents, issues, and profits, shall be applied for the subsist-
[*451] ence and maintenance of the said John * Wilson. The testator therefore seems to mean that the trustees should be invested with some sort of discretion with respect to the application. And if the tenant for life had proved dissolute and extravagant, and had squandered his money in gaming, to the defrauding of his honest creditors, it is by no means clear that the trustees would not have been justified, either in a Court of law or equity, in paying such creditors, before they had paid over the surplus to the tenant for life; as the testator seems to have had some jealousy of his son's conduct, and to have wished that the trustees should have an eye to the application of the money. Therefore we are all of opinion that the judgment must be for the defendant.

Postea to the defendant.

ENGLISH NOTES.

It may be broadly asserted that the same formalities are required to the limitation of a fee simple or fee tail by way of use, as in a conveyance at common law. The cases are very numerous and are collected 1 Sanders, Uses, 122, 5th ed. In two cases, however, it seems that an estate in tail was held to be well limited by way of use in a deed where the words "heirs of the body" were not used in immediate connection with the *praepositus*: *Owen* v. *Smyth* (1796), 2 H. Bl. 594, 3 R. R. 513; *Galley* v. *Barrington* (1824), 2 Bing. 387, 10 Moore 21, 27 R. R. . . . The rule is now well settled that the limitation of an equitable estate (by way of trust executed) has the same construction as a legal limitation. Elphinstone on Interpretation of Deeds, Rule 104; *Holliday* v. *Overton*, p. 836, *supra*; *Re Whiston's Estate, Lovalt* v. *Whiston* (1894), 1894, 1 Ch. 661, 63 L. J. Ch. 273, 70 L. T. 681, 42 W. R. 327.

If the use be limited to the person to whom the grant is made at common law, whatever may be the quality of the estate limited, the

grant takes effect as a grant at common law and as if the statute of uses had not been passed: *Peacock* v. *Eastland* (1870), L. R. 10 Eq. 17, 39 L. J. Ch. 534, 22 L. T. 706, 18 W. R. 856. In that case a tenant in tail executed a disentailing deed by which he granted the estate to two and their heirs free from all estates tail of himself, to the use of the grantees and their heirs upon trust for the grantor. The grantees disclaimed, and the disentailing deed was held ineffectual to bar the estates. But where the estate is limited to one to the use of another, the legal estate is immediately transferred to the person to whom the use is limited, and the subsequent disclaimer of the grantee to uses will not displace that estate: *Re Dudson's Contract* (C. A. 1878), 8 Ch. D. 628, 47 L. J. Ch. 632, 39 L. T. 182, 27 W. R. 179.

The actual decision in the ruling case is supported by *Collier* v. *McBean* (1865), 34 Beav. 426. The construction which Lord ROMILLY put upon the will was, however, disapproved by the Lords Justices on the appeal (1865), L. R. 1 Ch. 81, 35 L. J. Ch. 144, but this expression of a contrary view only affected the question as to whether the legal estate passed to particular persons, and did not affect the principle of the decision regarding the operation of the rule in *Shelley's Case*. Other cases recognizing the rule in the principal case are *Collier* v. *Warlters* (1873), L. R. 17 Eq. 252, 43 L. J. Ch. 216; *Richardson* v. *Harrison* (C. A. 1885), 16 Q. B. D. 85, 55 L. J. Q. B. 58, 54 L. T. 456.

AMERICAN NOTES.

That both estates must be of the same quality to give application to the rule in *Shelley's Case*, is well settled in this country. *Williams* v. *Williams*, 11 Lea (Tennessee), 652; *Turner* v. *Ivie*, 5 Heiskell (Tennessee), 222; *Green* v. *Green*, 23 Wallace (U. S. Sup. Ct.), 186; *Baker* v. *Scott*, 62 Illinois, 86; *Armstrong* v. *Zane's Heirs*, 12 Ohio, 287; *Taylor* v. *Lindsay*, 11 Rhode Island, 518; *Brown* v. *Renshaw*, 57 Maryland, 67; *Powell* v. *Brandon*, 24 Mississippi, 343; *Mannerback's Estate*, 133 Penn. State, 342; *Ware* v. *Richardson*, 3 Maryland, 505; 56 Am. Dec. 762, a valuable case; *Zuver* v. *Lyons*, 10 Iowa, 510; *Hanna* v. *Hawes*, 45 Iowa, 437; *Thurston* v. *Thurston*, 6 Rhode Island, 296; *Ward* v. *Amory*, 1 Curtis (U. S. Circ. Ct.), 419; 2 Washburn on Real Property, 650, citing the principal case; 2 Pingrey on Real Property, sect. 1016, citing the principal case; *Tallman* v. *Wood*, 26 Wendell (N. Y.), 9; *Gadsden* v. *Desportes*, 39 South Carolina, 131.

No. 16. — BROUGHTON *v.* LANGLEY.

(K. B. 1704.)

No. 17. — HARTON *v.* HARTON.

(K. B. 1798.)

No. 18. — BAKER *v.* WHITE.

(CH. 1875.)

RULE.

THE Statute of Uses is not directly applicable to Wills, but the Court may infer, from the terms of a will, that a testator intended that the same rules which the Statute of Uses made applicable to settlements of real estates, should be applied to the devise contained in the will.

But the Court will not infer that the use is executed in the beneficiary, if it appears that the immediate devisee has duties to perform which are essential for carrying out the intention.

Broughton v. Langley.

2 Ld. Raymond 873–878 (s. c. Lutw. 823; Salk. 679; 1 Eq. Cas. Abr. 383; Holt, 708).

Devise. — Operation by analogy to Statute of Uses.

[873] Under a limitation to two and their heirs in trust to permit J. S. to take the rents, issues and profits of the estate, the use is executed in J. S.

The plaintiff Humphry Broughton brought an ejectment against the defendant Abraham Langley upon a demise of three messuages, twenty acres of land, &c., lying at Hipperholme *cum* Brigghouse in the parish of Halifax in the county of York, made to the plaintiff for five years, to be computed from the first of March 12 Will. III. &c., by John Ramsden junior. Upon not guilty pleaded, and a trial had before TURTON Justice at the summer assises held at York 12 Will. III. a special verdict was found, viz., that before the time of the trespass and ejectment Robert Ramsden grandfather of the said

No. 16. — Broughton v. Langley, 2 Ld. Raym. 873, 874.

John Ramsden lessor of the plaintiff was seised of the, &c., in fee; and being so seised, the sixth of April, 1689, he made his testament, and thereby devised the messuages, &c., in question with their appurtenances, *in his verbis*, viz.: "I do hereby give, devise; and bequeath unto John Stancliffe, and Robert Ramsden my second son, and their heirs and assigns, all those my messuages or tenements with the appurtenances at Norwood-green, and all the houses, buildings, closes, lands and grounds to the same belonging, now in the tenure of Jeremy Robinson and Robert Wilson, or their assigns; and I do hereby express, publish and declare, that the said John Stancliffe and Robert Ramsden my son and their heirs shall by force of this my last will and testament stand and be seised of the said messuages, &c., to all the uses, intents and purposes hereinafter mentioned; that is to say, First of intent and purpose, that they shall permit and suffer George Ramsden, my son to have, receive * and take the rents, issues and [* 874] profits of the said messuages, &c., for and during the term of his natural life, and after his decease shall stand seised thereof to the use of the heirs of the body of the said George my son lawfully begotten and to be begotten, and for default of such issue to the use of the said John Ramsden and Robert Ramsden my sons, and of their heirs and assigns forever, equally to be divided amongst them; Provided always and upon condition that if it shall fortune the said George my son to marry a woman that shall have *bonâ fide* one or more hundred pounds, that then the said John Stancliffe and Robert Ramsden my son and the said George shall have power by virtue of this my will to make a jointure to and for such wife of £10 per annum out of the same lands, &c., for every hundred pounds such wife shall have for her portion for the life of such wife, and after to the heirs of the body of the said George upon such wife, &c.;" then the jury find further, that the said Robert Ramsden the grandfather by his said testament devised other tenements at Norwood-green in Hipperholme aforesaid to his said son Robert Ramsden in fee, in the occupation of Richard Riddlestone, upon condition that the said Robert Ramsden should permit and suffer George Ramsden and his heirs peaceably to enjoy and occupy a close of land called Paradise, and to take the rents, issues and profits thereof to his own use; and in default thereof, that the said George and his heirs after any disturbance made by the said Robert Ramsden or his heirs in the enjoyment thereof should enter

into one messuage, &c., part of the tenements lately mentioned and take the rents, &c., thereof until the said Robert Ramsden should desist from such molestation, and give security not to disturb for the time to come: then the jury find, that the devisor had issue three sons, John, Robert, and George; that the devisor died in 1689; that George upon the death of his father entered into the tenements in question aforesaid, and took the rents and profits to his own use during his life; that George in 1690 suffered a common recovery to the use of himself and his heirs; that by indentures of lease and release dated the first and second of November 9 Will. III.. George conveyed the premises, in consideration of £150 paid by the defendant, to the defendant in fee; that he entered, &c., and was seised *prout lex postulat;* that George Ramsden died the first of December, 1697. Then they find John Ramsden junior, the lessor of the plaintiff, heir of the body of the said George Ramsden: and they find lease, entry and ouster, and make the common conclusion, &c. The general question made upon this special verdict was, whether George Ramsden took an estate executed for his life by this will, or whether the estate remained in the trustees for his life, and he had only a trust not executed by the statute 27 Hen. VIII. c. 10. of uses. For it was admitted, that if George Ramsden [* 875] took an estate for his life executed, he would by virtue * of the subsequent clause (which limits the use to the heirs of his body) be tenant in tail executed; and then the common recovery suffered by him would bar the intail; and consequently the plaintiff would have no title, and the defendant's title would be good. But if he was but *cestui que trust* for his life, and the estate remained in the trustees for the said time, it would be otherwise. It was also admitted by the plaintiff's counsel, that a devise of lands may be by express words to the use of another than the devisee, and that such use will be executed by the statute of the 27 Hen. VIII. [For that see Hen. VI. Fitz. devise 22, that a devise by custom may be to a use, and then such use will be afterwards executed by the said statute. See also the words of 27 Hen. VIII. cap. 10. Moor. 107. 1 Sid. 26. and 2 Ventr. 312. *Burchett* v. *Durdant.*] And this case was argued at the bar by Mr. Cheatham, and Mr. Broderick for the plaintiff, and by Mr. Raymond and Mr. Cheshyre for the defendant. And the counsel argued for the plaintiff, that George Ramsden had but a trust in these lands, and that the estate in law remained in the trustees.

For they said, that though a devise may be by express words to the use of another than the devisee, yet without express words it cannot be averred to the use of another than the devisee, because it implies consideration in itself. 4 Co. Rep. 4. *Leake* and *Randal's* case. Then here by the first clause of the will, I give and bequeath to John Stancliffe and Robert Ramsden and their heirs, the estate and use passed to them in fee, if there are not subsequent words expressed, to convey the use to George Ramsden. And (by them) the subsequent words will not carry the use to George Ramsden. For they are that John Stancliffe and Robert Ramsden shall stand seized, to the intent that they shall permit and suffer George Ramsden to receive the rents, issues, and profits for his life; which words pass no estate to George Ramsden, but apparently show the intent of the devisor to be, that the trustees shall have the estate in law, but that George Ramsden by their permission shall receive the benefit of it. For if he had intended, that George Ramsden should have the estate in law, he would not have said, that the trustees should permit and suffer George Ramsden to take the profits, &c., which he might do in spite of them. Besides, his intent appears more plainly by the subsequent clause, for when he devises the estate to the heirs of the body, he varies the phrase, and leaves out the words permit and suffer, but says that the trustees shall stand seized to the use, &c., so that there he devises the very estate. Farther his intent appears more plainly, by the clause which gives power to George Ramsden and the trustees, to make a jointure; for if he did not intend that the trustees should have the estate, it would be vain and ridiculous, to appoint them to join in the conveyance. Then several cases were cited, that the words permit and suffer would *not pass an interest in the land, but founded only in [*876] covenant. 1 Roll. Abr. 848. Lit. X. pl. 2. Keilw. 41. 3 Bulstr. 252. Cro. Jac. 172. 2 Mod. 81. Cro. Eliz. 223. Cro. Jac. 598. But for authority in point they relied upon the case of *Burchett* and *Durdant*, 2 Ventr. 311, where H. Wicks devised lands to John Higden and his heirs, upon trust that he should permit and suffer Robert Durdant, during his life, to take the rents, issues, and profits, Robert committing no waste, and after his death to the heirs of the body of Robert Durdant then living. And it was there held in the Exchequer Chamber, that the estate in law remained in Higden, and that Robert Durdant had but a trust;

which is the same with the principal case. And therefore for these reasons they prayed judgment for the plaintiff.

E contra it was argued for the defendant, that this was an estate executed in George Ramsden, by the statute of the 27 Hen. VIII. To prove which they said, that before the statute of 27 Hen. VIII. an use, confidence or trust, were the same; but now since the statute, common parlance has made a distinction between a use and a trust; as if the first should be executed in possession by the said statute, the other not; though in truth a trust shall be executed, as well as an use. As if A. makes a feoffment to B. in trust for C. this shall be executed by the statute. But they urged, that before the statute such a limitation as that would have been an use; and therefore consequently being the first use, it shall now be executed by the statute. An use in 1 Co. Rep. 121 b. Co. Lit. 272 is defined to be a trust or confidence, which doth not issue out of the land, but is *quasi* a thing collateral, annexed in privity to the estate and to the person touching the land, viz., that *cestui que use* shall take the profits, and that the terretenant shall convey estates according to the direction of *cestui que use:* so that *cestui que use* had neither *jus in re* nor *ad rem;* but in equity he had both, where his remedy was by *subpoena. Cestui que use* may be sworn upon an inquest. Lit. sect. 464. There may be *possessio fratris* of an use. 5 Edw. III. 27. But *cestui que use* could not distrain cattle *damage feasant* upon the land. Dier, 9. Plowd. 352, 349. Keilw. 41, 46. He could not release the rent to the tenant of the land, nor give license to enter upon the land, 9 Hen. VII. 26. He could not take the trees, 15 Hen. VII. 13. And all actions ought to be brought in the name of the feoffees, 7 Ed. IV. 29 b. Now this definition of an use agrees with this devise to George Ramsden, considering it as before the 27 Hen. VIII. cap. 10. For here there is a confidence reposed in the persons of John Stancliffe and Robert Ramsden, and their heirs; it is annexed in privity to their estate, but collateral to the land; it is that George Ramsden shall take the profits, and of consequence that they shall convey estates according to his direction, and according to [* 877] the interest that he had in the * use. It is the same thing as if the devisor had said, I devise the land to trustees to the use of George Ramsden or to the intent that George Ramsden should take all the land to his use; for a grant of the rents, issues, and profits, is a grant of the land itself. Co. Lit. 4 b. 14 Hen.

VIII. 6. If it be so in a grant, much more shall it be so in a devise. Moor 753. *Griffith* v. *Smith*, 3 Leon. 78, pl. 118; 2 Leon. 221, Hob. 285. *Balder* v. *Blackburne*, Hutt. 36. Moor 774, Velvert, 73; *Carpenter* v. *Collins*. So Pasch. 8, Will. III. B. R. between *South* and *Allen*, 3 Salk. 228, Comb. 375, in ejectment upon a special verdict the case was, that J. S. seised of the lands in question in fee, 29 Car. II., devised all the rents, issues and profits of them to Sarah Burges, wife of John Burges, for life, to be paid by his executors, so as the husband of Sarah Burges should not intermeddle with them; the question was, whether Sarah Burges by this devise had the lands themselves or whether the executors were trustees for her? Rokeby and Samuel Eyre Justices held, that the executors were trustees; but Holt Chief Justice held, that this was an express devise to the wife herself, and that the subsequent words could not restrain it. Wherefore the counsel for the defendant concluded, that a devise of the profits is the same as a devise of the land but that a devise of the land to trustees, to the intent that George Ramsden should have and take the land, would have been an use executed in George Ramsden; and therefore that this devise to the trustees, to the intent that George Ramsden should take the profits, will be an use executed in George Ramsden. They compared this case to the case Pasch. 27, Hen. VIII. 6. pl. 15, where in a deed the covenantor declared, that his recoverees (having suffered a common recovery before) should suffer Giles to take the profits of the lands, it was held an use in Giles. So 30 Hen. VI. Fitzh. devise 22, a devise that one of the three feoffees should receive the profits, held a confidence, which is the same with an use. So in this case, before the statute of 27 Hen. VIII., this would have been an use in George Ramsden, and John Stancliffe, and Robert Ramsden would have been seized of these lands to the use or in trust for George Ramsden; and then it would be executed in possession, by the express words of the 27 Hen. VIII. cap. 10, where are, that where any person shall be seised of any manors, lands, &c., to the use, confidence, or trust, of another in fee tail, or for life, such use shall be executed in possession. Then they gave answers to the objections made of the other side. 1. And first to the intent of the devisor, because he intended that this should be only a trust; they answered, that it is true, that it is said in several books, that the intent will govern the raising of uses. Perk. 102, sect. 530, &c. But that which

is intended by the said books, is, that the judges will not adjudge an use or interest to pass, contrary to the intent of the party. But there is no authority in any book, that the intent of the [* 878] party can hinder the operation of the law. * And in this case of the statute in the execution of the use that is raised, if a man covenants to stand seized, to the use of himself for life, without impeachment of waste, and after his decease to the use of the heirs male of his body; the man's intent is plain, to have but an estate for his life, yet the law supervenes his intention, and makes him tenant in tail. 1 Vent. 379. *Pybus* v. *Mytford;* where HALE Chief Justice says expressly, that the intent of the party cannot control the operation of the law. 2. As to the objection made from the power, they said that it would not be void; but that it was a prudent caution made by the devisor, that the son should not marry without the consent of friends. For there the trustees, though the estate was executed in George Ramsden, may execute the power, and join in making of the jointure; and when it shall be made, the jointuress will be in by the will. As to the case of *Burchett* v. *Durdant*, cited on the other side out of 2 Vent. 311, they said, that the principal point in the said case was, whether the remainder, limited to the heirs of Robert Durdant now living, vested in George Durdant, or was contingent, viz., whether that was a description of the person? and it was held, that it was, and that the remainder vested in George Durdant: and therefore the other question, whether the estate for life was executed in Robert Durdant or not, was entirely immaterial; for be it so or not, Robert Durdant was but tenant for life, and therefore his recovery would not bar George Durdant nor his heirs, &c. [See the said case, Sir T. Jones, 99; 1 Ventr. 334; 3 Keb. 832; Raym. 333.] And for these reasons the counsel for the defendant concluded, that this was an use executed in George Ramsden, &c., and therefore that judgment ought to be given for the defendant. And of that opinion was the whole Court. And they agreed *in omnibus* with the defendant's counsel, and their answers to the objections made by the plaintiff's counsel. They said, that a use and trust (as to the words themselves) were of the same purport as to the execution by the said statute. For if a man makes a feoffment in fee to A. in trust to permit B. to take the rents, issues, and profits; this will be an use executed as well as if A. had made use of the word use. They approved also of the answer given to the

objection, that the intent appeared by the power; and said, that this was a good precedent, to keep children dutiful to their relations, when they cannot settle jointures upon their marriage without their concurrence. And they said, that if they construed this limitation only a trust, there will be strange debates. For if George shall have children, then the trustees will be seised in fee in trust for George for life, and the issues will be tenants in tail; which will be strange. Therefore it will be better to construe it one entire use executed by the statute. And judgment was given for the defendant.

Harton v. Harton.

7 Term Reports, 652–654 (4 R. R. 537).

Devise. — Trusts to permit Femes Coverts to receive Rents. — Legal Estate in Trustees.

A devise of lands to trustees and their heirs, upon trust to permit a [652] feme covert to receive and take the rents and profits during her life, for her sole and separate use, and after her decease to the use of the first and other sons of her body, then to the daughters as tenants in common with other like limitations to other femes covert vests the legal estate in the trustees.

The following case was sent by the Lord Chancellor for the opinion of this Court.

Samuel Jaques deceased being seised in fee of several freehold and copyhold estates, and having surrendered the copyhold to the use of his will, by his will dated 27th November, 1767, duly executed and attested to pass lands, devised to the defendant John Crozier and John Lightfoot since deceased and their heirs all his messuages, lands, tenements and hereditaments in the parish of Iver in the county of Bucks, and at Pinner in the county of Middlesex, with their appurtenances, upon trust to permit and suffer his niece the plaintiff Bridget Harton, then the wife of William Harton, to receive and take the rents and profits of all the said premises during her life for her own sole and separate use, notwithstanding her coverture, and without being in any wise subject and liable to the debts, management, power, or control of her then or any after-taken husband, and her receipt alone from time to time to be a sufficient discharge for the same; and after her decease then to the use of the first son of the body of his said niece Bridget Harton lawfully begotten and the heirs of his body

lawfully issuing; and for want of such issue then to the use of the 2d, 3d, 4th, 5th, and every other son and sons of his said niece Bridget Harton lawfully begotten, and the heirs of their respective bodies lawfully issuing, successively as they should be in seniority of age, and priority of birth, the eldest of such sons, and the heirs of his body being always to be preferred, and taken before the younger of such sons, and the heirs of his body; and in default of such issue to the use of all and every the daughter and daughters of his said niece Bridget Harton lawfully begotten and the heirs of their respective bodies lawfully issuing, to take as tenants in common and not as joint tenants; and in default of such issue of his said niece Bridget Harton the said testator devised the said estates, without inserting any new limitation, upon further trust to permit and suffer his niece Anna Maria, then the wife of J. Hogard, to take the rents and profits of all the premises devised to the said Bridget Harton as aforesaid during her life for her separate use, in like manner and with such [* 653] remainders over * to the use of the first and other sons of his said niece Anna Maria in tail, with remainder to her daughters in tail, as tenants in common, as the said premises are and stand limited above in trust for his said niece Bridget Harton for her life and to the use of the issue of her body in tail; and in default of such issue as aforesaid of his said niece Anna Maria, then upon further trust to permit and suffer his niece Sarah Jaques, spinster, to receive and take the rents and profits of all and singular the said premises during her life for her sole and separate use, in like manner and with such remainders over to the use of the first and other sons of his said niece Sarah Jaques in tail, with remainder to her daughters in tail, as tenants in common as the said premises are and stand limited above in his said will in trust for his said nieces Bridget Harton and Anna Maria Hogard respectively for life, with remainder to the use of the issue of their respective bodies in tail; and in default of such issue as aforesaid of his said niece Sarah Jaques, to the use of his cousin Samuel Plumb, Esq. and the heirs of his body lawfully begotten; and in default of such issue to his (the devisor's) own right heirs for ever. The devisor died seised, on 18th June, 1771, without having revoked or altered his said will, and left the said plaintiff, Bridget Harton his heir at law and customary heir. The plaintiff Samuel Harton is the first son of the body of the said plaintiff Bridget

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Harton, and the defendant William Henry Harton is the second son of her body. The defendant John Crozier is the surviving trustee in the said will, John Lightfoot his co-trustee, therein named, being dead. The questions were, whether by the will of S. Jaques, of the 27th November, 1767, the first son of the body of Bridget Harton took a legal remainder in tail in the estates thereby devised, or whether John Crozier and John Lightfoot, the trustees, took a fee-simple in the premises by the said will.

Law for the plaintiffs, mentioned the case of *South* v. *Alleine*[1] as the only one like this case upon which he could build any argument in favour of the plaintiffs: but being pressed by the Court as to the authority of that case, he admitted that it could not hold, as without adjudging the legal estate to be in the trustees, the interests of the several femes coverts would not be secured, and so the intention of the devisor might be defeated.

Lord KENYON, Ch. J. Whether this be a use executed in the trustees or not, must depend upon the intention of the devisor, * which is to be collected from the will. This [* 654] provision, it appears, was made in order to secure to the several femes coverts a separate allowance free from the control of their husbands, to effectuate which, it is essentially necessary that the trustees should take the estate with the use executed, otherwise the husband of each taker would be entitled to receive the profits, and so defeat the very object that the devisor had in view.

The other Judges concurred, and

LAWRENCE, J. mentioned the case of *Jones* v. *Lord Say and Seal*, 1 Eq. Abr. 383, where the devise was to trustees and their heirs in trust to pay several legacies and annuities, and to pay the surplus to a feme covert for life to her separate use or as she should direct, and after her death the trustees to stand seised to the use of the heirs of her body with remainder over, it was holden that by the words of the will, the use was executed in the trustees and their heirs during the life of the feme covert, and after her death it was executed in the persons entitled to take, charged with the annuities.

Lord KENYON, C. J., said that *Jones* v. *Lord Say and Seal* was a case by itself. The best report of it was in Viner's Abr. (8 vol.

[1] Salk. 228. See the report of the same case under the name of *Bush* v. *Allen* in 5 Mod. 63.

262) and it was recognised to be law, by Lord HARDWICKE in *Bagshaw* v. *Spencer*, 1 Ves. Sen. 144.

The following certificate was afterwards sent to the LORD CHANCELLOR:

We have heard this case argued by counsel, and are of opinion that the legal estate by way of use executed in fee-simple, vested in John Crozier and John Lightfoot; that construction being necessary (as we conceived) to give legal effect to the testator's intention, to secure the beneficial interest to the separate use of the several femes coverts.

KENYON,
W. H. ASHHURST,
N. GROSE,
J. LAWRENCE.

Baker v. White.

44 L. J. Ch. 651–658 (s. c. L. R. 20 Eq. 166).

[651] *Will. — Mixed Devise of Freehold and Copyhold Estates to Trustees. — Legal and Equitable Estates.*

Testator devised freehold and copyhold estates to trustees, their heirs, executors, administrators, and assigns, upon trust during the natural life of his son A. to receive the rents and profits thereof, and to pay the same to A. and his assigns during his life, or permit him to receive the same. And after the decease of A. the testator devised the same to the sole use and behoof of the heirs of his body lawfully begotten. The testator appointed the trustees and another executors, and declared that the receipts of his trustees and executors should be good discharges: — *Held*, on demurrer to a bill for specific performance of an agreement for the sale of freeholds and copyholds, that there was a legal estate in the trustees and their heirs during the life of A. in the copyholds, and demurrer allowed as to the copyholds.

Edward James Baker by his will, dated the 22nd of [*652] August, 1844, gave, devised, *and bequeathed to his brother, Richard Henry Baker, and his nephew, George John Parson, all his manor, messuages, farms, lands, tenements, hereditaments, and premises, not thereinbefore devised, of what nature or tenure soever, both freehold and copyhold, situate in the several parishes of Frensham, Stoke-next-Guildford, Worplesdon, Woking, Farnham, and Elstead, in the county of Surrey, and in the parishes of Lingashall and Northchapel, in the county of Sussex, or either of them, with their rights, members and appurtenances,

to hold the same unto the said R. H. Baker and G. J. Parson, their heirs, executors, administrators and assigns, according to the nature and tenure thereof respectively, upon trust during the natural life of his son James Baker, to receive the rents, issues and profits thereof, and to pay the same unto his said son James Baker and his assigns during his life, or otherwise to permit him or them to receive the same. And from and after the death of his son James, the testator gave, devised and bequeathed the same to the sole use and behoof of the heirs of his body lawfully begotten. And in case his said son James should die without leaving any issue of his body lawfully begotten, then the testator gave, devised and bequeathed the same to his daughter, Elizabeth Goldsmith, her heirs and assigns, forever, and he appointed the trustees and his son, James Baker, executors of his will, and the testator declared that the receipt and receipts of his said trustees and executors for any money payable to them by virtue of his said will should effectually discharge the person or persons paying the same from being answerable for the misapplication or non-application thereof.

The testator died on the 8th of October, 1844. At the time of his death the testator was seised or absolutely entitled in fee, and according to the custom of the manor of Farnham, respectively of or to freehold and copyhold hereditaments in the parish of Frensham, in the county of Surrey, including in particular the freehold and copyhold in the same parish comprised in the agreement for sale, for specific performance of which this suit was instituted.

The freehold hereditaments comprised in the above-mentioned devise were disentailed by an assurance, dated the 21st of March, 1845.

At a customary Court, held for the manor of Farnham, on the 20th of September, 1847, the plaintiff, pursuant to the devise, was admitted tenant of all such of the copyhold hereditaments as were situate in the parish of Frensham, to hold the same to him and his heirs according to the custom of the manor, and for such estate and interest as he was entitled to under the said will, and at the same Court the plaintiff, for the purpose of barring all estates tail and all remainders over, surrendered into the hands of the lord the same hereditaments, to the use of himself and his heirs, and at a customary Court, held on the 15th of October,

1850, was admitted tenant of the same accordingly. By an agreement in writing, dated the 12th of December, 1874, between the plaintiff of the one part, and the defendant of the other part, it was agreed, that the plaintiff should sell and the defendant should purchase the several freehold and copyhold hereditaments and premises situate respectively in the said parish of Frensham, as to the freeholds for an estate in fee simple in possession, and as to the copyholds in fee according to the custom of the manor in possession at the price of £400.

The defendant declined to carry out the agreement, upon the ground that the plaintiff was unable to make a good title, alleging that, according to the true construction of the will, the plaintiff took an equitable life estate only in the hereditaments comprised in the agreement.

The plaintiff filed his bill for specific performance of the agreement and the defendant demurred.

Mr. C. Walker (Mr. Chitty with him), for the defendant. — It is sufficient for the demurrer if it can be shown that the plaintiff has an equitable life estate in the copyholds.

In *Baker* v. *Parson*, 42 L. J. Ch. 228, a case which was decided by Lord Romilly on the will in dispute in this case, it was held that the plaintiff took an equitable estate for life, with a legal remainder to [*653] *the heirs of his body in both the freeholds and the copyholds. This, however, is opposed to a decision of the Court of Common Pleas also on this will, in *Doe* d. *Leicester* v. *Biggs*, 2 Taunt. 109 (11 R. R. 533).

We admit that where there is a devise of freeholds to trustees on trust to pay unto or permit and suffer A. to receive the rents during his life, the legal estate becomes vested in A. *Doe* d. *Baker* v. *Winchester*, 15 Law Times, 68, and that the rule is the same, where there is a mixed devise of freeholds and leaseholds. *Right, Lessee of Phillips* v. *Smith*, 12 East, 455 (11 R. R. 448). So that if there had been no devise of copyholds in this case the plaintiff would have been legal tenant in tail. But the Statute of Uses does not apply to copyholds, and the result of freeholds and copyholds being combined in one devise is that the legal estate in the copyholds attracts the legal estate in the freeholds. *Houston* v. *Hughes*, 6 B. & C. 403; *Baker* v. *Parson*, and *Cursham* v. *Newland*, 2 Bing. N. C. 64.

[The Master of the Rolls. — The doctrine of attraction in

Baker v. *Parson* is derived from the argument of counsel. Nothing is said about it in the judgment of Lord ROMILLY, and besides *Houston* v. *Hughes* is in direct opposition to *Doe* d. *Woodcock* v. *Barthrop*, 5 Taunt. 382 (15 R. R. 530), which was not cited in that case.]

The receipt clause declares that the receipts of the trustees and executors shall be good discharges, and the same persons are not both trustees and executors. This shows an intention that the trustees shall receive.

They also referred to *Carwardine* v. *Carwardine*, 1 Eden, 27; *Doe* v. *Barthrop*, 5 Taunt. 382 (15 R. R. 530).

Mr. Fisher and Mr. Popham for the plaintiff. — If your Honour holds that the trustees took some estate, we submit that they took the legal estate in fee. But a devise to trustees, although with words of inheritance, *primâ facie* gives them only so much of the legal estate as the purposes of the will require. *Doe* d. *Playor* v. *Nichols*, 1 B. & C. 336; 2 Dowl. & Ry. 480; 1 L. J. (o. s.) K. B. 124 (25 R. R. 398); *Watson* v. *Pearson*, 2 Ex. 581; 18 L. J. Ex. 46; *Blagrave* v. *Blagrave*, 4 Ex. 550; 19 L. J. Ex. 414.

The purposes of this will do not require the trustees to take the legal estate either in the freeholds or copyholds.

They also referred to *The Queen* v. *Garland*, L. R., 5 Q. B. 269; 39 L. J. Q. B. 86. Mr. Walker, in reply, referred to *Broughton* v. *Langley*, 2 Ld. Raym. 873 (No. 16, p. 864, *ante*); *Stevenson* v. *The Mayor, &c., of Liverpool*, L. R., 10 Q. B. 81; 44 L. J. Q. B. 34.

The MASTER OF THE ROLLS (SIR G. JESSEL). — I should not have felt either doubt or difficulty about deciding this case were it not for the decision of my predecessor, Lord ROMILLY, in the office I have the honour to hold, when this very case on this very will was before him in the case of *Baker* v. *Parson*. In accordance with the practice, which I consider to be binding on every Judge of primary jurisdiction, I should have deferred to that authority without argument had there been no other decision on the subject of this very will by a Court of co-ordinate jurisdiction. But considering that the decision of the Court of Common Pleas in *Doe* d. *Baker* v *Winchester* and the decision of Lord ROMILLY in *Baker* v. *Parson* on the same will, which I have now before me, cannot by any possibility stand together, I think I am at liberty to say that I am not conclusively bound by the decision

in *Baker* v. *Parson*, especially considering that that decision was so recent as the year 1872. As I said before, being com-
[654 *] pletely antagonistic to the decision * of the Court of Common Pleas, which decision was not cited to Lord ROMILLY, it cannot be considered to have settled the law for any purpose whatever.

The real questions upon this will are two. First of all, what estate did the trustees take in the freeholds, and then, what estate did they take in the copyholds? The subject of the contract for sale, of which specific performance is being sought, comprising both freeholds and copyholds, and the demurrer being put in on the ground that a good title cannot be made to the estate, of course if the demurrer is well founded, either as to the freeholds or as to the copyholds, effect must be given to it by allowing it. Now, first of all, what is the rule as to freeholds? From the time of Lord RAYMOND it has been settled that a gift to trustees in trust to permit a man to take the rents during his life does not give the legal estate to the trustees without more. It has been treated as analogous to an executed use, not on the ground that the Statute of Uses directly applies to wills, because that statute was passed before the Statute of Devises, but upon this ground, that the will showed an intention that the same rules which the Statute of Uses made applicable to settlements of real estate should be applied to the gifts or devises in the will. It was, therefore, an index of intention, and nothing more. On that same principle when a man gave real estate to the use of A. upon trust for B. it was held that A. took the legal estate, the language of conveyancers in settlements, to which the Statute of Uses applies, being so used in the will as to amount to an expression of intention that the same mode of construction should be adopted. Beyond that the Statute of Uses had no direct bearing. Now that being so in comparatively modern times, the question arose upon a gift of this kind. It being admitted that where you give lands to a trustee upon trust to pay the rents over to anybody, the trustee must take the legal estate, because otherwise he could not pay at all, as he could not receive the rents. What was to happen where the testator made a gift in this form, "I give to A. B. upon trust to pay or permit C. D. to receive the rents"? Of course that was open to two constructions. It might have been said that the power to receive showed such an inten-

tion to vest the legal estate in the trustee that you must give effect to it, or it might have been said that the two directions were contradictory, and that the latter direction in the will was contradicted by the former, and must be followed. If there never had been a decision fixing the law upon the subject, it is not impossible that I might have thought the former line of argument entitled to greater weight, but the case of *Doe* d. *Leicester* v. *Biggs* has decided that under a will so framed the legal estate passes not to the trustee but to the person who takes the life interest. I consider that that is settled beyond question. That being so, I have to consider a gift which, so far as the terms of it are concerned, is exceedingly similar in its terms to the case of *Doe* d. *Leicester* v. *Biggs*. The gift here is a gift to the trustees by name, to hold the same unto the trustees by name, their heirs, &c., upon trust during the natural life of my son James Baker, to receive the rents, issues and profits thereof, and to pay the same unto my said son James Baker and his assigns during his life, or otherwise to permit him or them to receive the same; except that the words are, "on trust to receive and pay," instead of "on trust to pay," the case is absolutely undistinguishable from *Doe* d. *Leicester* v. *Biggs;* but inasmuch as the *ratio decidendi* in *Doe* d. *Leicester* v. *Biggs* was that the latter direction in a will being inconsistent with the former must be followed, the trust to receive and pay is as much antagonistic according to that view to the trust to permit to receive, as the trust to pay is antagonistic to the trust to pay and to receive, consequently if *Doe* d. *Leicester* v. *Biggs* is to be a governing case on the subject, which I take it to be, this case is absolutely undistinguishable from it, and if there is nothing more in the will it is plain, I take it on the authority of that case, that the legal estate during the life of James Baker is in James Baker.

But then it is said that there is a receipt clause. It is true that there is a * receipt clause in this will which [655 *] declares that the receipts of the trustees and executors shall be good discharges, and it is quite true that the same persons, that is, all the same persons, are not both trustees and executors. It is said that that shows an intention that they shall receive. I think the argument is not without weight. Certainly the clause would be very absurd if the trustees could receive nothing, and if I were to hold that the trustees could receive nothing

I should find great difficulty in saying that I was entitled to disregard that clause, but inasmuch as I can give effect to that clause without entitling the trustees to receive the rents of the freehold estates, it does not appear to me that the view I take as to the gift of the freeholds is at all inconsistent with the view which was taken by the Court of Common Pleas. It was exactly the view that Court took. But it was said in the case of *Baker* v. *Parson* that is not a gift merely of freehold estates, that it is a gift at least of copyhold estates also. I say "at least," because I do not intend to give any opinion as to whether leasehold estates would or would not pass by this particular gift.

Now, in that case, although Lord ROMILLY stated his opinion to be that the trustees take the legal estate in freeholds and copyholds for the life of the plaintiff in trust for him with the ultimate remainder in trust to the heirs of his body, and although in one case it is possible to suppose he thought that that arose from some other words, yet inasmuch as I cannot find any reason for it, except that addressed to him in argument, I am unable to state why he arrived at that conclusion unless he adopted the argument. The argument certainly was that there was what was called an attraction, that the effect of combining freeholds and copyholds in one devise is that the legal estate in the copyhold attracts the legal estate in the freehold. But why should the legal estate in the copyholds attract the legal estate in the freeholds in preference to the legal estate in the freeholds attracting the legal estate in the copyholds? If any physical theory of attraction is supposed to govern the decisions of Courts of justice on questions of the limitations of real estate according to English law, I suppose it would be thought that, following physical theories, the weightier and more important body would attract the smaller and less important body, and that inasmuch as, according to English law, freeholds are looked upon as being wider, as far as tenure is concerned, than copyholds, I should have thought that if any such analogy as the physical theory of attraction could have any possible effect, it would show that the freeholds do attract the copyholds. But really, there can be no theory of attraction one way or the other.

Now the case of *Houston* v. *Hughes* was referred to, which was said to warrant that theory of attraction. However, when we come to look at that case, we find that it was a case in which, as I

understand it, there were excellent reasons for giving a legal fee to the trustees. The gift itself was contained in the will, which was sent for the opinion of the Court of Common Law by the Court of Chancery, as was the practice in those days. It began by a direction that the testator's just debts, &c., should be fully paid and satisfied, followed by a devise to trustees of all his property — freeholds, copyholds or leaseholds. According to my notion of the law as it then stood, and as it still stands, that would have charged the debts on the real estate, and nothing more was wanted (there being a devise to the trustees and their heirs) to give them the fee. There were other reasons for giving them the fee also. Mr. Justice BAYLEY says this, "Upon the question whether the trustees take the legal fee or not I think that, according to the case of *Doe* v. *Willan*, 2 B. & Ald. 84 (20 R. R. 355), where an estate is given to trustees and their heirs indefinitely the trustees will take the fee, if the purposes of the trust require that they should have the absolute property in them or that they should take it for an indefinite period of time, unless a contrary intent is manifested on the face of the will." I take it the law is now settled in wider terms than that — that now they take the fee unless you can show on the other side that the estate is *distinctly [* 656] limited — that is to say, the *onus probandi* is the other way; that, substantially, is a fair statement of the law: "Now in this case the freehold property being mixed with property in which the trustees must have the whole interest, is a circumstance which may assist the Court in determining whether the trustees take the whole fee or less than the fee."

"In this instance they must take an absolute interest, both in the copyholds and in the leaseholds for years: and if they do not take an absolute interest in the freeholds of inheritance and the freeholds for life the consequence would be that the one would be separated entirely from the other, which would be directly contrary to the intention of the testator." But the learned Judge does not seem to have noticed that if they remained together so long as the trusts of the will required it, there was no reason why they should not separate afterwards, and that was the whole question. It does appear to me not to be an authority for the principle of attraction, and that the ground stated would have been sufficient to support the decision, although it could have been well supported on other grounds.

Now, that is the only authority which can be suggested. But is there any doubt or question that you can give freeholds, copyholds and leaseholds together, and that the persons who take them need not take the same estate in all? I cannot understand why there should be any doubt on the subject, or why there should be any notion that they must perforce take the same estate.

Now I come to treat of the gift of copyholds. The gift of copyholds standing alone seems to me to be quite as free from difficulty as the gift of freeholds standing alone. I pass from the consideration of their going together. I say that it ought not, in my opinion, to affect the construction. The gift of copyholds to A. upon trust for B., gives a legal estate of the copyholds to A., and the reason of it is this: that you have no aid from the analogy of the Statute of Uses — the testator cannot intend to tell you it is to be settled according to the Statute of Uses, because the Statute of Uses never did apply to copyholds. So that you lose the reason for construing this will with reference to the Statute of Uses.

Then, if that is so, the next question arises: — Is there any way of limiting the estate? Is a gift to A. and his heirs of copyholds upon trust to B. for life, and after the death of B. upon trust for C. in fee, one which of necessity carries an absolute interest in the copyholds — to the trustees? Now that is a question which has been argued and decided more than once. First of all, what is the law respecting copyholds? The law with respect to freeholds is clear. That you do not under an indefinite gift to trustees with a definite period for the existence of the trust, assume that a larger legal estate was intended to pass to the trustees than was necessary for the performance of the trust during that definite period. That has frequently been laid down by the Courts. I will read what was said in *Watson* v. *Pearson*, "It is certainly true that where the purposes of the trust upon which the estate is devised to trustees are such as not to require a fee in them, as for instance, where the trust is to pay annuities or to pay over rents and profits to a party for life, there, if subject to the specified trusts, the estate is given over, the parties taking under such devise have been held to take legal estates, the estate given to the trustees (even when given with words of inheritance) having been in such cases taken to have been meant to be co-extensive only with the trust to be performed." Now there one of the two illustrations given is a gift

No. 18. — Baker v. White, 44 L. J. Ch. 656, 657.

to one for life, as being an instance of a simple definite trust with a gift over.

I may say that that doctrine is expressly recognized and affirmed in the case of *Blagrave* v. *Blagrave*. So that in a simple gift of freeholds to A. and his heirs upon trust for B. for life, with a gift over on the death of B. in remainder simply to C. and his heirs, C. takes the legal estate after the death of B. That I take to be clear and settled law. But this also has to be decided, that if instead of a simple remainder the testator begins again, and gives the property in this way: — "I give Blackacre to A. and B. and their heirs, upon trust to pay the *rents to C. for life, and [*657] after the decease of B. I give and devise Blackacre to D.," there it being what is called a new devise, it has been held to be equally clear — it cannot be more clear or better established — that the devisee takes the legal estate, it being the beginning of a new devise, the estate of the trustees, although not in terms limited to the life of the first beneficial owner, is read as if it were so limited. Now that is the law as to freehold estates.

Then what is the law as to leasehold estates? Upon that a modern case, no doubt, but a very good authority, — *Stevenson* v. *The Mayor &c., of Liverpool*, — has been cited. There there was a gift in this way — a gift which the Court held to be a gift for life to a lady, and that the executors during her life took the legal estate, the gift being indefinite. It was given in this wise — "Subject to my debts, I bequeath to my wife the clear rentals of my two leasehold houses for her life, to be paid to her every month, and after her decease I leave one of them to my son R., and I direct that the rents shall be received, and the property be under the management of my executors. After R.'s decease" (that is the son) "I direct his share of the property to be equally divided between his children; but should he die without having lawful issue I direct the same to be equally divided among the surviving children of my daughter." Then he appointed executors, and the executors proved the will. It was held that although there was no direct bequest the executors took the legal estate in the house No. 17 as trustees, but only to the extent of the trust, and that after the death of R., the legal estate became vested in the surviving children, that is, they held the extent of the trust to be marked out by a definite limited interest, and that the moment you come to an absolute interest, the same as in the freeholds, you did not want trustees any longer

because the absolute owners might fairly take care of their own property, consequently, I take it, the law as to leaseholds is exactly the same as the law as to freeholds.

Now what is the law as to copyholds? On that point there is a most distinct authority, if distinct authority we want. In *Doe* v. *Willan* the point occurred. There there was a gift of copyholds to trustees and their heirs in trust, to permit a lady — who I think was not married, though that is not material — to receive the rents or pay to her, and they were to be free from the debts of the husband if she should marry, and after her death in such manner as she should appoint, and in default of appointment to her right heirs. The question was whether after the death, the testator having used the second class of words — "I devise the premises unto such person" — the appointees under the lady's will took the legal estate in the copyholds. The Judges decided that the appointee did take the legal estate, for the reason that there had been a gift to trustees and their heirs indefinite in terms, not required for any purpose after the life of the lady, because she could then appoint absolutely, or her heirs would take, and there was no necessity for the continuance of the trust after her death. The terms of the trust were indefinite to them and their heirs, and it must be held that the trust was confined by the words, "of the life of the tenant for life." It is exactly the same rule in principle, both as regards freehold and leasehold estates.

So that we have it as regards the three descriptions of estates, that where you have an indefinite devise to trustees and their heirs upon trust, to pay or allow somebody to receive the rents during life, followed either by a simple remainder to another person in fee simple or fee tail, or as another person shall appoint, but giving an absolute interest, or followed by a new devise to a person in fee simple or fee tail or giving an absolute interest, in either of those cases, the estate of the trustee by implication is to be limited to the life of the person who takes the first life interest. Now applying that to this case we find the exact case, so far taking away the separate use, which, as I said before, is immaterial, for the rule is the same whether the tenant for life is a man or a woman — here we find it is to hold, and the trustees during the life of my son are to pay or permit him to receive — which, as I have [* 658] said before, being a * copyhold, must give them the legal estate at all events; "and from and after the decease of my

said son James, I give and bequeath the same [a new devise] to the sole use and behoof of the heirs of his body lawfully begotten," which is a fee tail. The result, therefore, is that, according to what I understand to be the settled law on the subject, there is an estate in the trustees and their heirs during the life of the son in the copyholds, and after his death the legal estate to the use of heirs of his body; and if that be so, I can give full effect to the receipt clause, because the trustees will receive the rents of the copyholds during the life of the son, and the receipt clause comes into effect, and there is no occasion to reject it, or to say that it has no bearing on the construction.

For these reasons I am of opinion that the plaintiff can make a good title to the freehold estates, but that he cannot make a good title to the copyhold estates; and therefore I allow the demurrer.

ENGLISH NOTES.

In so far as *Baker* v. *White* follows *Doe* d. *Leicester* v. *Biggs* (1809), 2 Taunt. 109, 11 R. R. 533, the case must be read subject to the criticism of the Master of the Rolls (Sir George Jessel), himself in *Re Tanqueray-Willaume & Landau* (C. A. 1882), 20 Ch. D. 465, 51 L. J. Ch. 434, 46 L. T. 542, and of the Court of Appeal in *Re Lashmar, Penfold* v. *Moody* (C. A. 1890), 1891, 1 Ch. 258, 60 L. J. Ch. 143, 64 L. T. 333. The position of *Doe* d. *Leicester* v. *Biggs* is this, that as titles may depend upon that decision, no Court deems itself at liberty to overrule it, but at the same time the case will only be followed in a case falling within the four corners of the decision.

The rule is, obviously dependent upon the construction of every particular will. Thus in *Kenrick* v. *Lord Wm. Beauclerk* (1802), 3 Bos. & P. 175, 6 R. R. 746, the testator devised his real estate and also all his personal estate unto J. M. and O. W. and their heirs upon the trusts following, that is to say to the intent that they should dispose of his personal estate in payment of debts, &c., and "as to all my real estate . . . subject to my debts . . . I devise the same . . . to R. P. . . . for life," followed by limitations by way of strict settlement on the issue of R. P. This was held to vest a legal estate immediately in R. P. and that J. M. and O. W. took no estate in the realty. A direction that the immediate devisees are to pay the debts would give them the legal estate: *Marshall* v. *Gingell* (1882), 21 Ch. D. 790, 51 L. J. Ch. 818, 47 L. T. 859. And where there is a general devise to trustees and their heirs, and the purposes mentioned in the will require them to take some legal estate of freehold, *primâ facie* they take the fee, and it lies on the parties alleging that they take a

less estate to show what less estate will enable the purpose to be carried out. *Collier* v. *Warlters* (1873), L. R. 17 Eq. 252, 43 L. J. Ch. 216, 29 L. T. 868, 22 W. R. 209; *Re Townsend's Contract* (1895), 1895, 1 Ch. 716, 64 L. J. Ch. 334, 72 L. T. 321, 43 W. R. 392.

It may be pointed out that in the case of a deed, an estate in fee limited to trustees, for instance, to preserve contingent remainders, cannot be cut down by implication, although they might fulfil the purposes of their appointment by taking a less estate: *Lewis* v. *Rees* (1856), 3 K. & J. 132, 26 L. J. Ch. 101, 3 Jur. N. S. 12.

AMERICAN NOTES.

The English doctrine of uses prevails in this country, either as part of the common law or by statute, in many of the States, but not in Ohio, Vermont, and Tennessee. In New York, Wisconsin, and Michigan uses are expressly limited by statute. See note, *De Camp* v. *Dobbins*, 2 Stewart (N. J. Eq.), 43.

A passive trust or use, where the trustee has no active duty imposed on him, is executed by the statute of uses: *Bowman* v. *Long*, 26 Georgia, 142; *Simonds* v. *Simonds*, 112 Massachusetts, 157; *Tappan's Appeal*, 55 New Hampshire, 317; *Ogden's Appeal*, 70 Penn. State, 591; *Witham* v. *Brooner*, 63 Illinois, 344; *Riehl* v. *Bingenheimer*, 28 Wisconsin, 84; *Williman* v. *Holmes*, 4 Richardson Equity (S. Car.), 475; *Adams* v. *Perry*, 43 New York, 487 (a trust to convey to another); *Upham* v. *Varney*, 15 New Hampshire, 462 (to permit another to occupy and receive rents); *Snelling* v. *Lamar*, 32 South Carolina, 72; 17 Am. St. Rep. 835: "It is well settled that where an estate in real property is conveyed to one for the use of or in trust for another, and no duty is imposed upon the trustee for the proper performance of which it is necessary that the legal estate should remain in the trustee, such estate, by the operation of the statute of uses, will pass at once to the *cestui que trust*, or person for whose use the estate is conveyed; but when there is anything for the trustee to do which renders it necessary that he should retain the legal title in order fully to perform the duties imposed upon him by the instrument creating the trust, then the statute will not execute the use, as it is termed, and the legal estate will remain in the trustee. These principles have been so often determined that it cannot now be necessary to do more than refer to some of the cases in which they have been settled."

"If there is any active duty imposed upon the devisee of the legal estate, in carrying out the purposes of the devisee in favor of the *cestui que use*, which requires him to be vested with the legal estate, it becomes a trust in the first taker, and the *cestui que use* is in modern language the *cestui que trust*, the legal seisin and estate vesting in the trustee. 2 Washburn on Real Property, p. 461, citing *Broughton* v. *Langley*: *Upham* v. *Varney*, 15 New Hampshire, 467; *Norton* v. *Leonard*, 12 Pickering (Mass.), 152; *Wood* v. *Wood*, 5 Paige (New York Chancery), 596; and 2 Washburn on Real Property, p. 488, citing *Harton* v. *Harton*, and *Jones* v. *Bush*, 4 Harrington (Delaware), 1; *Ayer* v. *Ayer*, 16 Pickering (Mass.), 327, 330.

"Where the intention is that the estate shall not be executed in the *cestui*

que trust, and any object is to be effected by its remaining in the trustees, there it shall not be executed": *Posey* v. *Cook*, 1 Hill Law (So. Car.), 414; *Exeter* v. *Odiorne*, 1 New Hampshire, 232 (trust for charity); *Brady* v. *Walters*, 55 Georgia, 25 (for children to be born); *Barnett's Appeal*, 46 Penn. State, 392 (to lease, collect rents, invest, and pay over); *Rife* v. *Geyer*, 59 Penn. State, 396 (for separate use against creditors); *Williman* v. *Holmes*, 4 Richardson Equity (So. Car.), 475 (for sole and separate use of a married woman): "Nor will the statute execute the trust in case there is some duty to be performed or act to be done by the trustee necessary to the scheme of the trust, and for the performance of which it is necessary that the legal estate should not pass from the trustee by operation of the statute."

Unless expressly limited, the trustee takes an estate commensurate with the purposes of the trust and no more: *Ward* v. *Amory*, 1 Curtis (U. S. Circ. Ct.), 419; *Comby* v. *McMichael*, 19 Alabama, 747; *Smith* v. *Dunwoody*, 19 Georgia, 238; *Coulter* v. *Robertson*, 24 Mississippi, 278; *Manice* v. *Manice*, 43 New York, 303; *Payne* v. *Sale*, 2 Devereux & Battle Equity (Nor. Car.), 455; *Ellis* v. *Fisher*, 3 Sneed (Tennessee), 231; *Cutter* v. *Hardy*, 48 California, 568; *Mack* v. *Mulcahy*, 47 Indiana, 68; *Webster* v. *Cooper*, 14 Howard (U. S. Sup. Ct.), 488.

Even a fee if necessary: *Korn* v. *Cutler*, 26 Connecticut, 4; *Stockbridge* v. *Stockbridge*, 99 Massachusetts, 244; *Fisher* v. *Fields*, 10 Johnson (New York), 505; *Deering* v. *Adams*, 37 Maine, 264; *Gill's Heirs* v. *Logan's Heirs*, 11 B. Monroe (Kentucky), 231.

A direction that the trustee shall hold, manage, receive rents, etc., gives him an estate: *Tay* v. *Taft*, 12 Cushing (Mass.), 448; *Striker* v. *Mott*, 28 New York, 89; *Shankland's Appeal*, 47 Penn. State, 113; *Pearce* v. *Savage*, 45 Maine, 90; *Mead* v. *Jennings*, 46 Missouri, 91. So where he is to lease, collect, and pay over rents: *Sears* v. *Russell*, 8 Gray (Mass.), 89; *Wood* v. *Wood*, 5 Paige (N. Y. Chancery), 604. Or to receive rents and apply: *Killam* v. *Allen*, 52 Barbour (N. Y.), 606. Or to pay debts, and pay income, and if insufficient, to sell the property, for support of the widow: *Hardy* v. *Redman's Adm'r*, 3 Cranch (U. S. Circ. Ct.), 635. Or without direct devise, a direction to pay an annuity, to be increased in his discretion, to the widow: *Walker* v. *Whiting*, 23 Pickering (Mass.), 313.

But otherwise if a mere trust to pay income: *Keating* v. *Smith*, 5 Cushing (Mass.), 234. Or where there is a devise, subject to an annuity, and not to come into possession until the death of the annuitant, the executors meanwhile to rent, repair, insure, and pay over the net proceeds: *Tucker* v. *Tucker*, 5 New York, 408.

In *Ware* v. *Richardson*, 3 Maryland, 548, it was held that a devise in trust to collect and pay over rents and profits is a use executed in the trustee, but a devise in trust to permit another to enjoy the rents and profits is executed in the *cestui que trust*.

Under statutes allowing married women to hold property as their own, free of control, such a use is executed by the statute: *Sutton* v. *Aiken*, 62 Georgia, 733. But if she has not an absolute right of disposal, the trust remains: *Richardson* v. *Stodder*, 100 Massachusetts, 528.

No. 19. — In re Owen, 10 Ch. D. 166. — Rule.

As soon as a trust ceases to be active, the statute executes it in the *cestui que trust: Parker* v. *Converse*, 5 Gray (Mass.), 336; *Vallette* v. *Bennett*, 69 Illinois, 632; *Greenwood* v. *Coleman*, 34 Alabama, 150; *Churchill* v. *Corker*, 25 Georgia, 479; *Stokes's Appeal*, 80 Penn. State, 337; *Lynch* v. *Swayne*, 83 Illinois, 336 (but see *Read* v. *Power*, 12 Rhode Island, 16; *Kirkland* v. *Cox*, 94 Illinois, 404).

A trust for coverture fails if there is no marriage or the *cestui's* husband dies: *Kuntzleman's Trust Estate*, 136 Penn. State, 142; 20 Am. St. Rep. 909.

No. 19. — In re OWEN.

(CH. 1878.)

RULE.

WHERE an application is made under the Statute 6 Anne, c. 18, to the party in possession of an estate for the production of the *cestui que vie;* the refusal or neglect of the person in possession to comply with the demand is *primâ facie* evidence of the death of the *cestui que vie:* and it is not necessary that the affidavit, in support of the consequential application to the Court, should state that the applicant believes the *cestui que vie* to be dead.

In re Owen.

10 Ch. D. 166–168 (s. c. 48 L. J. Ch. 248; 27 W. R. 305).

Tenant for Life of Freeholds. — Reversionary Interest. — Production of Cestui que Vie by Party in Possession. — 6 Anne, c. 18.

[166] Where an application is made under the statute 6 Anne, c. 18, s. 1, to the party in possession of an estate for the production of a *cestui que vie* to the person entitled to the estate in remainder, and the party in possession does not respond to the application, the applicant is entitled to an order for production.

Mary Anchors, who died in February, 1835, by her will made in 1834 devised a freehold estate, situate in Denbighshire, to trustees to the use of her grandson Edward Owen for life, with remainders to his sons in tail, and to his daughters as tenants in common in tail.

Edward Owen had two children (sons); one died in infancy, and the other in 1872, unmarried, intestate, and without having barred his estate tail.

No. 19. — In re Owen, 10 Ch. D. 166, 167.

In 1838 Edward Owen sold his life interest to John Hayward, and he shortly afterwards sold or mortgaged it to Miss Downes, who upon the bankruptcy of Howard entered into, and was now in possession.

In 1853 Edward Owen was convicted of forgery, and was transported to Van Dieman's Land. The devisees in remainder in tail *executed deeds for the purpose of barring the [* 167] entail, and sold their interests in the estate to a purchaser.

This was an application by the purchaser of the remainder that the purchaser of the life interest do produce the *cestui que vie*. The application being made under the statute 6 Anne, c. 18, s. 1. The applicant, who had caused inquiries to be made for Edward Owen in Hobart Town, Tasmania, had failed in tracing him after the year 1855, and believing that he was dead, he, on the 6th of December, 1878, gave notice to the solicitors of the party now in possession of the estate, in pursuance of the above statute, to produce the *cestui que vie* within fourteen days from the date of the notice, but they had failed to do so. The solicitors accepted service of the notice to produce on behalf of their client, and informed the purchaser that their client held a policy of life assurance upon the life of Edward Owen; that they had had no information of him since the year 1855; and that they had applied to the office in which the policy was effected for payment of the sum assured thereby.

Cozens-Hardy, in moving for an order that the party in possession do produce Edward Owen, pointed out that the affidavit of the purchaser of the estate did not contain any express statement that he had cause to believe that Edward Owen's death was concealed by Miss Downes, and submitted whether the affidavit was sufficient without an express statement to that effect. He referred to the cases of *Ex parte St. Aubyn*, 2 Cox, 373, *Ex parte Grant*, 6 Ves. 512, *In re Lingen*, 12 Sim. 104, *In re Clossey*, 2 Sm. & Giff. 46, *In re Dennis*, 7 Jur. (N. S.) 230, and *Re St. John's Hospital, Cirencester*, before Vice Chancellor Sir J. Stuart on the 11th of January, 1868, Reg. Lib. 1868, B. 143; and see 16 W. R. 556.

Hall, V. C.: —

Having regard to the way in which the statute 6 Anne, c. 18, s. 1, has been construed, and to the cases which have been referred to, and also to the orders which have been made by the Court under the statute, I hold that where it appears by an ap-

[*168] plicant's *affidavit (as it does here) that an application has been made to the person being and claiming title to be in possession in respect of the life estate by the person entitled to the estate in remainder for the production of the *cestui que vie*, and the person so in possession and applied to does not respond to the application, the applicant is, under the statute, entitled to an order for production under it. I therefore make an order for production in the common form.

ENGLISH NOTES.

The persons mentioned in the Statute are "person within age, married woman, or any other person whatsoever." The statute empowers the Court to make an order as well in the case of a person having an interest determinable on life, as in the case of an estate *pour autre vie* strictly so called; *Re Stevens* (1886), 31 Ch. D. 320, 55 L. J. Ch. 433, 54 L. T. 80, 34 W. R. 268. An assignee of an estate for life may be required to produce the tenant for life: *Re Hall, Ex parte Castledine* (1881), 44 L. T. 469, 29 W. R. 521.

The order is made *ex parte: Ex parte Whalley* (1828), 4 Russ. 561; *Re Owen*, the principal case.

The order has sometimes been made to produce the *cestui que vie* at the bar of the Court. This is not required by the Statute, and orders have been made for the production of the *cestui que vie* at the time and place mentioned in the order; *Ex parte Whalley, supra*; *Re Clossey* (1854), 2 Sm. & G. 46, 18 Jur. 222.

The Court has extended the time for production, where there was reasonable evidence that the *cestui que vie* was alive; *Re St. John's Hospital* (1868), 18 L. T. 317, 16 W. R. 670. The Court might, however, require terms: *Brown* v. *Petre* (1818), 2 Swanst. 235. There a lessee for years determinable upon lives, paid an advanced rent pending a dispute whether the last *cestui que vie*, who had been many years abroad, was alive. A demand of a further advanced rent was made, and the lessee filed a bill to recover the payments. A commission was directed to issue to examine witnesses touching the existence of the *cestui que vie*, but the lessee was directed to pay into Court the arrears and accruing payments of the advanced rent which he had been accustomed to pay.

In *Re Isaac* (1838), 4 My. & Cr. 11, Lord COTTENHAM, L. C., held that the Court had no jurisdiction to make the applicant pay the costs of producing the *cestui que vie*. The LORD CHANCELLOR, however, recognised that if the Court had had no jurisdiction to entertain the application it might have been dismissed with costs. The distinction

between *Re Isaac* and such cases as *Pringle* v. *Secretary of State for India* (C. A. 1888), 40 Ch. D. 288, 58 L. J. Ch. 815, 60 L. T. 796, is somewhat fine, for in the latter case the Court held that it had inherent jurisdiction to order an applicant to pay the costs of an unsuccessful claim, there being nothing in the Act of Parliament under which the application had been made, to show that the legislature intended the Court not to have such jurisdiction. It should be mentioned that the applicant's claim in *Pringle's Case*, did not fail on the ground of want of jurisdiction. The subject of the jurisdiction of the Court to award costs where the Act of Parliament under which the application is made is silent as to costs, was considered in *Ex parte Molyneux* (1845), 2 Coll. 273.

AMERICAN NOTES.

In *Clark* v. *Owens*, 18 New York, 434, the death of a *cestui que vie* was shown by reputation among the family and relatives.

END OF VOL. X.

NOTES

ON

ENGLISH RULING CASES

CASES IN 10 E. R. C.

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10 E. R. C. 1. ACKROYD v. SMITH, 10 C. B. 164, 14 Jur. 1047, 19 L. J. C. P. N. S. 315.

Unassignability of easement in gross.

Cited in Mitchell v. D'Olier, 68 N. J. L. 375, 59 L.R.A. 949, 53 Atl. 467, holding easements to be heritable and assignable must be held as appurtenant to land: Engel v. Ayer, 85 Me. 448, 27 Atl. 352; Garrison v. Rudd, 19 Ill. 558,—holding that right of way in gross cannot be granted over, because of being attached to the person, but dies with person; Boatman v. Lasley, 23 Ohio St. 614, holding that right of way in gross is right personal to grantee, and cannot be made assignable or inheritable by any words in deed by which it was granted; Standard Oil Co. v. Buchi, 72 N. J. Eq. 492, 66 Atl. 427, holding that deed granting right to lay pipes for transportation of petroleum does not convey mere easement in gross, nor revocable license, and is not revoked by assignment to third person; Tinicum Fishing Co. v. Carter, 61 Pa. 21, 100 Am. Dec. 597, 27 Phila. Leg. Int. 172, 2 Legal Gaz. 156, holding that there may be grant of easement in gross personal to grantee, but it cannot be assigned or transmitted by descent; Cadwalader v. Bailey, 17 R. I. 495, 14 L.R.A. 300, 23 Atl. 20, holding that negative easement appurtenant such as restriction on building to obstruct view cannot be reserved on conveyance of such premises; Poull v. Mockley, 33 Wis. 482, holding that easement in gross to take water from well is assignable by grantee of such easement; Loggie v. Montgomery, 38 N. B. 112, holding easement in gross not assignable.

Cited in notes in 14 L.R.A. 333, on transferability of easement in gross; 2 L.R.A.(N.S.) 984, on way appurtenant to close separated by intervening land.

Cited in Hollingsworth Contr. 411, on covenants relating to land between others than landlord and tenant; 2 Washburn Real Prop. 6th ed. 262, as to what covenants run with the land.

Distinguished in Simpson v. Godmanchester [1897] A. C. 696, 66 L. J. Ch. N. S. 770, 77 L. T. N. S. 409, where easement was claimed in connection with lands; Thorpe v. Brumfitt, L. R. 8 Ch. 650, where words of grant could be construed as making right of way appendant to piece of ground conveyed.

Disapproved in Goodrich v. Burbank, 12 Allen, 459, 90 Am. Dec. 161, holding that vendor of land may reserve assignable right of taking water from spring situated thereon through pipes of certain dimensions, and such right need not be annexed to any particular estate.

Limitation of enjoyment of easement to property in connection with which granted.

Referred to as leading case in Purdom v. Robinson, 30 Can. S. C. 64, holding right of way granted as easement incidental to specified property cannot be used by grantee for same purpose in respect of any other property.

Cited in Boss v. Ft. Wayne, 121 Ind. 389, 23 N. E. 259, holding that right of mill-owner in pond of water created by dam is limited easement, not absolute right to water, and city may take from it its supply of water so long as it does not interfere with easement; Wentworth v. Philpot, 60 N. H. 193, holding that if grantor of two pieces of land, in his conveyance of first, reserves to himself right to draw water from well situated on it, this right, though enjoyed by him in his occupation of second piece, does not pass by subsequent conveyance of that piece; Huntington v. Asher, 96 N. Y. 604, 48 Am. Rep. 652 (reversing 26 Hun, 496), holding that right to profit a prendre, although capable of being transferred in gross may also be attached by owner of land to other land as appurtenance, and by conveyance of latter; Tardy v. Creasy, 81 Va. 553, 59 Am. Rep. 676, holding that covenant in deed of part of tract of land by which grantor agreed that grantee should have exclusive mercantile benefits is not binding upon subsequent grante of another portion of same tract; Mahler v. Brumder, 92 Wis. 477, 31 L.R.A. 695, 66 N. W. 502; United States Pipe Line Co. v. Delaware, L. & W. R. Co. 62 N. J. L. 254, 42 L.R.A. 572, 41 Atl. 759,—holding that where way is created by grant for benefit of particular land, its use is limited to such land and cannot be extended to other land; Telfer v. Jacobs, 16 Ont. Rep. 35, holding that right of way cannot be used in connection with adjoining land to which the privilege is not annexed; Robinson v. Purdom, 26 Ont. App. Rep. 95, holding that right of way for benefit of specific lot cannot be used by owner of lot generally apart from ownership and use of lot; Loggie v. Montgomery, 3 N. B. Eq. Rep. 238, holding owner of dominant tenement cannot, in exercise of power to change method of enjoying easement convert it into one for benefit of another tenement altogether.

Rights connected with land not lying in grant.

Cited in Loggie v. Montgomery, 38 N. B. 112, holding nothing passed by deed, considering an easement as not appurtenant; Great Northern R. Co. v. Inland Revenue Comrs. [1901] 1 K. B. 416, 70 L. J. K. B. N. S. 336, 84 L. T. N. S. 183, 49 Week. Rep. 261, 65 J. P. 275, holding obligation of mine owner on one hand not to work mine and thereby damage company's works and right of railroad company to insist on observance of such obligation on the other, arising under statute, is not such right or obligation as is capable of being created by grant; Limmer Asphalte Paving Co. v. Inland Revenue Comrs. L. R. 7 Exch. 211, 41 L. J. Exch. N. S. 106, 26 L. T. N. S. 633, 20 Week. Rep. 610, holding purported transfer of exclusive right to use asphalt of one company within certain counties did not constitute conveyance of property; Edgar v. English Fisheries Comrs. 23 L. T. N. S. 732, in connection with question whether it is possible to have exclusive right to take all fish in navigable river simply as appurtenant to land.

Distinguished in Western U. Teleg. Co. v. New Brunswick R. Co. N. B. Eq. Cas. 338, where right given was connected with use and enjoyment of land and appurtenant to it.

Necessity of dominant tenement to support easement.

Cited in McDonald v. McDougall, 30 N. S. 298, on necessity of easement being appurtenant to tenement in order to exist and be maintained and measurement

of scope and incidents of easement by virtue of nature of dominant tenement: Ogilvie v. Crowell, 40 N. S. 501, holding no private way acquired by grant or prescription where there was no dominant tenement.

Cited in notes in 14 L.R.A. 300, on effect of attempt to sever appurtenant easement from dominant tenement; 10 Eng. Rul. Cas. 13, on right to claim easement only as accessory to, and for benefit of, a tenement.

Enjoyment of easement during grant.

Cited in Heward v. Jackson, 21 Grant Ch. (U. C.) 263, on enjoyment of easement.

Creation of easements.

Cited in Saylor v. Cooper, 2 Ont. Rep. 398, holding that way of necessity is impliedly granted where there is no access to highway except over land of grantor or that of some other person; Linthicum v. Ray, 9 Wall. 241, 19 L. ed. 657, holding that grant of right of using wharf built refers only to building then erected, when right was not attached as incident to any estate.

— Unconnected with enjoyment of land.

Cited in Norcross v. James, 140 Mass. 188, 2 N. E. 946, holding that new and unusual incidents cannot be attached to land by way either of benefit or of burden; West Virginia Transp. Co. v. Ohio River Pipe Line Co. 22 W. Va. 600, 46 Am. Rep. 527, holding that agreement by land-owner, that products of his land shall be transported to market by certain common carrier, does not bind any subsequent purchaser; Diamond v. Reddick, 36 U. C. Q. B. 391, on creation of easement unconnected with use and enjoyment of land so as to constitute property in grantee.

Cited in note in 41 L.R.A.(N.S.) 1107, on right of owner of dominant estate to grant rights in easement independently of estate itself.

10 E. R. C. 16, POMFRET v. RICROFT, 2 Keble, 505, 543, 569, 1 Saund. 321, 1 Sid. 429, 1 Vent. 26, 44.

Implied grant of that which is necessary to enjoyment of thing granted.

Cited in Wood v. Grayson, 22 App. D. C. 432, on passing of right to light and air with grant of building, without special words of conveyance; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773, holding that grant of franchise carries with it everything necessary to enjoyment thereof; Sterricker v. Dickinson, 9 Barb. 516; Steam Stonecutter Co. v. Shortsleeves, 16 Blatchf. 381, Fed. Cas. No. 13,334,—to the point that when use of thing is granted, everything is granted by which grantee may have and enjoy such use; Thomson-Houston Electric Co. v. Illinois Teleph. Constr. Co. 143 Fed. 534, holding that sale of machine intended to be used in connection with device covered by patent owned by vendor, and which is useless without such device, impliedly grants purchaser right to use it; Wells v. Mason, 5 Ill. 84, holding that word demise in lease imports legal estate in lessor; Hathorn v. Stinson, 10 Me. 224, 25 Am. Dec. 228, holding that grantor of mill and dam who is owner of lands above which was flowed by such dam, cannot compel grantee to remunerate him for injury caused by such flowing; Hammond v. Woodman, 41 Me. 177, 66 Am. Dec. 219, holding when use of thing is granted, everything essential to that use is granted also, such right carrying with it implied authority to do everything necessary to secure enjoyment of easement; Pullan v. Cincinnati & C. Air Line R. Co. 4 Biss. 35, Fed. Cas. No. 11,461; Salem Capital Flour Mills Co. v. Stayton Water-Ditch & Canal Co. 33 Fed. 146; Prescott v. White, 21 Pick.

341, 32 Am. Dec. 266,—holding when use of thing is granted, everything is granted by which it may be enjoyed; Griffin v. Fellows, 81* Pa. 114, 8 Mor. Min. Rep. 657 (affirming 1 Legal Chron. 210, 5 Legal Gaz. 265); Ring v. Walker, 87 Me. 550, 33 Atl. 174,—holding that grant of principal thing carries with it everything necessary for beneficial enjoyment of that which is granted; Crouch v. Fowle, 9 N. H. 219, 32 Am. Dec. 350, holding that term "demise" in lease may import covenant of good right and title to make lease, and for quiet enjoyment; Riddle v. Littlefield, 53 N. H. 503, 16 Am. Rep. 388, holding if house or store be conveyed everything which belongs to it or is in use with it, and whatever is essential to enjoyment, passes as incident unless specially reserved; Central R. Co. v. Valentine, 29 N. J. L. 561, holding that grantee takes land with right to whatever is necessary to enjoyment of premises, for purposes for which they are intended to be used, whether intended use is mentioned in deed or not; Troup v. Hurlbut, 10 Barb. 354, holding that to give right to overflow land by prescription, there must have been continued adverse user for twenty years; Bliss v. Greeley, 45 N. Y. 671, 6 Am. Rep. 157, to the point that grant carries with it every incident necessary to make grant effectual; Marvin v. Brewster Iron Min. Co. 55 N. Y. 538, 14 Am. Rep. 322, 13 Mor. Min. Rep. 40, holding that grant of minerals in land carries with it, as incident of grant, right to mine, in such manner as is most advantageous to owner of right so that surface is not wholly destroyed; Prime v. Twenty-third Street R. Co. 1 Abb. N. C. 63, holding that street railroad cannot leave snow, removed from its tracks, heaped up between them and the abutting land for an unreasonable time; Boults v. Mitchell, 15 Pa. 371, holding that license to do act necessarily implies every privilege essential to enjoyment of principal thing; Clements v. Philadelphia Co. 3 Pa. Super. Ct. 14 (dissenting opinion), on right of dominant owner to enjoy easement in such manner as to secure to him every advantage contemplated by grant; Philadelphia & R. Coal & I. Co. v. Taylor, 1 Legal Chron. 361, 5 Legal Gaz. 392, 5 Mor. Min. Rep. 133, holding that owner of subjacent level in mine, owes servitude, and must leave pillar of coal to support gangway and to keep out water from level above; Cozens v. Stevenson, 5 Serg. & R. 421, holding that lease for two years from future day, stating that third person was in possession, does not imply promise on part of lessor, to deliver possession to lessee; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773 (dissenting opinion), on inclusion, in grant of use, of everything by which the use may be had or enjoyed; Headley v. Hoopengarner, 60 W. Va. 626, 55 S. E. 744, holding that in conveyance of estate less than fee, as for term of years, covenant of warranty of title, and for quiet and peaceable enjoyment is implied; Smart v. Stuart, 5 U. C. Q. B. O. S. 301, holding that implied covenant of quiet enjoyment exists upon demise of land under lease; Winch v. Thames Conservators, L. R. 7 C. P. 458, 41 L. J. C. P. N. S. 241, 27 L. T. N. S. 95, holding owner of land letting right to use towing-path, must be taken to have assented to exercise of power to repair by lessee.

Cited in 3 Washburn, Real Prop. 6th ed. 372, on appurtenances passing with the land.

—Easement impliedly necessary to grant.

Cited in Wood v. Grayson, 22 App. D. C. 432, holding that easement of light and air would pass upon conveyance of building, where owner of two lots erects building containing porches which project upon, and windows which overlook other lot, and gives mortgage upon lot containing building, granting also easement of light and air; West River Bridge Co. v. Dix, 6 How. 507, 12 L. ed.

535, on implication in grant of right of way from necessity; Bean v. Coleman, 44 N. H. 539, holding that nothing passes as incident to grant of easement but that which is necessary for its reasonable and proper enjoyment; Brakely v. Sharp, 9 N. J. Eq. 9, holding that upon grant of land, easements necessary for its enjoyment, pass by the grant, although not expressly named; Barry v. Edlavitch, 84 Md. 95, 33 L.R.A. 294, 35 Atl. 170, holding that right to occupy space intervening between wall and line, by one who acquires easement by prescription for use of wall to support building, is part of easement acquired; Holmes v. Seely, 19 Wend. 507, holding that where owner conveys parcel of tract which cannot be approached from highway except over remaining lands of grantor, grantee is entitled to right of way over such remaining lands; French v. Marstin, 24 N. H. 440, 57 Am. Dec. 294, holding that uninterrupted user of easement of land of another for more than twenty years, under claim of right, is prima facie evidence of lost grant of such easement; Gill v. Trout, Tappan (Ohio) 251, holding that way of necessity passes as incident to grant; Bailey v. Copeland, Wright (Ohio) 150, holding that when one grants parcel of ground in midst of his land, he grants, by implication, way to come to it; Powell v. Sims, 5 W. Va. 1, 13 Am. Rep. 629, holding that implied grant of easement of light will be sustained only in cases of real necessity, and will be rejected when it appears that, at reasonable cost, other lights to building may be substituted; Cole v. McKey, 66 Wis. 500, 57 Am. Rep. 293, 29 N. W. 279, to the point that lease gives lessee right of passage through halls and stairways necessary to enjoyment of part of building covered by lease; Edinburgh Life Assur. Co. v. Barnhart, 17 U. C. C. P. 63 (dissenting opinion), on inclusion of easement in grant by presumption of law, though not referred to in grant; Harris v. Smith, 40 U. C. Q. B. 33, holding that right of way is not such continuous easement as to pass by implication of law with grant of land, only way of necessity will so pass.

Cited in 2 Washburn, Real Prop. 6th ed. 277, as to how easements may be acquired; 2 Washburn, Real Prop. 6th ed. 342, on easements of part owners of house.

— Where right of water supply or drainage is granted.

Cited in Lyman v. Arnold, 5 Mason, 195, Fed. Cas. No. 8,626, as to whether property of removed soil is included in grant to dig in another's soil and lay drain or pipes; Hazard v. Robinson, 3 Mason, 272, Fed. Cas. No. 6,281, holding that unity of possession does not extinguish right to use watercourse appurtenant to mill; Yunker v. Nichols, 1 Colo. 551, 8 Mor. Min. Rep. 64, holding that right to convey water over land of another for irrigation does not need grant; Gray v. Saco Water Power Co. 85 Me. 526, 27 Atl. 455, holding that right to draw water from pond through described opening carries with it right to do all that is necessary to secure enjoyment of right; Johnston v. Hyde, 33 N. J. Eq. 632, holding that grant of easement of right to flow of so much water of stream as existing dam would divert, carried with it right to repair dam; Jackson v. Trullinger, 9 Or. 393, holding that right to overflow adjoining lands, is easement and will by conveyance as appurtenant, when agreeing in nature and quality with principal thing granted; Goodhart v. Hyett, L. R. 25 Ch. Div. 182, 53 L. J. Ch. N. S. 219, 50 L. T. N. S. 95, 48 J. P. 293, 32 Week. Rep. 165, holding right to have pipes upon land as easement, carries with it necessary right to enter and do what is necessary to preserve the right.

Cited in 3 Farnham, Waters, 2763, on landlord's duty as to water supply.

Derogation of grant by grantor.

Cited in Amidon v. Harris, 113 Mass. 59, holding grantor has no right to derogate from his own grant; Outerbridge v. Phelps, 13 Abb. N. C. 117, to the point that right of way reserved to grantor, is easement newly created by way of grant from lessee; Windsor & A. R. Co. v. R. Co. 10 Can. S. C. 335, holding matters of contract and grant are subjects legally distinct from wrongs, such as those from which Crown is exempt by reason of maxim Crown can do no wrong; Aubert-Gallion v. Roy, 21 Can. S. C. 456, holding municipality restrainable by injunction from erecting free bridge across river where legislature had granted privilege of building toll bridge within such municipality; Platt v. Grand Trunk R. Co. 12 Ont. Rep. 119, holding interruption of easement to build dam across river is breach of covenant for quiet enjoyment; Harris v. Smith, 40 U. C. Q. B. 33, holding that when owner of entirety conveys dominant tenement, right to easements, existing in point of user, passes under rule that no man shall derogate from his own grant.

Impeachment of assignee's title by assignor.

Cited in Eaton v. Mellus, 7 Gray, 566, holding that if A. sells to B. debt against C. he agrees, by necessary implication, that his title to the claim is thereby vested in purchaser and that no act of his own shall deprive his assignee of right and authority to collect it of debtors; Jordan v. Gillen, 44 N. H. 424, holding testimony offered by assignor, tending to impeach, by his subsequent declarations, title of assignee, inadmissible.

Implied covenant as to repair by landlord.

Cited in Skillen v. Waterworks Co. 49 Ind. 193, holding lessor of water power makes no implied covenant to repair; Sheets v. Selden, 7 Wall. 416, 19 L. ed. 166; Kirby v. White, 108 Md. 501, 21 L.R.A.(N.S.) 129, 129 Am. St. Rep. 451, 70 Atl. 213; Gluck v. Baltimore, 81 Md. 315, 48 Am. St. Rep. 515, 32 Atl. 515,—holding covenant that lessor will make repairs not implied; Krueger v. Ferrant, 29 Minn. 385, 43 Am. Rep. 223, 13 N. W. 158, holding there is no implied covenant on part of landlord to make repairs, or that premises are suitable for tenant's use or business, and rule extends to the common roof; Morse v Maddox, 17 Mo. 569, holding lessor of farm with privilege of using water from mill pond does not undertake to keep water at certain height in dam or repair it; Doupe v. Genin, 45 N. Y. 119, 6 Am. Rep. 47, holding when building has been injured by fire, landlord cannot be compelled to rebuild or repair for tenant, unless he has so covenanted, and he owes no greater obligation to one, use of whose tenement is impaired in consequence of fire than to one whose premises are destroyed, or directly injured by it; Gottsberger v. Radway, 2 Hilt. 342, holding landlord under no obligation to make repairs where agreement contained no covenant to do so; Betcher v. Hagell, 38 N. S. 517, holding landlord not bound to repair roof injured during storm; Humphrey v. Wait, 22 U. C. C. P. 580; Rogers v. Sorell, 14 Manitoba L. Rep. 450,—holding that landlord is not liable for injury to tenant caused by defect in building which existed at time of demise; Carstairs v. Taylor, L. R. 6 Exch. 217, 40 L. J. Exch. N. S. 129, 19 Week. Rep. 723, holding lessor not bound to repair; Colebeck v. Girdler's Co. L. R. 1 Q. B. Div. 234, 45 L. J. Q. B. N. S. 225, 34 L. T. N. S. 350, 24 Week. Rep. 577, holding lessor not bound by implied covenant to repair party wall supporting lessee's house.

Cited in notes in 14 L.R.A. 241, on responsibility of landlord for injuries from defects in portions of building remaining in his possession; 23 L.R.A. 160,

on liability of landlord as to condition of part of premises not controlled by tenant.

Duty of tenant or owner of dominant estate to repair.

Cited in Purcell v. English, 86 Ind. 34, 44 Am. Rep. 255, holding duty of tenant to keep in safe condition for his own use the demised premises extends to all appurtenances connected therewith, including steps, stairways, and other approaches; Newbold v. Brown, 44 N. J. L. 266, holding that action will not lie against tenant from year to year for permissive waste; Dozier v. Gregory, 46 N. C. (1 Jones, L.) 100, holding that husband of tenant in dower is not liable for mere permissive waste, after death of wife, and surrender of his possession; Boynton v. Clinton & E. Mut. Ins. Co. 16 Barb. 254, on obligation of lessee to rebuild where premises are destroyed by fire under lease requiring him to keep building in repair; Haxall v. Shippen, 10 Leigh, 536, 34 Am. Dec. 745, on liability of tenant for life for waste; Consolidated R. Co. v. Victoria, 5 B. C. 266, holding grantee of right of way cannot compel grantor to repair it; McConkey v. Brockville, 11 Ont. Rep. 322, holding municipal corporation not liable for injury caused by obstruction of drain by private individual at point near where private drain connected with street drain; Colebeck v. Girdler's Co. L. R. 1 Q. B. Div. 234, 45 L. J. Q. B. N. S. 225, 34 L. T. N. S. 350, 24 Week. Rep. 577, holding there is no obligation to repair on part of owner of servient tenement, but owner of dominant tenement must repair, and may enter on land of owner of servient tenement for that purpose; Buckley v. Buckley [1898] 2 Q. B. 608, 67 L. J. Q. B. N. S. 953, holding acquisition of easement and consequential right to execute repairs necessary to its enjoyment, did not cause loss of right to insist upon prima facie obligation to maintain gate so that water would not break out and flood land.

Cited in note in 10 Eng. Rul. Cas. 33, 34, on respective duties of owners of dominant and servient tenements as to continuing and repairing easement.

Cited in 1 Underhill, Land. & T. 222, on nondeterminability of tenancy at will for permissive waste; 2 Washburn, Real Prop. 6th ed. 312, as to who is bound to repair way.

Duty of cattle owner to keep cattle on his own land.

Cited in Burlington & M. R. R. Co. v. Brinkman, 14 Neb. 70, 15 N. W. 197, on common law obligation of cattle owner to keep his cattle on his own land; Cornwall v. Sullivan R. Co. 28 N. H. 161, holding where there are two adjoining closes, with undivided partition fence, which each owner is bound to keep in repair, each is required to keep his cattle on his own land at his peril; Corwin v. New York & E. R. Co. 13 N. Y. 42, holding by common law owner was bound to take care that his cattle did not trespass on his neighbor's lands; Madden v. Nelson & Ft. S. R. Co. 5 B. C. 541, holding that at common law occupiers of adjoining closes are not bound to fence either against or for benefit of each other; M'Lennan v. Grand Trunk R. Co. 8 U. C. C. P. 411, holding railway company not liable for killing of cattle which strayed upon track from pasture of neighbor of their owner; Van Natter v. Buffalo & L. H. R. Co. 27 U. C. Q. B. 581, holding common law requires no one to fence; Garrioch v. McKay, 13 Manitoba L. Rep. 404, holding that landowner is not bound to fence against neighbor's cattle, except by contract, prescription or specific statute; Bearns v. Reid, Newfoundl. Rep. (1897-1903) 118, holding it duty of owner of cows to watch them and have person in charge of them to keep them from straying; Ricketts v. East & West India Docks & B. Junction R. Co. 19 E. R. C. 18, 12 C. B. 160, 16 Jur. 1072, 21 L. J.

C. P. N. S. 201, 7 Railway Cas. 295, holding railroad company liable to repair fences only as against owner of adjoining close.

Liability of possessor of close for injury due to condition of premises.

Cited in Kinney v. Morley, 2 U. C. C. P. 226, holding possessor of close responsible for death of person killed by falling of wall in ruinous condition.

Right of way of necessity and duration of same.

Cited in Pierce v. Selleck, 18 Conn. 321, holding right of way of necessity is not permanent right, nor way permanent way, attached to land itself, whatever may be its relative condition, and which may be conveyed by deed, irrespective of continuing necessity of grantee; Prowattain v. Philadelphia, 17 Phila. 158, 42 Leg. Int. 170; Woodworth v. Raymond, 51 Conn. 70,—holding that way of necessity is not created by mere necessity, but always grows out of some grant, to which it is attached by construction as necessary incident; Whitehouse v. Cummings, 83 Me. 91, 23 Am. St. Rep. 756, 21 Atl. 743, holding right of way of necessity, in absence of anything in deed to contrary, is incident to grant indicative of intent of parties; Oliver v. Hook, 47 Md. 301, holding if grantee acquires new way to estate previously reached by way of necessity, way is thereby extinguished; also that right of way can only be raised out of land granted or reserved by grantor, never out of land of stranger; Richards v. Attleborough Branch R. Co. 153 Mass. 120, 26 N. E. 418, holding law does not give to every owner of land a right of way to it, or prohibit an owner from cutting himself from all access to it by his conveyances; Cooper v. Maupin, 6 Mo. 624, 35 Am. Dec. 456, holding that right of way by necessity, from one part of claimant's land to another part of same tract, over land of another, cannot exist; Dudley v. Cilley, 5 N. H. 558, to the point that common law, under certain circumstances, gives way of necessity; Dunklee v. Wilton R. Co. 24 N. H. 489, holding that ways of necessity are burdens of nature of easements, which are apparent, and which naturally result from relative situation of property; State v. Northumberland, 44 N. H. 628, holding that right by necessity to pass upon adjoining land when way is suddenly obstructed, is but temporary, and gives public no permanent easement in such adjoining land; Camp v. Whitman, 51 N. J. Eq. 467, 26 Atl. 917, holding that purchaser of back lot shut off from highway by land of others is entitled to carriage way across grantor's land to street, although a footway along edge of park exists; Newkirk v. Sabler, 9 Barb. 652, holding that person has no right to enter upon another's land, for purpose of taking away chattel belonging to him; Park Coal Co. v. Cummings, 7 Legal Gaz. 149, holding that reservation of right "to pass through lot" for purpose of mining and removing coal, meant simply that right to pass through lot, over defendant's soil lying under Diamon vein of coal, already conveyed by defendant; Lawton v. Rivers, 2 M'Cord, L. 445, 13 Am. Dec. 741, holding right of way may arise from necessity, by grant or by prescription, and though right of way by necessity is said to be by grant, distinction may be preserved, because it is from necessity that law implies grant; Turnbull v. Rivers, 3 M'Cord, L. 131, 15 Am. Dec. 622, holding that inconvenience of going always to one's plantation by water, will not amount to such necessity as will give way of necessity; Prowattain v. Philadelphia, 1 Sadler (Pa.) 437, 4 Atl. 806, 17 W. N. C. 261, on foundation and character of right to way of necessity; Screven v. Gregorie, 8 Rich. L. 158, 64 Am. Dec. 747, holding that inconvenience in reaching highway will not give rise to right by way of necessity; Clack v. White, 2 Swan, 540; Tracy v. Atherton, 35 Vt. 52, 82 Am. Dec. 621; Roper Lumber Co. v. Richmond Cedar

Works, 158 N. C. 161, 73 S. E. 902,—holding that way of necessity arises only by implication in favor of grantee, and may not be acquired over land of stranger; Hoffman v. Shoemaker, 69 W. Va. 233, 34 L.R.A.(N.S.) 632, 71 S. E. 198, holding that grantor may claim way of necessity over premises conveyed by him; Fielder v. Bannister, 8 Grant, Ch. (U. C.) 257, as to whether way of necessity is in reality way by grant; Read v. Smith, 2 N. B. 288, holding way of necessity must arise from prescription or grant; Turnbull v. Merriam, 14 U. C. Q. B. 265, holding way of necessity is limited by the necessity, and when necessity ceases, right of way ceases; Hamilton v. Morrison, 18 U. C. C. P. 228, holding there was no way of necessity properly speaking unless there is right to pass over adjoining lands where proper line of road is founderous; Gayford v. Moffatt, L. R. 4 Ch. 133, holding tenant occupying inner close entitled to way of necessity through outer close; London Corp. v. Riggs, L. R. 13 Ch. Div. 798, 49 L. J. Ch. N. S. 297, 42 L. T. N. S. 580, 28 Week. Rep. 610, 44 J. P. 345, on foundation of way of necessity; Pinnington v. Galland, 10 E. R. C. 35, 9 Exch. 1, 22 L. J. Exch. N. S. 349, holding grantee of inner close has right of way over surrounding land of grantor.

Cited in 2 Washburn, Real Prop. 6th ed. 281, as to when right to way of necessity arises.

Pleading easement of necessity.

Cited in Boyce v. Brown, 7 Barb. 80, holding better opinion is that way of necessity cannot be pleaded in general terms.

Action by heir or remainderman for injury to inheritance or remainder.

Cited in Schiffer v. Eau Claire, 51 Wis. 385, 8 N. W. 253, holding action maintainable by person owning estate in remainder during continuance of intermediate estate, when injury complained of is detrimental to estate in remainder; Davis v. Jewett, 13 N. H. 88, holding that where suit is brought for damage arising from flowing land and injury is to reversionary interest merely, it must be alleged in plaintiff's declaration; George v. Fisk, 32 N. H. 32, holding that tenant and landlord may both maintain actions at same time for injuries done to estate; Stuart v. Baldwin, 41 U. C. Q. B. 446, holding that if heir at law sues for severance of ores it is because ores remained vested in him as part of inheritance, where testator had created power in another to sell his estate.

Action of covenant.

Cited in Kinney v. Watts, 14 Wend. 38, holding that under statute no action lies upon implied covenant of quiet enjoyment under lease; Grannis v. Clark, 8 Cow. 36, holding that in action upon "demise" covenant in lease, it is not necessary to show that lessee was evicted; Gardner v. Keteltas, 3 Hill, 330, 38 Am. Dec. 637, holding that if lessee be prevented from entering upon demised premises by one in possession under paramount title, action lies against lessor for breach of covenants.

Liability for injury to easement.

Cited in Kelly v. O'Grady, 34 U. C. Q. B. 562, holding that action lies against owner of land through which drain passes, under award of fence viewers, for obstructing drain; Miller v. Cronkhite, 2 N. B. Eq. 203, holding that license to lay pipes on another's land, is revoked by preventing licensee to go upon land for purpose of making repairs; Jones v. Pritchard [1908] 1 Ch. 630, 2 B. R. C. 380, 77 L. J. Ch. N. S. 405, 98 L. T. N. S. 386, 24 Times L. R.

309, holding that owner of party wall is not liable for any nuisance or inconvenience occasioned by user for contemplated purpose.

When action of trespass lies.

Cited in Rogers v. Brooks, 99 Ala. 31, 11 So. 753, holding that landlord cannot maintain trespass against tenant to recover penalty imposed by statute for cutting trees; Smith v. Yell, 8 Ark. 470, to the point that by common law, actual or constructive possession by operation of law, was necessary to be proved to maintain trespass; Starr v. Jackson, 11 Mass. 519, holding that trespass will lie by owner of land in possession of tenant at will for destruction of buildings; Chase v. Hazelton, 7 N. H. 171; Elliot v. Smith, 2 N. H. 430,— holding that trespass on the case lies in favor of reversioner against stranger for cutting trees on land; Schermerhorn v. Buell, 4 Denio, 422, holding that if lessor except trees on demised premises, they do not pass with land, and he can maintain trespass against tenant if he cut them; Livingston v. Mott, 2 Wend. 605, holding that action of trespass will not lie by reversioner for injury to inheritance, committed by person who acts under authority of tenant for life; Smith v. Fortiscue, 48 N. C. (3 Jones, L.) 65, holding that lessor of tenant at will cannot maintain action of trespass quare clausum fregit against one for entry upon premises unless there was some actual injury done, besides treading down grass; Jarvis v. Edgett, 6 N. B. 66, holding that one holding under mortgagor may be sued in trespass by purchaser at sale by master in chancery for cutting and carrying away logs.

Liability for want of repair.

Cited in Livingston v. Pendergast, 35 N. H. 544, holding that in action for personal injury resulting from defect in highway it is sufficient to allege generally that injury was caused, by defect, insufficiency, and want of repairs of highway.

10 E. R. C. 22, MASON v. SHREWSBURY & H. R. CO. 40 L. J. Q. B. N. S. 293, L. R. 6 Q. B. 578, 25 L. T. N. S. 239, 20 Week. Rep. 14.

Necessity of claim as of right as basis of easement by prescription.

Cited in Malcolm v. Hunter, 6 Ont. Rep. 102, holding no statutory right given to licensee of water privilege by occupation of twenty years where user was apparently permissive; Warin v. London & C. Loan & Agency Co. 7 Ont. Rep. 706, holding mere enjoyment is not enough to give title by prescription, it must be enjoyment by person claiming as of right.

Right to discontinue artificial water-course or other artificial condition.

Cited in Canton Iron Co. v. Biwabik Bessemer Co. 63 Minn. 367, 65 N. W. 643, holding owner of dominant estate had right to discontinue diversion, and restore water to its original channel and flow, whenever diversion became onerous, or ceased to be beneficial to him; Sparks Mfg. Co. v. Newton, 57 N. J. Eq. 367, 41 Atl. 385, holding owners of servient tenement cannot compel owner of dominant tenement to continue to exercise water privilege, though former may derive incidental benefit; Peter v. Caswell, 38 Ohio St. 518, holding mill owners might restore water to its original channel; Lake Drummond Canal & Water Co. v. Burnham, 147 N. C. 41, 17 L.R.A.(N.S.) 945, 125 Am. St. Rep. 527, 60 S. E. 650, holding upper proprietor not obliged to maintain structure and conditions arising from it, though of benefit to lower tenant; Willow Grove & G. Pl. Road Co. v. Graver, 22 Montg. Co. L. Rep. 188, holding that easement consisting of right to take water for mill may be abandoned, when

its exercise becomes onerous, or ceases to be of any benefit to owner: Oliver v. Lockie, 26 Ont. Rep. 28, holding owner of servient tenement taking water by artificial stream takes it with notice stream is created for convenience of dominant tenement and that it may be diverted when this purpose has been served.

Cited in note in 50 L.R.A. 842, on rights acquired in an artificial condition of a body of water.

Distinguished in Smith v. Youmans, 96 Wis. 103, 37 L.R.A. 285, 65 Am. St. Rep. 30, 70 N. W. 1115, where water rights and easement were not abandoned.

Right of riparian proprietor to have stream flow in original channel.

Cited in O'Connell v. East Tennessee, V. & G. R. Co. 87 Ga. 246, 13 L.R.A. 394, 27 Am. St. Rep. 246, 13 S. E. 489, holding railroad company liable for injury to land of riparian owner, caused by erection of embankment along bank of river whereby overflow upon lands opposite was caused; Cole v. Missouri, K. & O. R. Co. 20 Okla. 227, 15 L.R.A.(N.S.) 268, 94 Pac. 540, holding riparian owner upon water course is entitled to have water flow to him in its natural state and is bound to submit to receive it so far as it is nuisance by its tendency to flood his lands.

Cited in note in 41 L.R.A. 751, on correlative rights of upper and lower proprietors as to use and flow of stream.

Limits of water course in overflowage.

Cited in Kansas City, M. & B. R. Co. v. Smith, 72 Miss. 677, 27 L.R.A. 762, 48 Am. St. Rep. 579, 17 So. 78, holding valley of mile, or mile and a half along stream of large creek was beyond requirement of law for course of stream.

10 E. R. C. 35, PINNINGTON v. GALLAND, 1 C. L. R. 819, 9 Exch. 1, 22 L. J. Exch. N. S. 349.

Easements of necessity.

Cited in Yunker v. Nichols, 1 Colo. 551, holding because of local conditions that all lands were held in subordination to dominant right of others who must necessarily pass over them to obtain supply of water for irrigation, and servitude passed by operation of law: Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257, holding lease by implication gave right of way so tenement could be enjoyed; Outerbridge v. Phelps, 13 Jones & S. 555, 58 How. Pr. 77, 13 Abb. N. C. 117, on existence of easement without express reservation or grant; Jones v. Wagner, 66 Pa. 429, 5 Am. Rep. 385, 28 Phila. Leg. Int. 52, holding owner of mineral estate, if law be not controlled by conveyance, owes servitude to superincumbent estate of sufficient supports: McDade v. Spencer, 6 Lack. Leg. News, 84, holding that owner of mineral estate, in absence of agreement to contrary, owes servitude to superincumbent estate, of sufficient support; Edinburgh Life Assur. Co. v. Barnhart, 17 U. C. C. P. 63 (dissenting opinion), on inclusion of easement in grant though not referred to therein where substantially part of thing granted or specially necessary to its proper enjoyment; Midland R. Co. v. Miles, L. R. 33 Ch. Div. 632, 55 L. J. Ch. N. S. 745, 55 L. T. N. S. 428, 35 Week. Rep. 76, holding where grant is made with exception or reservation in favor of grantor, rights of necessity, or implied rights, which, under that reservation, pass to grantor, take effect by way of regrant by grantee to grantor, and are limited by necessity of the case.

Explained in Pyer v. Carter, 1 Hurlst. & N. 916, holding word "necessity" is to be understood as meaning necessity at time of conveyance.

— Way of necessity.

Cited in Ritchey v. Welsh, 149 Ind. 214, 40 L.R.A. 105, 48 N. E. 1031, holding way of necessity may arise out of partition proceedings; Dahlberg v. Haeberle, 71 N. J. L. 514, 59 Atl. 92, holding right of way would arise by severance of lot from entire tract; Meredith v. Frank, 56 Ohio St. 479, 47 N. E. 656, holding way of necessity reserved by implication to grantor; Hoffman v. Shoemaker, 69 W. Va. 233, 34 L.R.A.(N.S.) 632, 71 S. E. 198, holding that grantor may claim way of necessity over premises conveyed by him; Dillman v. Hoffman, 38 Wis. 559, holding all authorities agree that when one part of an estate is dependent of necessity for enjoyment on some use in nature of easement, in another part, and owner conveys either part, without express provision on the subject part so dependent, carries or reserves with it an easement of such necessary use in the other part; Stephens v. Gordon, 22 Can. S. C. 61, holding if grantor does not assign way, or if he assigns way that is unreasonable, grantee may select one that is most direct and convenient for himself but one, use of which will not unreasonably interfere with grantor in enjoyment of his rights on servient tenement; Saylor v. Cooper, 8 Ont. App. Rep. 707, holding tenant is entitled to rights of way which belonged to landlord and right exists to as full extent with respect to way of necessity, as with respect to way acquired by express grant; Turnbull v. Merriam, 14 U. C. Q. B. 265, holding right of way of necessity impliedly reserved; Harris v. Smith, 40 U. C. Q. B. 33, holding way of necessity is only way which will pass by implication of law with grant of land; Wheeldon v. Burrows, L. R. 12 Ch. Div. 31, 48 L. J. Ch. N. S. 853, 41 L. T. N. S. 327, 28 Week. Rep. 196, holding way of necessity forms exception to rule that if grantor intends to reserve right of way over tenement granted he must reserve it expressly in grant.

Distinguished in Mitchell v. Seipel, 53 Md. 251, 36 Am. Rep. 404, where an alley was held not a way of necessity.

— As dependent on order of conveyances in time.

Cited in Young v. Wilson, 21 Grant, Ch. (U. C.) 144, holding reservation of easement might be implied though servient tenement was first conveyed; Hamilton v. Morrison, 18 U. C. C. P. 228, holding no way of necessity impliedly granted where owner conveying had left to him means of access to public road.

10 E. R. C. 46, HALL v. LUND, 1 Hurlst. & C. 676, 9 Jur. N. S. 205, 32 L. J. Exch. N. S. 113, 7 L. T. N. S. 692, 11 Week. Rep. 271.

Implied grant of easement.

Cited in Burns v. Gallagher, 62 Md. 462, applying doctrine of implied grant of easements or quasi easements by analogy and giving it operation by way of estoppel in case of easement over lot retained by equitable vendor; Hunter v. Richards, 26 Ont. L. Rep. 458, 5 D. L. R. 116 (dissenting opinion), on grant of easement by implication arising from circumstances; Birmingham, D. & D. Bkg. Co. v. Ross, L. R. 38 Ch. Div. 295, 57 L. J. Ch. N. S. 601, 59 L. T. N. S. 609, 36 Week. Rep. 914, on construction of implied grant.

Cited in note in 10 E. R. C. 58, as to when grant of an easement will be implied.

Distinguished in Carbrey v. Willis, 7 Allen, 364, 83 Am. Dec. 688, holding

where there is grant of land by metes and bounds, without express reservation, and with full covenants of warranty against incumbrances, there is no reservation by implication unless easement is strictly one of necessity.

— Apparent and existing easements.

Cited in Janes v. Jenkins, 34 Md. 1, 6 Am. Rep. 300, holding right to enjoyment of lights passed by conveyance as incident and appurtenant to land conveyed; Wood v. Grayson, 22 App. D. C. 432, holding it is competent to arrive at necessary extent of space or area required to supply light and air by what parties have done, and what they have recognized as reasonably necessary in actual use; Diamond v. Reddick, 36 U. C. Q. B. 391, holding lease as explained by previous enjoyment carried implied grant that lessee might use stream for purpose of his business; Thomas v. Owen, L. R. 20 Q. B. Div. 225, 57 L. J. Q. B. N. S. 198, 58 L. T. N. S. 162, 36 Week. Rep. 440, 52 J. P. 516, holding right of way passed under word "appurtenances," under circumstances of case.

Cited in note in 26 L.R.A.(N.S.) 362, on easements created by severance of tract with apparent benefit existing.

Construction of deed with reference to conditions at date thereof.

Cited in Johnston v. Hyde, 33 N. J. Eq. 632, holding deeds of given date are to be construed in reference to state and condition of premises at that time; Jones v. Hunter, 1 N. B. Eq. Rep. 250, holding right to build over alley and block up way of access should have been expressly reserved by lease if it was desired to do so; Edinburgh Life Assur. Co. v. Barnhart, 17 U. C. C. P. 63, holding deed explainable by state of premises at time it was made, and mode in which they were then and had been previously enjoyed; Diamond v. Reddick, 36 U. C. Q. B. 391, holding lease explainable by previous enjoyment.

Cited in 2 Devlin, Deeds, 3d ed. 1577, on construction of deed with respect to actual, rightful state of property at time of execution; 3 Washburn, Real Prop. 6th ed. 369, on construing deeds according to actual state of premises.

Derogation of his own grant by grantor.

Cited in Diamond v. Reddick, 36 U. C. Q. B. 391, holding lessor could grant no more right than remained to him after lease to defendant; Carbrey v. Willis, 7 Allen, 364, 83 Am. Dec. 688, holding that grantor of land with full covenants of warranty and his privies, are estopped to claim any interest in granted premises.

10 E. R. C. 60, EWART v. COCHRANE, 7 Jur. N. S. 925, 5 L. T. N. S. 1, 4 Macq. Sc. App. Cas. 117, 1 Paterson Sc. App. Cas. 1010, 10 Week. Rep. 3.

Implied grant of that which is reasonably necessary to enjoyment of thing granted.

Cited in Morrison v. King, 62 Ill. 30, holding that incorporeal hereditaments appendant or appurtenant to land, will pass by conveyance of land as incident thereto; Ingle v. Bottoms, 160 Ind. 73, 66 N. E. 160, holding question of how much of surface is reasonably necessary for operation of mine is question of fact, and not of law; Janes v. Jenkins, 34 Md. 1, 6 Am. Rep. 300, holding right to enjoyment of lights passed by conveyance as incident and appurtenant to land conveyed; Mitchell v. Seipel, 53 Md. 251, 36 Am. Rep. 404, holding that on grant of part of tenement as it is then used and enjoyed, all easements necessary to reasonable enjoyment of property will pass; Leonard v. Leonard, 7 Allen, 277, holding easement whose use in connection with land conveyed is

reasonably necessary passes as appurtenance without being named: Pettingill v. Porter, 8 Allen, 1, 85 Am. Dec. 671, holding word "necessary" cannot reasonably be held to be limited to absolute physical necessity; Howell v. Estes, 71 Tex. 690, 12 S. W. 62, holding that if improvement constructed over one parcel of land for convenient use of another contiguous parcel by owner of both, be open and visible and permanent, and owner sells latter, use of such easement will pass as easement; Hunter v. Richards, 5 D. L. R. 116, 26 Ont. L. Rep. 458 (dissenting opinion), on grant of easement by implication arising from circumstances; Maughan v. Casci, 5 Ont. Rep. 518, on passing of easement by implied grant; Briggs v. Semmens, 19 Ont. Rep. 522, holding that upon severance of tenement by devise into separate parts, rights of way necessary for reasonable enjoyment of parts devised, and which were used at time of devise for benfit of such parts, are also devised; Ternan v. Flinn, 40 N. S. 167, holding that to establish right of way facts must show bona fide user of disputed way for some definite purpose and for period or at times clearly stated; Young v. Wilson, 21 Grant, Ch. (U. C.) 611, holding that whether dominant or servient tenement be first sold, in case of continuous and apparent user, reservation of easement must be implied in favor of dominant tenement; Adams v. Loughman, 39 U. C. Q. B. 247, holding that upon severance of heritage, grant will be implied, first, of all those continuous and apparent easements which have in fact been used by owner during unity and which are necessary to use of tenement conveyed, though they have no legal existence as easements, and secondly, of all those easements without which enjoyment of the several portions could not be had at all: Francis v. Hayward, L. R. 20 Ch. Div. 773, 52 L. J. Ch. N. S. 12, 46 L. T. N. S. 659, 30 Week. Rep. 744, on passing of easement used and necessary for comfortable enjoyment of property; Russell v. Watts, L. R. 25 Ch. Div. 559, 50 L. T. N. S. 673, 32 Week. Rep. 626 (dissenting opinion), on meaning of word "necessary;" Thomas v. Owen, L. R. 20 Q. B. Div. 225, holding right of way passed under word "appurtenances."

Cited in notes in 6 L.R.A.(N.S.) 411, on effect of dividing tract with visible servitude in favor of one parcel on another; 8 L.R.A.(N.S.) 331, on implication from necessity of easement other than of way; 10 Eng. Rul. Cas. 57, as to when grant of an easement will be implied; 10 E. R. C. 71, on passing of necessary easement by implication on sale of one of two tenements owned by grantor.

Distinguished in Carbrey v. Willis, 7 Allen, 364, 83 Am. Dec. 688, holding where there is grant of land by metes and bounds, without express reservation, and with full covenants of warranty against incumbrances, there is no reservation by implication unless easement is strictly one of necessity; Baring v. Abingdon [1892] 2 Ch. 374, 62 L. J. Ch. N. S. 105, 67 L. T. N. S. 6, 41 Week. Rep. 22, where a right of common was claimed.

Criticized in McCarty v. Kitchenman, 47 Pa. 239, 86 Am. Dec. 538, holding plaintiff purchased with lot right to use adjoining alley, where easement was both apparent and continuous; Harris v. Smith, 40 U. C. Q. B. 33, holding that servient tenement remains burdened with apparent and continuous easement, whether conveyed before dominant tenement or not till after it, but principle on which this liability rests is not the same in the two cases.

— Drains and sewers.

Cited in Fitzpatrick v. Mik, 24 Mo. App. 435, holding that grant of part of land of grantor, with all appurtenances, conveys easement of private sewer appurtenant to such part and connecting sink thereon with public sewer; Kelly v. Dunning, 43 N. J. Eq. 62, 10 Atl. 276, holding easement necessary for comfort and enjoyment and which is apparent and continuous, such as drain or other

artificial water course, which is continuous in its service, and can always be seen or known on careful inspection, will pass on severance of two tenements without use of word "appurtenant:" Young v. Wilson, 21 Grant, Ch. (U. C.) 144, holding easement for watercourse connected with mill impliedly reserved, though servient tenement was first conveyed; Hall v. Lund, 10 E. R. C. 46, 1 Hurlst. & C. 676, 9 Jur. N. S. 205, 11 Week. Rep. 271, holding lessee of mill entitled to use stream for purpose of throwing refuse from mill therein.

Criticized in Toothe v. Bryce, 50 N. J. Eq. 589, 25 Atl. 182, holding flow of water at stable and greenhouse necessary where it constituted valuable addition to property, and increased its beneficial use.

10 E. R. C. 80, HOLLINS v. VERNEY, 53 L. J. Q. B. N. S. 430, 51 L. T. N. S. 753, L. R. 13 Q. B. Div. 304, 48 J. P. 580, 33 Week. Rep. 5, modifying the decision of the Queen's Bench Division, reported in L. R. 11 Q. B. Div. 715.

Continuity of user required to establish prescriptive right.

Cited in Adams v. Fairweather, 13 Ont. L. Rep. 490, on actual use as necessary to satisfy statute during whole of statutory term in order to gain easement by prescription; Brady v. Sadler, 16 Ont. Rep. 49, holding that period of enjoyment required by prescription act must be period next before suit wherein claim shall be brought into question; Re Cockburn, 27 Ont. Rep. 450, holding that unity of possession during period interrupted running of statute and right of way by prescription could not be created; Huddlestone v. Love, 13 Manitoba L. Rep. 432, holding that easement by prescription can only be established by continuous enjoyment for period fixed by statute; Ternan v. Flinn, 40 N. S. 167, holding that to establish right of way by prescription, facts must show bona fide user, for some definite purpose and for period of time clearly stated; Knock v. Knock, 27 Can. S. C. 664 (reversing 29 N. S. 267), holding that notwithstanding use of way as winter road only, cessation for year immediately preceding commencement of action, was bar under statute; Smith v. Baxter [1900] 2 Ch. 138, 69 L. J. Ch. N. S. 437, 82 L. T. N. S. 650, 48 Week. Rep. 458, holding term "interruption" refers to adverse obstruction, and not mere discontinuance of user, also that rule that question as to enjoyment of user for full period of twenty years is one of fact applies to user in connection with light.

Cited in note in 44 L.R.A.(N.S.) 92, on easement by prescription where original use was licensed.

Cited in 2 Washburn, Real Prop. 6th ed. 303, on continuous and uninterrupted enjoyment of easement as essential to title by prescription.

10 E. R. C. 98, DALTON v. ANGUS, L. R. 6 App. Cas. 740, 44 L. T. N. S. 844, 50 L. J. Q. B. N. S. 689, 30 Week. Rep. 191, 46 J. P. 132, affirming the decision of the Court of Appeal, reported in L. R. 4 Q. B. Div. 162, which reverses the decision of the Queen's Bench Division, reported in L. R. 3 Q. B. Div. 85.

Easement by prescription or implied grant.

Cited in Hollingsworth & V. Co. v. Foxborough Water Supply Dist. 165 Mass. 186, 42 N. E. 574, on acquisition of right to store water in reservoir by prescription; Kuhn v. Fairmont Coal Co. 66 W. Va. 711, 102 C. C. A. 457, 179 Fed. 191, holding that deed of all the coal and mining privileges necessary for removal of coal, etc., does not by implication reserve right to subjacent support of surface in its original condition; Loggie v. Montgomery, 38 N. B. 112 (affirming 3 N. B. Eq. Rep. 238), holding adverse possession necessary to acquisition

of easement by prescription; Iredale v. Loudon, 15 Ont. L. Rep. 286, on acquisition of title to room by length of possession; Re Cockburn, 27 Ont. Rep. 450, to the point that claim to right of way may be established on theory of lost grant; Hunter v. Richards, 5 D. L. R. 116, 26 Ont. L. Rep. 458, holding that where there is evidence of user, open and uninterrupted for twenty years, jury ought to presume lost grant; Leslie v. Pere Marquette R. Co. 24 Ont. L. Rep. 206, holding that presumption of lost grant might be applied to right to passage way under railroad where it was used for 20 years.

Cited in notes in 10 Eng. Rul. Cas. 10, on right to claim easement only as accessory to, and for benefit of, a tenement; 10 Eng. Rul. Cas. 94, on what is necessary to obtain easement by prescription; 25 Eng. Rul. Cas. 343, 344, on presumption of grant from public acts of user.

Cited in 2 Washburn Real Prop. 6th ed. 294, 296, 298, 300, on easements acquired by prescription; 2 Washburn Real Prop. 6th ed. 319, on prescriptive easement arising from presumed covenant; 2 Washburn Real Prop. 6th ed. 322, on easement of prospect; 2 Washburn Real Prop. 6th ed. 323, on rights of riparian proprietors.

The decision of the Queen's Bench Division was distinguished in Ring v. Pugsley, 18 N. B. 303, where owners of servient tenement had means of resisting enjoyment of alleged easement.

— Necessity of notice to owner of servient tenement.

Cited in Ludlow Mfg. Co. v. Indian Orchard Co. 177 Mass. 61, 58 N. E. 181, on presumption of notice of conditions giving rise to cause of action; Hudson v. Watson, 11 Pa. Super. Ct. 266, holding acquiescence means enjoyment was peaceable; Union Lighterage Co. v. London Graving Dock Co. [1901] 2 Ch. 300, [1902] 2 Ch. 557, 71 L. J. Ch. N. S. 791, 87 L. T. N. S. 381, 70 L. J. Ch. N. S. 558, 84 L. T. N. S. 527, 17 Times L. R. 447, 18 Times L. R. 754, holding cited case establishes there must be some knowledge or means of knowledge on part of person against whom right is claimed.

Distinguished in Tone v. Preston, L. R. 24, Ch. Div. 739, 49 L. T. N. S. 99, 32 Week. Rep. 166, 53 L. J. Ch. N. S. 50, where question whether support claimed was obvious and apparent did not arise, and enjoyment was not as of right.

The decision of the Court of Appeal was cited in Sturges v. Bridgman, L. R. 11 Ch. Div. 852, 48 L. J. Ch. N. S. 785, 41 L. T. N. S. 219, 28 Week. Rep. 200, holding consent or acquiescence of owner of servient tenement lies at root of prescription, and of fiction of lost grant.

— Extent of rights.

Cited in Baker v. Willard, 171 Mass. 220, 40 L.R.A. 754, 50 N. E. 620, holding implied grant of easement is not to be extended by construction beyond what was necessary, or what is fairly shown to have been within intention of creator of it.

The decision of the Queen's Bench Division was cited in Rivers v. Adams, L. R. (3 Exch. Div. 361, 48 L. J. Exch. N. S. 47, 39 L. T. N. S. 39, 27 Week. Rep. 381, holding it necessary to connect user with right claimed.

— Period of prescription.

Cited in Clement v. Bettle, 65 N. J. L. 675, 48 Atl. 567, holding proof of twenty years' open notorious, continuous, public, peaceable and uninterrupted use of road establishes legal presumption of right to use same and prescriptive or written grant to use it, which grant had been lost or mislaid; Mann v. Brodie, L. R. 10 App. Cas. 378, on cutting down of period required for prescription as to private rights by legislation and legal fiction of presumed grants.

Cited in note in 16 E. R. C. 229, as to when limitations begin to run where wrongful act and damages are not instantaneous.

— Presumption and rebuttal of grant.

Cited in Crowe v. Cabot, 40 N. S. 177, holding that inference drawn from continuous enjoyment of easement for twenty years may be rebutted and disproved; Adams v. Fairweather, 13 Ont. L. Rep. 490, holding lost grant is presumed only where circumstances are such as would have existed had there been grant in fact; Goodman v. Saltash, L. R. 7 App. Cas. 633, 52 L. J. Q. B. N. S. 193, 48 L. T. N. S. 239, 31 Week. Rep. 293, 47 J. P. 276 (dissenting opinion), as to whether prescription can only be of something which could have lawful origin at common law; Gardner v. Hodgson's Kingston Breweries Co. [1900] 1 Ch. 592, holding under Prescription Act actual uninterrupted enjoyment of way for forty years suffices to establish easement; unless it can be shown to have been enjoyed under some written consent or agreement.

The decision of the Court of Appeal was cited in Lehigh Valley R. Co. v. McFarlan, 43 N. J. L. 605, holding that owner of servient tenement cannot overcome presumption of grant arising from uninterrupted user of twenty years by proof that no grant was, in fact, made.

The decision of the Court of Appeal was distinguished in Norfolk v. Arbuthnot, L. R. 5 C. P. Div. 390, 49 L. J. C. P. N. S. 782, 43 L. T. N. S. 302, 44 J. P. 796, where question was not whether there was evidence of lost grant.

Statutes of prescription.

Cited in Re Cockburn, 27 Ont. Rep. 450, approving language of cited case on construction of prescription act and citing same on doctrine of lost grant: Simpson v. Godmanchester [1897] A. C. 696, 66 L. J. Ch. N. S. 770, 77 L. T. N. S. 409, holding second section of Prescription Act is not confined to rights of way and watercourses, but includes easements of every description.

Prescriptive lights and air.

Cited in Kine v. Jolly [1905] 1 Ch. 480, 74 L. J. Ch. N. S. 174, 53 Week. Rep. 462, 92 L. T. N. S. 209, 21 Times L. R. 128, holding rights to be enforced in respect of prescriptive easement for light are rights properly enforceable in action of nuisance; Russell v. Watts, L. R. 10 App. Cas. 590, 55 L. J. Ch. N. S. 158, 53 L. T. N. S. 876, 34 Week. Rep. 277, 50 J. P. 68 (dissenting opinion), on nature of instrument having effect of privileging window as against subsequent holder of land; Wheaton v. Maple [1893] 3 Ch. 48, 62 L. J. Ch. N. S. 963, 2 Reports, 549, 69 L. T. N. S. 208, 41 Week. Rep. 677, holding words "or other easement" in section two of Lord Tenderden's act of 1832 do not include claim to use of light specially provided for by section three; Bass v. Gregory, 2 E. R. C. 562, L. R. 25 Q. B. Div. 481, 59 L. J. Q. B. N. S. 574, 55 J. P. 119, holding lost grant of right to air for ventilation of cellar might be presumed and cited also on application of second section of Prescription Act; Smith v. Baxter [1900] 2 Ch. 138, 69 L. J. N. S. 437, 48 Week. Rep. 458, 82 L. T. N. S. 650, on establishment by lost grant of title to ancient lights; Harris v. De Pinna, L. R. 33 Ch. Div. 238, 56 L. J. Ch. N. S. 344, 54 L. T. N. S. 770, 50 J. P. 486, holding claim to current of air uninterruptedly could not be asserted under Prescription Act.

Distinguished in Perry v. Eames [1891] 1 Ch. 658, holding terms "or other easements" in second section of 2 & 3 Will. 4, C. 71, do not include light.

The decision of the Queen's Bench Division was cited in Ray v. Sweeney, 14 Bush, 1, 29 Am. Rep. 388, on easements of light and air by prescription.

Prescriptive lateral support.

Cited in Hudson County v. Woodcliff Land & Improv. Co. 74 N. J. L. 355, 65 Atl. 844, holding facts of case required inference of implied grant of easement for lateral support of road; Bell v. Love, L. R. 10 Q. B. Div. 547, 52 L. J. Q. B. N. S. 290, 48 L. T. N. S. 592, 47 J. P. 468, holding defendants had no right to let down surface support of a house which had existed for more than twenty years before it was undermined.

Cited in note in 20 L.R.A. 730, on prescriptive right to lateral support for buildings.

Disapproved in Tunstall v. Christian, 80 Va. 1, 56 Am. Rep. 581, holding right to lateral support for artificial burdens cannot be acquired by prescription.

The decision of the Court of Appeal was cited in Backus v. Smith, 5 Ont. App. Rep. 341 (reversing 44 U. C. Q. B. 428), holding that in order to gain right of lateral support of building by prescription, owner of adjoining premises must have known that building was receiving support claimed.

The decision of the Queen's Bench Division was cited in Handlan v. McManus, 42 Mo. App. 551, holding that right to have building supported by adjoining land cannot be acquired by prescription, when there is no adverse user of any of that land.

Right to lateral or vertical support.

Cited in Schultz v. Byers, 53 N. J. L. 442, 13 L.R.A. 569, 26 Am. St. Rep. 435, 22 Atl. 514 (dissenting opinion), on right of support to soil in its natural state, and to artificial structures erected thereon, by soil of adjacent or subjacent lands; Hudson County v. Woodcliff Land Improv. Co. 74 N. J. L. 359, 65 Atl. 844, holding that adjoining land of vendor was burdened with lateral support of road built in accordance with terms of deed, where conveyance was made for purpose of building road in accordance to grade shown on map; Manning v. New Jersey Short Line R. Co. 80 N. J. L. 349, 32 L.R.A.(N.S.) 155, 78 Atl. 200, holding that lateral support is included in title gained by railroad in condemnation of land for railroad purposes; Mosier v. Oregon R. & Nav. Co. 39 Or. 256, 87 Am. St. Rep. 652, 64 Pac. 453, holding that railroad company is liable for removal of lateral support to adjoining land, regardless of question of negligence; Noonan v. Pardee, 200 Pa. 474, 55 L.R.A. 410, 86 Am. St. Rep. 722, 50 Atl. 255, 11 Kulp, 1, holding plaintiff could not recover for deprivation of lateral support, where defendants mined at distance therefrom and action was for undermining; Griffin v. Fairmont Coal Co. 59 W. Va. 480, 2 L.R.A.(N.S.) 1115, 53 S. E. 24, on rules governing interpretation of instruments and contracts in relation to support; Iredale v. London, 40 Can. S. C. 313 (reversing 15 Ont. L. 286 which reversed 14 Ont. L. 17), as to whether holder of possessory title to shop has right of support from lower story; Southwark & V. Water Co. v. Wandsworth Dist. Bd. of Works [1898] 2 Ch. 603, 62 J. P. 756, 79 L. T. N. S. 132, 14 Times L. R. 576, 47 Week. Rep. 107, holding owner of house pulling it down has right to remove support; Greenwell v. Low Beechburn Colliery Co. [1897] 2 Q. B. 165, 66 L. J. Q. B. N. S. 643, 76 L. T. N. S. 759, holding right not to have buildings interfered with by underground working when once acquired is in character same as right of owner of surface; Jordeson v. Sutton, S. & D. Gas. Co. [1899] 2 Ch. 217, 68 L. J. Ch. N. S. 457, 63 J. P. 692, 80 L. T. N. S. 815, 15 Times L. R. 374, holding that prima facie defendants had no right to cause subsidence of plaintiff's buildings.

Cited in notes in 68 L.R.A. 681, 683, on liability for removal of lateral or subjacent support of land in its natural condition; 17 E. R. C. 420, on right of owner

of surface to underlying mines; 17 E. R. C. 672, on right of support where surface and mines are severed.

Distinguished in Lemaitre v. Davis, L. R. 19 Ch. Div. 281, 51 L. J. Ch. N. S. 173, 46 L. T. N. S. 407, 30 Week. Rep. 360, 46 J. P. 324, holding there is nothing in cited case which conclusively settles question whether owner having claim of support against land, can enforce such claim against building on it: Great Northern R. Co. v. Inland Revenue Comrs. [1901] 1 K. B. 416, 70 L. J. K. B. N. S. 336, 65 J. P. 275, 49 Week. Rep. 261, 84 L. T. N. S. 183, where right involved was that of railway company to insist that mines lying under railroad be not worked and arose by statute.

The decision of the Court of Appeal was cited in Hutchison v. St. John, Y. M. C. A. 19 N. B. 65, to the point that owner of land has no right to load his own soil so as to make it require support of that of his neighbor; Backus v. Smith, 44 U. C. Q. B. 428 (dissenting opinion), on right of owner of land to lateral support for buildings, in absence of prescriptive right.

The decision of the Queen's Bench Division was cited in Schultz v. Byers, 53 N. J. L. 442, 13 L.R.A. 569, 26 Am. St. Rep. 435, 22 Atl. 514, holding that excavation by owner on his own land adjoining another's building, causing damage without notice, is evidence of negligence in doing work.

Consideration of future in determination of questions as to light.

Cited in Corbett v. Jonas [1892] 3 Ch. 137, 62 L. J. Ch. N. S. 43, 3 Reports, 25, 67 L. T. N. S. 191, holding that in questions of light granted, as distinguished from ancient light, regard is to be had to the future; Dicker v. Popham, 63 L. T. N. S. 379, holding court bound to consider future application of plaintiff's premises in granting injunction to restrain obstruction of light, or directing inquiry as to damages.

Doctrine of stare decisis in law of conveyancing.

Cited in Pearson v. Mulholland, 17 Ont. Rep. 502, holding court will adhere to previous decision holding deed operative, though court thinks it inoperative, on ground of use by conveyancers of such deeds on faith of such decision.

Independent contractor, non-delegable duties of owner.

Cited in North Chicago Street R. Co. v. Durgeon, 184 Ill. 477, 56 N. E. 796, holding there is exception to rule that doctrine of respondeat superior does not apply to cases of independent contractors in case of defendant corporation exercising some chartered privilege or power which could not be exercised independently of his charter; St. Louis & S. F. R. Co. v. Madden, 77 Kan. 80, 17 L.R.A.(N.S.) 788, 93 Pac. 586, holding person causing something to be done doing of which casts duty upon him cannot escape responsibility by delegating performance to contractor; Woodman v. Metropolitan R. Co. 149 Mass. 335, 4 L.R.A. 213, 14 Am. St. Rep. 427, 21 N. E. 482, holding that if performance of lawful contract necessarily will bring wrongful consequences if not guarded against and cannot be performed except under right of employer, who retained right of access to premises, law may require employer, at his peril to see that due care is used to prevent harm, whatever nature of his contract with those he employs; Rockport v. Rockport Granite Co. 177 Mass. 246, 51 L.R.A. 779, 58 N. E. 1017, holding quarry owner is not liable for injuries caused by "motion" man and his servants, also that erection of derrick is such act that if independent contractor had done it and traveler on highway been injured by negligence of contractor's servants in erecting it landowner would not be liable; Ainsworth v. Lakin, 180 Mass. 397, 57 L.R.A. 132, 91 Am. St. Rep. 314, 62 N. E. 746, holding owner causing erection of buildings must see that

proper due care is taken where proposed act will otherwise endanger others; Stevens v. United Gas & Electric Co. 73 N. H. 159, 70 L.R.A. 119, 60 Atl. 848, holding duty imposed by law upon defendant as owner and occupier of premises, for reasonable protection of invitee, not performed by attempted delegation of it to third party; Weber v. Buffalo R. Co. 20 App. Div. 292, 47 N. Y. Supp. 7, holding duty imposed upon defendant by law, could not be escaped by delegating performance of duty to contractor; Covington & C. Bridge Co. v. Steinbrock, 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N. E. 618, holding that, where party is under duty to public, or third person, to see that work he is about to do, is carefully performed so as to avoid injury to others, he cannot by letting it to contractor, avoid his liability; Wertheimer v. Saunders, 95 Wis. 573, 37 L.R.A. 146, 70 N. W. 824, holding defendants could not claim immunity from liability by reason of having delegated to independent contractors duty they themselves owed plaintiff; Earl v. Reid, 23 Ont. L. Rep. 453 (reversing 21 Ont. L. Rep. 545, 16 Ann. Cas. 1), holding that owner may be liable, although out of possession, if he created nuisance complained of; McNerney v. Forrester, 2 D. L. R. 718, holding that owner of building, which is dangerous because of damage by fire, is liable to injury to adjoining property by its fall through neglect to brace walls sufficiently; Walker v. McMillan, 6 Can. S. C. 241 (affirming 21 N. B. 31), holding that owner is liable for injury caused by fall of building where contract under which building was being erected was illegal as contrary to building ordinances; Mitchell v. Winnipeg, 17 Manitoba L. Rep. 166, on inability of owner upon whom duty is cast to protect against injuries resulting from work itself to relieve himself of liability by employing independent contractor; Longmore v. McArthur, 19 Manitoba L. Rep. 641, holding that workman injured in consequence of negligence of subcontractor by whom he was employed may sue either subcontractor or contractor or both; Dooley v. St. John, 38 N. B. 455, holding that where work is let to subcontractor employer is not liable for injury to men of subcontractor employed in doing the work, but where work is let to subcontractor doing of which may cause injury to public employer himself is liable; Toronto Street R. Co. v. Dollery, 12 Ont. App. Rep. 679, holding house owner who employed contractor to move house liable for injury caused by obstruction of highway; McKeegan v. Cape Breton Coal Co. 40 N. S. 566, holding principle that negligence of contractor prudently selected is not negligence of those whose employ him is subject to qualification arising from application; Hughes v. Percival, L. R. 8 App. Cas. 443, 52 L. J. Q. B. N. S. 719, 49 L. T. N. S. 189, 31 Week. Rep. 725, 47 J. P. 772 (affirming L. R. 9 Q. B. Div. 441), holding duty of defendant to exercise care in use of party wall could not be shifted by delegating performance thereof to third person.

Cited in notes in 14 L.R.A. 829, on exceptions to rule that an employer is not liable for acts of independent contractor; 46 L.R.A. 78, on liability of owner of premises for contractor's negligence; 65 L.R.A. 507, as to who are independent contractors; 65 L.R.A. 638, 642, 649, on general rules as to absence of liability of employer for torts of independent contractor; 65 L.R.A. 834, 836, 841, 842, 850, on liability for injuries from independent contractor's failure to take necessary precautions; 66 L.R.A. 120, on liability for acts of independent contractor where injuries result from nonperformance of absolute duties of employer; 19 E. R. C. 12, on prima facie liability for negligence of occupier of a tenement.

Distinguished in Blake v. Woolf [1898] 2 Q. B. 426, 62 J. P. 659, 67 L. J. Q. B. N. S. 813, 79 L. T. N. S. 188, 47 Week. Rep. 8, where landlord employed competent plumber to repair water supply apparatus on leased premises, work was negligently done, and overflow resulted, damaging tenant's goods.

—Excavation and withdrawals of support.

Cited in Green v. Berge, 105 Cal. 52, 45 Am. St. Rep. 25, 38 Pac. 539, holding both lot owner and contractor liable for depriving adjoining land of lateral support: Cabot v. Kingman, 166 Mass. 403, 33 L.R.A. 45, 44 N. E. 344, holding sewer commissioners liable if contractor in proper performance of contract removes soil from premises to injury of owner; Steves v. South Vancouver, 6 B. C. 17, holding municipality liable for injury due to act of contractor who undermined tree in building road; Ballentine v. Ontario Pipes Line Co. 16 Ont. L. Rep. 654, holding defendants not relieved by allowing or directing contractor to perform work for them, where duty was cast upon them to see that excavation was done in such way as not to cause escape of dangerous quantity of gas: Hardaker v. Idle District Council [1896] 1 Q. B. 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196, holding local authorities liable for injury caused by negligent manner in which contractor performed work of constructing sewer, contractor not having performed duty of authorities to properly support gas-pipes.

Assumption of legislative authority by judges.

The decision of the Queen's Bench Division was cited in McEdwards v. McLean, 43 U. C. Q. B. 454, on taking away rights by judicial decisions, as assumption of legislative authority.

10 E. R. C. 164, WIMBLEDON & P. COMMONS CONSERVATORS v. DIXON, L. R. 1 Ch. Div. 362, 45 L. J. Ch. N. S. 353, 33 L. T. N. S. 679, 24 Week. Rep. 466.

Measure of use or easement.

Cited in Grand Trunk R. Co. v. Toronto, 37 Can. S. C. 210 (dissenting opinion), as illustrative of principles to be kept in view in weighing acts of user; St. Louis Safe Deposit & Sav. Bank v. Kennett, 101 Mo. App. 370, 74 S. W. 474, holding courts vigilantly guard dominant tenement in its full possession of an easement, and servient one from an increase of the servitude.

Cited in note in 17 E. R. C. 621, on extent of liberties of grantor of land excepting mines and minerals and liberties of getting same.

Restriction of way to original purposes and conditions.

Cited in Parks v. Bishop, 120 Mass. 340, 21 Am. Rep. 519, holding that if condition and character of dominant estate are substantially altered right of way cannot be used for new purposes, required by altered condition of property and imposing greater burden upon servient estate: Milner's Safe Co. v. Great Northern & C. R. Co. [1906] W. N. 163, 213 [1907] 1 Ch. 208, 76 L. J. Ch. N. S. 99, 96 L. T. N. S. 130, 23 Times L. R. 88, 75 L. J. Ch. 807, on impropriety of exercise of right of way by dominant tenement so as to increase burden originally cast on servient tenement; Bradburn v. Morris, L. R. 3 Ch. Div. 812, holding use of occupation road for agricultural purposes for twenty years by occupier of lands not of itself sufficient to prove right to use road for purpose of getting minerals; Newcomb v. Coulson, L. R. 5 Ch. Div. 133, 46 L. J. Ch. N. S. 459, 36 L. T. N. S. 385, 25 Week. Rep. 469, on restriction of use of road to original purpose; Pym v. Harrison, 33 L. T. N. S. 796, on alteration by user of gift of way for limited purposes.

Distinguished in Baldwin v. Boston & M. R. Co. 181 Mass. 166, 63 N. E. 428, where change in use of land was in degree and not in kind and burden upon servient tenement was not increased; Cahill v. Layton, 57 Wis. 600, 46 Am. Rep.

46, 16 N. W. 1, where original right was held not that of suitable and convenient passage, but roadway definitely fixed, and actually used and maintained as fixed, for many years; Finch v. Great Western R. Co. L. R. 5 Exch. Div. 254, 41 L. T. N. S. 731, 28 Week. Rep. 229, 44 J. P. 8, holding where there is express grant of private way to particular place, to unrestricted use of which grantee of right of way is entitled, grant is not to be restricted to access to land for purposes for which access would be required at time of grant.

Effect of deviations in line of way by user.

Cited in Warren v. Van Norman, 29 Ont. Rep. 84, holding right to way not done away with by alterations in line thereof; Atty. Gen. v. Antrobus [1905] 2 Ch. 188, 69 J. P. 141, 92 L. T. N. S. 790, 21 Times L. R. 471, 3 L. J. R. 1071, 74 L. J. Ch. N. S. 599, holding but one out of a number of tracks to public monument allowable, such track being public road.

Cited in note in 10 Eng. Rul. Cas. 303, on extinguishment of easement by change in dominant tenement.

Location of undefined way.

Cited in Stephens v. Gordon, 22 Can. S. C. 61, holding that where no way is specified in instrument of grant, grantor may assign way, but that way must be reasonable one; Rogers v. Duncan, Cameron (Can.) 352, holding right of way may be acquired by express grant or by prescription or as way of necessity where no formed road existed.

Cited in note in 12 E. R. C. 549, on necessity of termini of way by prescription.

10 E. R. C. 179, EMBREY v. OWEN, 6 Exch. 353, 15 Jur. 633, 20 L. J. Exch. N. S. 212.

Limitations on use of stream or body of water by riparian proprietor.

Referred to as leading case in Kay v. Kirk, 76 Md. 41, 35 Am. St. Rep. 408, 24 Atl. 326, holding defendant could not make ditch which would give current of stream such impetus and strength that it would damage plaintiff's mill dam at time of flood.

Cited in Howard v. Ingersoll, 13 How. 381, 14 L. ed. 189, to the point that riparian owner has right to use waters of stream for domestic and agricultural purposes, provided such use works no substantial injury to others; Butte Canal & D. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Mor. Min. Rep. 552, holding that first appropriator of water of stream passing through public land has right to use of water to extent of his original appropriation; Tampa Waterworks Co. v. Cline, 37 Fla. 586, 33 L.R.A. 376, 53 Am. St. Rep. 262, 20 So. 780, holding proprietor of adjacent land has right to usufruct of stream flowing through it; Druley v. Adam, 102 Ill. 177, holding that there can be no property merely in water of running stream; and riparian owner has only a usufruct in the water while it passes; Livingston v. McDonald, 21 Iowa, 160, 89 Am. Dec. 563, on principles of law regulating rights of adjacent proprietors with respect to running natural stream, with defined and known channel; Davis v. Winslow, 51 Me. 264, 81 Am. Dec. 573, holding that each person has equal right to reasonable use of navigable rivers; or public streams, as public highways; Gladfelter v. Walker, 40 Md. 1, holding owner of land through which stream flowed, entitled to use of water in its natural state, and might maintain action for damages against one who polluted it, so as to render it unfit for use, unless latter had acquired adverse right by grant or prescription; Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102, holding it is fair participation and reasonable use by

each that law seeks to protect; People v. Hulbert, 131 Mich. 156, 64 L.R.A. 265, 100 Am. St. Rep. 588, 91 N. W. 211, holding riparian owner might bathe in lake, though it was source of city's supply of water; Crawford Co. v. Hathaway (Crawford Co. v. Hall) 67 Neb. 325, 60 L.R.A. 889, 108 Am. St. Rep. 647, 93 N. W. 781, holding riparian proprietor has right only to reasonable use of stream as it flows by his land, subject to like right belonging to all other riparian proprietors he does not own the water; Hayes v. Waldron, 44 N. H. 580, 84 Am. Dec. 105, holding that whether use of stream to carry off manufacturer's waste is reasonable or not, is question for jury, depending upon size and character of stream and purposes for which it is used; Bullard v. Saratoga Victory Mfg. Co. 77 N. Y. 525, holding that question of reasonable use of stream by riparian owner is one of fact; O'Riley v. McChesney, 3 Lans. N. Y. 278, holding use of stream for purpose of throwing flax sheaves therein unreasonable appropriation of it to detriment of proprietor below; Adams v. Durham & N. R. Co. 110 N. C. 325, 14 S. E. 857, holding that value of easement of railroad company building over stream and diverting it, is presumably estimated in contemplation of observance by corporation of rule requiring it to exercise its privilege so as to inflict no unnecessary hurt; Union Mill & Min. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370, holding use which is unreasonable as such as works actual, material and substantial damage to common right; Patten v. Marden, 14 Wis. 474, holding that upper owner may use water of stream to work mill, subject to limitation that he must not materially interfere with use of stream by lower mill owner; Brown v. Bathurst Electric & Water Power Co. 5 N. B. Eq. Rep. 543, sustaining doctrine of reasonable use and holding it is only where some right to use as flow of water different from that which common law confers as incident to property that twenty years uninterrupted user as of right is required to sustain it; Dickson v. Carnegie, 1 Ont. Rep. 110, holding plaintiff not absolutely entitled to have water of stream permitted to flow over and upon his land in natural course and flow of stream; Ellis v. Clemens, 21 Ont. Rep. 227, holding that where defendant, by discontinuing use of water, during hard frost, might have prevented damage complained of by plaintiff, but did not do so, he was liable for damage done; McDonald v. Lake Simcoe Ice & Cold Storage Co. 29 Ont. Rep. 247, holding there is no exclusive property in water, except such as riparian owner or owner of soil covered by water sewers from the general body; Crowther v. Cobourg, 1 D. R. 40, holding that owner of land on bank of stream can maintain action to restrain fouling of water by municipal drainage works, without showing actual injury, if it appears that it might cause injury to health; R. v. Meyers, 3 U. C. C. P. 305, on law as to flowing water; Mills v. Dixon, 4 U. C. C. P. 222, on general subject of water rights and issues raised by pleadings in cases involving such rights; Whelan v. McLachlan, 16 U. C. C. P. 102, holding common law right of riparian proprietor would not establish right to use non navigable stream for passing timber and logs down it; Hamilton v. Gould, 24 U. C. Q. B. 58, on rights of riparian owner in flowing stream; Bradford Corp. v. Ferrand, [1902] 2 Ch. 655, 2 B. R. C. 980, 71 L. J. Ch. N. S. 859, 51 Week. Rep. 122, 87 L. T. N. S. 388, 18 Times L. R. 830, 67 J. P. 21, holding that every riparian owner has equal right to ordinary use of water which flows in stream adjacent to his lands; Withers v. Purchase, 60 L. T. N. S. 819, on ordinary water rights of riparian owners; Bradford Corp. v. Ferrand [1902] 2 Ch. 655, 71 L. J. Ch. N. S. 859, 67 J. P. 21, 51 Week. Rep. 122, 87 L. T. N. S. 388, 18 Times L. R. 830, holding right of riparian owner to use of water in stream is incident to property in land through which it passes; Ormerod v. Todmorden Joint Stock

Mill Co. L. R. 11 Q. B. Div. 155, 52 L. J. Q. B. N. S. 445, 31 Week. Rep. 759, 47 J. P. 532, holding running water is not bonum vacans, it is only publici juris; Kensit v. Great Eastern R. Co. L. R. 23 Ch. Div. 566, 52 L. J. Ch. N. S. 608, 48 L. T. N. S. 784, 31 Week. Rep. 603, holding action will not lie by riparian proprietor if there has been no diminution in quantity or purity of water; Ewing v. Colquhoun, L. R. 2 App. Cas. 839, holding riparian owner's right to have stream flow in natural state is subject to use of water by those above, below, or opposite him, either acquired by user, or such as general law gives to riparian proprietors.

Cited in notes in 30 L.R.A. 667, on right of prior appropriation of water; 41 L.R.A. 737, 741, 757, on correlative rights of upper and lower proprietors as to use and flow of stream.

Cited in 2 Cooley Torts 3d ed. 1208, on reasonableness of use of water by riparian owner; 2 Cooley, Torts, 3d ed. 1211, on right of riparian owner to flow of water in undiminished volume; 2 Farnham Waters, 1577, on riparian owner's right to use water of stream; 2 Farnham Waters, 1583, on priority between uses of water; 2 Farnham Waters, 1738, on rights acquired in water course by priority of use; 2 Washburn Real Prop. 6th ed. 325, on rights of riparian proprietors.

Distinguished in Chasemore v. Richards, 1 E. R. C. 729, 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81, holding law as to right to water flowing in definite visible channel inapplicable to percolating waters.

— Diversion or withdrawal.

Cited in Newhall v. Ireson, 8 Cush. 595, 54 Am. Dec. 790, holding diversion of large portion of entire volume of water is unwarrantable and injurious use of common right to watercourse, running in its natural channel; Elliott v. Fitchburg R. Co. 10 Cush. 191, 57 Am. Dec. 85, holding action would not lie for diversion of water not producing perceptible damage; Higgins v. Flemington Water Co. 36 N. J. Eq. 538, holding action lies for diversion of water of stream causing perceptible damage; Paterson v. East Jersey Water Co. 74 N. J. Eq. 49, 70 Atl. 472, holding that riparian owner may maintain action for equitable relief against diversion of water without first resorting to action at law to determine question of damage; Garwoods v. New York C. & H. R. R. Co. 17 Hun, 356, holding no proprietor can divert or diminish quantity of water which would otherwise flow to proprietors below to their perceptible and material injury, without their consent; Walton v. Mills, 86 N. C. 280, holding injunction would not be granted to restrain upper proprietor from diverting water to be used in gold washing operations; Esquimalt Waterworks Co. v. Victoria, 12 B. C. 302, on acquisition of exclusive property in portion of water by abstraction thereof from stream; M'Lean v. Crosson, 33 U. C. Q. B. 448, holding one proprietor liable in damages to other for diverting stream against latter's land so that portion thereof was washed away; Esquimalt Waterworks Co. v. Victoria, C. R. [1907] A. C. 388, on necessity of severance of some definite portion of water from stream in order to effect appropriation of water under statute; McCartney v. Londonderry & L. S. R. Co. [1904] A. C. 301, 73 L. J. P. C. N. S. 73, 91 L. T. N. S. 105, 53 Week. Rep. 385, holding portion of water incapable of restoration to stream cannot be abstracted and consumed for purposes unconnected with tenement which gives access to stream; Sandwich v. Great Northern R. Co. L. R. 10 Ch. Div. 707, 27 Week. Rep. 616, holding use of water of stream by railroad company for supplying engine not unreasonable.

Cited in note in 25 E. R. C. 408, on rights of riparian proprietor to use or divert water of stream.

Distinguished in Sharp v. Wilson, 93 L. T. N. S. 155, 21 Times L. R. 679, holding plaintiffs entitled to damages and injunction for diminution and pollution of water by defendants.

— Irrigation.

Cited in Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, holding that riparian proprietors are entitled to reasonable use of waters of stream for purpose of irrigation; Meng v. Coffee, 67 Neb. 500, 60 L.R.A. 910, 108 Am. St. Rep. 697, 93 N. W. 713, holding that at common law riparian proprietor may take water from stream for purposes of irrigation; also that what use is reasonable must be largely question of fact in each case; Vansickle v. Haines, 7 Nev. 249, on right of riparian proprietor to use water of stream for irrigating; Farrell v. Richards, 30 N. J. Eq. 511, holding that right to use water of stream for irrigation is subject to limitation that such use must not essentially interfere with natural flow of stream; Robinson v. Davis, 47 App. Div. 405, 62 N. Y. Supp. 444, holding riparian owner might use water from pond to flow cranberry bog; Messinger's Appeal, 109 Pa. 285, 4 Atl. 162, 16 Pittsb. L. J. N. S. 399, 43 Phila. Leg. Int. 99, holding extent to which riparian proprietor may divert water from stream for irrigating, depends upon whether it is reasonable having regard to conditions and circumstances of other proprietors on the stream; Baker v. Brown, 55 Tex. 377, holding that if stream is sufficiently large to admit of necessary irrigation without unreasonably impairing rights of other proprietors, use would be reasonable and lawful otherwise not; Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, holding irrigation is proper mode of using water by riparian proprietor, lawful extent of use depending upon circumstances of each case; Canadian P. R. Co. v. Parke, 6 B. C. 6, on absence of right of riparian owner at common law to irrigate to detriment of another proprietor on stream; Sampson v. Hoddinott, 1 C. B. N. S. 590, holding detention of water of river for irrigation necessarily injurious to lower proprietor.

Cited in 3 Farnham Waters, 1898, on necessity of irrigation; 3 Farnham Waters, 1900, 1902, on right to consume water for irrigation purposes.

— Detention or obstruction.

Cited in Boyd v. Conklin, 54 Mich. 583, 52 Am. Rep. 831, 20 N. W. 595, holding that rural landowner has no right to put up such artificial barriers as will flood his neighbor's land with water that would otherwise escape over his own, for purpose of reclaiming bed of pond on his premises; M'Elroy v. Goble, 6 Ohio St. 187, holding that action for nuisance because of obstruction of stream for agricultural purposes, unless damage occasioned thereby be real material, and substantial; Keith v. Corey, 17 N. B. 400, holding riparian owner entitled to detain water for purpose of mill; Kirchhoffer v. Stanbury, 25 Grant, Ch. (U. C.) 413, on obstruction of water course by structures; Ward v. Caledon, 19 Ont. App. Rep. 869, holding riparian proprietors may not detain water unreasonably, or let it off in unusual quantities to annoyance of his neighbor; Ellis v. Clemens, 22 Ont. Rep. 216, affirming 21 Ont. Rep. 227), holding use unreasonable where in restoring water to channel it froze and formed mass of ice blocking channel; Howatt v. Laird, 1 Has. & W. (Pr. Edw. Isl.) 157, holding right to nominal damages given by penning back water at such times as convenience and necessities of mill required.

— Proof of damages.

Cited in Corning v. Troy Iron & Nail Factory, 40 N. Y. 191, holding plaintiff's

had right of recovery, without proof of actual damage for violation of right to have stream flow in its natural channel; Carson v. Martley, 1 B. C. pt. 2, p. 281, holding action maintainable for invasion of riparian right without actual damage; Saunders v. William Richard Co. 2 N. B. Rep. Eq. 303, holding that if diversion of stream is not from its natural channel nor from course through which plaintiff has acquired right to have waters flow, as against defendant plaintiff must show actual or impending damage to warrant interference of court.

— Measure of damages.

Distinguished in Pennington v. Brinsop Hall Coal Co. L. R. 5 Ch. Div. 769, 46 L. J. Ch. N. S. 773, 37 L. T. N. S. 149, 25 Week. Rep. 874, holding measure of damages to light and air represent depreciation in value of injured property, while in case of injury to right to running water damages represent only past injury to plaintiff's right.

Actionable wrong by dealing with waters.

Cited in Davenport v. Norfolk & S. & S. & C. R. Cos. 148 N. C. 287, 128 Am. St. Rep. 599, 62 S. E. 431, holding railroad company liable for damage caused by failure to provide culverts of sufficient number and capacity to carry water off plaintiff's land; Little v. Ince, 3 U. C. C. P. 528, on common law action for injury by erection of a dam.

Maintenance of action for violation of right without damage.

Cited in McGrath v. Gegner, 77 Md. 331, 39 Am. St. Rep. 415, 26 Atl. 502, holding law presumes some damage has been sustained by breaking of contract, and gives right to nominal damages, though there is not actual loss or injury; Kenney v. New York C. & H. R. R. Co. 15 N. Y. Civ. Proc. Rep. 347, 2 N. Y. Supp. 512, 49 Hun, 535, holding recovery of nominal damages for wrong or neglect causing death rests upon legal presumption; Smith v. Rochester, 38 Hun, 612, holding that actual damage is not indispensable as foundation of action at law, if right is invaded; Fullam v. Stearns, 30 Vt. 443, holding that every violation of a right imports some damage, and if none other be proved, law allows nominal damages; Tucker v. Paren, 7 U. C. C. P. 269, holding where injury is done to any right actual perceptible damage need not be proved in order to maintain action; Plumb v. M'Gannon, 32 U. C. Q. B. 8, holding abridgment of easement gives cause of action without proof of actual damage sustained.

Cited in 1 Cooley, Torts, 3d ed. 84, on concurrence of wrong and damage as essential to tort.

Distinguished in Brumsden v. Humphrey, L. R. 14 Q. B. Div. 141, 53 L. J. Q. B. N. S. 476, 51 L. T. N. S. 529, 32 Week. Rep. 944, 49 J. P. 4, holding that in certain class of cases mere violation of legal right imports damage, but this principle is not as a rule applicable to actions for negligence.

Rights incident to ownership of land.

Cited in Angus v. Dalton, L. R. 4 Q. B. Div. 162, 10 Eng. Rul. Cas. 98, L. R. 3 Q. B. Div. 85 (dissenting opinion), on necessity of admission of rights essential to enjoyment of land by owner.

10 E. R. C. 195, MINER v. GILMOUR, 33 L. T. N. S. 98, 12 Moore, P. C. C. 131, 7 Week. Rep. 328.

Riparian rights in general.

Cited in North Shore R. Co. v. Pion, L. R. 14 App. Cas. 612, 59 L. J. P. C. N. S. 25, 61 L. T. N. S. 525 (affirming 14 Can. S. C. 677), holding that by French law riparian owner has same right of access to navigable as to non-navigable

river: North Shore R. Co. v. Pion, 15 Quebec L. R. 228, holding that riparian owner has right of access to river, disturbance of which may be vindicated in damages, or restrained by injunction: Re Provincial Fisheries, 26 Can. S. C. 444, holding that riparian owners of non-navigable rivers have exclusive right of fishing to middle of waters: Roy v. Fraser, 36 N. B. 113, on nature and extent of public right in navigable stream: Buccleuch v. Metropolitan Bd. of Works, 3 E. R. C. 455, L. R. 3 Exch. 306, 5 Exch. 221, 5 H. L. Cas. 418, 37 L. J. Exch. N. S. 177, 39 L. J. Exch. N. S. 130, 41 L. J. Exch. N. S. 137, holding riparian owner may maintain action against any one constructing embankment and roadway so as to shut out his premises from river: Edleston v. Crossley, 18 L. T. N. S. 15, denying injunction to restrain obstruction of stream, where water is not substantially diminished: Wilts B. Canal Nav. Co. v. Swindon Waterworks Co. L. R. 9 Ch. 451, 29 L. T. N. S. 722, holding that canal company, having power to supply canal from neighboring streams, are riparian proprietors.

Cited in 2 Farnham Waters, 1580, on priority between uses of water: 2 Farnham Waters, 1611, on right to interfere with flow of stream by ponding water: 2 Farnham Waters, 1621, on right of lower owner to remove obstruction from stream.

— Private rights dependent on contiguity of land to water.

Cited with special approval in Lyon v. Fishmongers' Co. 23 E. R. C. 141, L. R. 1 App. Cas. 662, 46 L. J. Ch. N. S. 68, 35 L. T. N. S. 569, 25 Week. Rep. 165, holding it is necessary for existence of riparian right that land be in contact with flow of stream; but lateral contact is as good jure naturae, as vertical: Roberts v. Gwyrfai Dist. Council, 25 E. R. C. 401 [1899] 2 Ch. 608, 68 L. J. Ch. N. S. 757, 81 L. T. N. S. 465, holding diversion of water from lake to supply township some distance off is not exercise of right of riparian proprietor.

Cited in Sage v. New York, 10 App. Div. 294, 41 N. Y. Supp. 938 (dissenting opinion), on necessity of land being in lateral or vertical contact with flow of stream, for existence of riparian right: Holman v. Green, 2 Has. & W. (Pr. Edw. Isl.) 329, holding private right to egress and regress from bank to channel of river or bay is individual only and accruing to riparian owner: Merritt v. Toronto, 6 D. L. R. 152, holding that one whose land is separated from river by marshy ground is not riparian owner.

— Similarity of civil and common law.

Cited in Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, on similarity of English and French law, prior to Code Napoleon, as to riparian rights: Tanguay v. Price, 37 Can. S. C. 657, holding that rights of riparian owners on floatable stream were same in Quebec as in England: French Hock Comrs. v. Hugo, L. R. 10 App. Cas. 336, 54 L. J. P. C. N. S. 1720, 54 L. T. N. S. 92, 34 Week. Rep. 18, on right of owner of sources of stream under Dutch-Roman law.

Right of use of water by riparian owner.

Cited in Spence v. McDonough, 77 Iowa, 460, 42 N. W. 371, holding right of riparian owner to use all of water of stream, if required by his stock, is sanctioned by law: Doremus v. Paterson, 65 N. J. Eq. 711, 55 Atl. 304 (reversing 63 N. J. Eq. 605, 52 Atl 1107), holding that generally speaking, each riparian proprietor has right to devote waters to any use which he may see fit, provided that, in doing so, he does not injuriously affect rights of any of other proprietors therein; Garwood v. New York C. & H. R. R. Co. 83 N. Y. 400, 38 Am. Rep. 452, holding privilege of using water for irrigation or for manufacturing purposes cannot be exercised if thereby lawful use of water by lower proprietor is interfered with to his injury: Jones v. Conn, 39 Or. 30, 54 L.R.A. 630, 87 Am.

St. Rep. 634, 64 Pac. 855, holding rule that riparian proprietor has right to have water of stream flow down to his land as it is wont to run undiminished in quantity, and unimpaired as to quality is subject to limitation that each proprietor is entitled to reasonable use of water for domestic, agricultural, and manufacturing purposes; Messinger's Appeal, 109 Pa. 285, 4 Atl. 162, 16 Pittsb. L. J. N. S. 399, 43 Phila. Leg. Int. 99, holding riparian proprietor may, jure naturae, divert water from stream for domestic purposes, and for irrigation of his land, but should not so divert it as to destroy or materially diminish or impair application of water by other proprietors; Lawson v. Mowry, 52 Wis. 219, 9 N. W. 280, holding that riparian owner's rights in canal do not authorize him to divert waters therefrom by means of artificial channel through his lots to injury of other riparian owners above and below; Priewe v. Wisconsin State Land & Improv. Co. 93 Wis. 534, 33 L.R.A. 645, 67 N. W. 918, holding one riparian owner has no legal right to draw water from navigable lake to injury of other riparian proprietors thereon, without legislative authority; Re Orford Twp. 18 Ont. App. Rep. 496, holding that where riparian owners exercise their rights reasonably, whether they do so individually or collectively, they are not liable for injury to lower owner; Bradford Corp. v. Ferrand [1902] 2 Ch. 655, 2 B. R. C. 980, 71 L. J. Ch. N. S. 859, 51 Week. Rep. 122, 87 L. T. N. S. 388, 18 Times L. R. 830, 67 J. P. 21, holding that every riparian owner has equal right to ordinary use of water which flows in stream adjacent to his land; Keewatin Power Co. v. Kenora, 13 Ont. L. Rep. 237, holding that riparian owners are entitled to most extensive use of waters flowing past their land, in absence of restrictions in grant; Graham v. Northern R. Co. 10 Grant, Ch. (U. C.) 259, holding diversion of water for purchases of trade must be confined to reasonable quantity and, must be such as not to inflict sensible injury upon other riparian proprietors above and below; Ellis v. Clemens, 22 Ont. Rep. 216 (affirming 21 Ont. Rep. 227), holding that riparian owner using waters of stream must restore them to natural channel before they reach lands of lower owner; M'Lean v. Crosson, 33 U. C. Q. B. 448, holding plaintiff had as incident to ownership of land, right to have water of stream pass by it in usual and natural flow; Norbury v. Kitchin, 9 Jur. N. S. 132, 7 L. T. N. S. 685, holding that whether taking of water for reservoir for house is reasonable use of stream is for jury; Kensit v. Great Eastern R. Co. L. R. 23 Ch. Div. 566, 48 L. T. N. S. 784, 52 L. J. Ch. N. S. 608, 31 Week. Rep. 603, holding that lower riparian owner cannot enjoin use of water by non-riparian owner with license of upper owner; Ormerod v. Todmorden Mill Co. L. R. 11 Q. B. Div. 155, 52 L. J. Q. B. N. S. 445, 31 Week. Rep. 759, 47 J. P. 532, holding that riparian owner cannot confer on non-riparian owner right to use water of stream; Belfast Rope Works Co. v. Boyd, Ir. L. R. 21 Eq. 560, on reasonable uses of stream as including the turning of its natural gravitation into water power by weirs.

Cited in notes in 41 L.R.A. 739, 749, on correlative rights of upper and lower proprietors as to use and flow of stream; 10 Eng. Rul. Cas. 215, 216, on riparian owner's right to use of stream; 25 Eng. Rul. Cas. 408, on rights of riparian proprietor to use or divert water of stream.

— Dam and power rights.

Cited in De Witt v. Bissell, 77 Conn. 530, 69 L.R.A. 933, 60 Atl. 113, holding owner of land on both sides and bed of natural stream not navigable may erect dam to create power to operate mills and machinery, subject to rights of landed proprietors above and below; Cox v. Howell, 108 Tenn. 130, 58 L.R.A. 487, 65 S. W. 868, granting injunction to enjoin diversion of water from mill; Beamish

v. Barrett, 16 Grant, Ch. (U. C.) 318, holding that as between lower and higher riparian proprietors, former if he owns land on both sides of stream may erect dam across stream for purpose of mill, and may pen back waters of stream to any height that fall of stream within limits of lower proprietor's own land will admit, provided he does not interfere with rights of proprietor higher up: Keith v. Corey, 17 N. B. 400, holding riparian owner might detain water for purposes of mill; De Corporation v. Paradis, Rap. Jud. Quebec, 9 B. R. 22, refusing to compel municipality to demolish its water works on stream at suit of mill owner thereon who suffered no damage; Ward v. Caledon, 19 Ont. App. Rep. 69, holding that riparian owner has right to dam stream for purpose of mill, provided he does not thereby interfere with rights of other proprietors: Farquharson v. Imperial Oil Co. 29 Ont. Rep. 206, holding that owners of land on both sides of creek have right prima facie to give privilege for erection of dam across stream: Re Birnham, 22 Ont. App. Rep. 40, holding that there can be no interference under act respecting mill privileges, with occupied mill privilege: Nuttall v. Bracewell, L. R. 2 Exch. 1, 36 L. J. Exch. N. S. 1, 4 Hurlst. & C. 714, 12 Jur. N. S. 989, 15 L. T. N. S. 313, holding that upper owner cannot divert water to the injury of lower mill owner; Baily & Co. v. Clark [1902] 1 Ch. 649, 71 L. J. Ch. N. S. 396, 86 L. T. N. S. 309, 50 Week. Rep. 511, holding that upper owner may abstract from artificial watercourse water to such extent as not to cause sensible injury to lower owner's mill; Sandwich v. Great Northern R. Co. L. R. 10 Ch. Div. 707, 27 Week. Rep. 616, holding that railroad may take water for engines, when it never shortened working of lower mill for more than a few minutes a day.

— As affected by different ownerships on opposite banks.

Cited in Moulton v. Newburyport Water Co. 137 Mass. 163, holding owners of land upon one side of brook, and upon both sides short distance up, did not have right to sell and appropriate one half of water.

— Distinction between ordinary and extraordinary uses.

Cited in Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, holding real difference between classes of user is, that water may be used for ordinary purposes without regard to effects of such use in case of deficiency below, while with reference to extraordinary uses, effects on those below must always be considered in determining its reasonableness: Wiggins v. Muscupiable Land & Water Co. 113 Cal 182, 32 L.R.A. 667, 54 Am. St. Rep. 337, 45 Pac. 160, holding that by common law distinction was recognized between right of riparian owner to ordinary use of water for supplying his natural wants for domestic uses and for cattle, and right to use it for his artificial wants.

Liability for damages from use of one's own property.

Cited in National Teleph. Co. v. Baker [1893] 2 Ch. 186, 62 L. J. Ch. N. S. 692, 3 Reports, 318, 68 L. T. N. S. 283, 57 J. P. 373, holding tramway company, using best known system of electrical traction, not liable for causing electrical disturbance in wires of telephone company.

10 E. R. C. 219, ARKWRIGHT v. GELL, 2 Horn & H. 17, 8 L. J. Exch. N. S. 201, 5 Mees. & W. 203.

Rights in artificial watercourse or to continuance of artificial conditions.

Cited in Canton Iron Co. v. Biwabik Bessemer Co. 63 Minn. 367, 65 N. W. 643, holding that upper owner who, for benefit of his own land, diverts surface water into artificial ditch, may discontinue ditch and permit such water to flow upon lower owner's land as it had formerly done, unless facts show equitable estoppel;

Kray v. Muggli, 84 Minn. 90, 54 L.R.A. 473, 87 Am. St. Rep. 332, 86 N. W. 882, holding riparian owner entitled to insist that permanent dam be maintained; Lake Drummond Canal & Water Co. v. Burnham, 147 N. C. 41, 17 L.R.A.(N.S.) 945, 125 Am. St. Rep. 527, 60 S. E. 650, holding plaintiff not required to keep canal open for defendant's benefit; L'Esperance v. Great Western R. Co. 14 U. C. Q. B. 173, on treatment of drain in same manner as natural stream or watercourse; Oliver v. Lockie, 26 Ont. Rep. 28, holding owner of servient tenement taking water by artificial stream takes it with notice stream is created for convenience of dominant owner; Greatrex v. Hayward, 22 L. J. Exch. N. S. 137, 8 Exch. 291, holding flow of water from drain for purposes of agricultural improvements for twenty years, could not give right to neighbour so as to preclude proprietor from altering level of his drains for greater improvement of his land; Wood v. Waud, 10 E. R. C. 226, 3 Exch. 748, 18 L. J. Exch. N. S. 305, 13 Jur. 742, holding right to artificial watercourses, as against party creating them, must depend upon character of watercourse, whether it be of permanent or temporary nature, and upon circumstances under which it is created; M'Evoy v. Great Northern R. Co. [1900] 2 Ir. Q. B. 325, holding rights to water flowing in artificial watercourse constructed by particular person on his own land and for his own benefit are to be ascertained by view of purpose for which original structure was built.

Cited in note in 50 L.R.A. 839, 840, on rights acquired in an artificial condition of a body of water.

Cited in 3 Farnham Waters, 2408, on possibility of acquiring rights in artificial condition of water; 2 Washburn Real Prop. 6th ed. 335, on rights in artificial watercourses.

Distinguished in L'Esperance v. Great Western R. Co. 14 U. C. Q. B. 187, where injury to plaintiff by having water-course obstructed was same whether such water-course was natural or artificial.

Explained in White v. Chapin, 12 Allen, 516, holding servitude which subjects lower land to continued discharge of water from artificial cut above may be created under circumstances which do not establish correlative right to continuance of discharge for benefit of lower estate.

— As dependent on adversary use or enjoyment.

Cited in Cardelli v. Comstock Tunnel Co. 26 Nev. 284, 66 Pac. 950, holding use of artificial flow of noncontinuous nature gave no right to its continuance when finally resumed; Ranney v. St. Louis & S. F. R. Co. 137 Mo. App. 537, 119 S. W. 484, holding that owner of land cannot acquire by prescription right to drain land through ditches constructed by adjacent owner upon latter's land, when such ditches are of temporary character; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276, holding fact that surface water which had gathered on plaintiff's land passed off over defendant's land, but not by act of plaintiff, nor under any claim of right by him, for twenty years, would not change its character and make it water course; Sparks Mfg. Co. v. Newton, 57 N. J. Eq. 367, 41 Atl. 385, holding that because owners of servient tenement derive benefit from rightful interference with natural flow of stream by owner of dominant tenement, it does not follow that former are entitled to have exercise of right continued; Crescent Min. Co. v. Silver King Min. Co. 17 Utah, 444, 70 Am. St. Rep. 810, 54 Pac. 244, holding title by prescription not gained by plaintiff in artificial stream of percolating water flowing from defendant's to plaintiff's lands; Mason v. Shrewsbury & H. R. Co. L. R. 6 Q. B. 578, 40 L. J. Q. B. N. S. 293, 25 L. T. N. S. 239, 20 Week. Rep. 14, 10 Eng. Rul. Cas. 22, holding claim to have flow of water in canal continued

cannot be supported under Prescription Act unless enjoyment has been as of right.

Cited in note in 10 E. R. C. 224, 225, on acquisition by riparian owner of easement in artificial stream as against its originator.

Cited in 3 Farnham Waters, 2436, on prescriptive rights in water course.

— Continunity of use.

Cited in Burrows v. Lang [1901] 2 Ch. 502, 70 L. J. Ch. N. S. 607, 84 L. T. N. S. 623, 49 Week. Rep. 564, 17 Times L. R. 514, holding that "temporary" does not mean merely that thing happens to last in fact for only a few years, but means that thing may, within reasonable contemplation of parties come to an end some day, and is not meant to be equivalent to grant in fee; also that rights to artificial water course on one's own land are determinable by view of original purpose of structure.

Cited in note in 10 Eng. Rul. Cas. 33, on respective duties of owners of dominant and servient tenements as to continuing and repairing easement.

Rights of riparian proprietors on stream.

Cited in Adamson v. M'Nab, 6 U. C. Q. B. 113 (dissenting opinion), on general law as to right of parties through whose closes stream of water flows.

Acquisition of right by user.

Cited in Napier v. Bulwinkle, 5 Rich. L. 311, holding every proprietor is permitted to use his own at his pleasure, provided no one else is thereby injured; and an incidental advantage which another derives from his land, if it does him no legal wrong, gives him no cause of action; Angus v. Dalton, L. R. 3 Q. B. Div. 85, 47 L. J. Q. B. N. S. 163, 38 L. T. N. S. 510, 10 Eng. Rul. Cas. 98, L. R. 4 Q. B. Div. 162, holding that presumption arising from user may be negatived by surrounding circumstances.

Distinguished in Curtiss v. Ayrault, 47 N. Y. 73, where both tenements, by acts of former owner of both as a whole, had become each dominant and each servient to the other, as their respective needs required.

Easement by prescription where original use licensed.

Cited in note in 44 L.R.A.(N.S.) 92, on easement by prescription where original use was licensed.

10 E. R. C. 226, WOOD v. WAUD, 3 Exch. 748, 13 Jur. 472, 18 L. J. Exch. N. S. 305.

Rights in light air and water.

Cited in Lehigh Coal & Nav. Co. v. Pocono Spring Water Ice Co. 7 North. Co. Rep. 350, holding that river water course begins where water comes to surface and continues to flow in regular channel until it mingles with the sea; Hamilton v. Gould, 24 U. C. Q. B. 58, on right of owner to enjoy light and air diffused over, and water flowing through portion of soil belonging to him; Ormerod v. Todmorden Joint Stock Mill Co. L. R. 11 Q. B. Div. 155, 52 L. J. Q. B. N. S. 445, 31 Week Rep. 759, 47 J. P. 532, as to whether running water can be said to be public juris.

Cited in 2 Cooley Torts 3d ed. 747, on liability for injury to rights in easements; 3 Farnham Waters, 2572, on surface water as part of soil on which it stands.

Water rights in general.

Cited in Druley v. Adam, 102 Ill. 177, holding that all riparian owners have same rights in regard to use of water of stream, and aside from right of consump-

tion for supplying natural wants, flow of water cannot be lessened; Livingston v. McDonald, 21 Iowa, 160, 89 Am. Dec. 563, on principles of law regulating rights of adjacent proprietors in running, natural stream with well defined channel; Paterson v. East Jersey Water Co. 74 N. J. Eq. 49, 70 Atl. 472, holding that riparian rights are not subject to rule relating to easements by force of which unity of ownership of dominant and servient lands extinguishes easement; R. v. Meyers, 3 U. C. C. P. 305, on law as to natural streams and flowing water; Graham v. Burr, 4 Grant, Ch. (U. C.) 1, holding that injunction lies to prevent lower owner from damming back water of stream to injury of upper mill owner; Kirchhoffer v. Stanbury, 25 Grant, Ch. (U. C.) 413, holding that under conveyance of land extending to river, grantee who constructs wall extending into bed of stream has onus of showing that such erection is not injurious; Keith v. Corey, 17 N. B. 400, holding that mill owner has right to detain water sufficient to run mill although such detention may injure lower owner; Harrison v. Harrison, 16 N. S. 338, holding that as to water not flowing in defined channels, the flowing does not warrant presumption of grant.

Cited in notes in 41 L.R.A. 758, on correlative rights of upper and lower proprietors as to use and flow of stream; 51 L.R.A. 931, on use of natural stream to convey appropriated water; 10 E. R. C. 215, on riparian owner's right to use of stream.

Cited in 2 Cooley Torts 3d ed. 1211, on right of riparian owner to flow of water in undiminished volume; 3 Farnham Waters, 2130, on relinquishment of water by appropriator; 3 Farnham Waters, 2401, on reciprocal easements in water; 2 Washburn Real Prop. 6th ed. 324, on rights of riparian proprietors.

— Existing and prior uses.

Cited in Watson v. Perine, 13 U. C. C. P. 229, holding plaintiff who built his mill before erection of defendant's dam below, and connected it with his land, of which he was riparian proprietor, might claim natural flow of stream in right of mill, close, tail race, and premises.

— Reasonableness of use.

Cited in Slack v. Marsh, 11 Phila. 543, 32 Phila. Leg. Int. 355, holding that riparian owner has right to use water for ordinary, reasonable, domestic purposes even though that use consumes all water during dry season; Gamble v. Howland, 3 Grant, Ch. (U. C.) 281, on doctrine of reasonable use; Ellis v. Clemens, 21 Ont. Rep. 227, holding general rule is that any user which inflicts positive, repeated and sensible injury on proprietor above or below is not reasonable.

— Actionable damage.

Cited in Chaffin v. Fries Mfg. & Power Co. 135 N. C. 95, 47 S. E. 226, holding that instruction that to entitle plaintiff to nominal damages he must show damages capable of being estimated, perceptible, as an appreciable quantity, is erroneous; Elliott v. Fitchburg R. Co. 10 Cush. 191, 57 Am. Dec. 85, holding it actionable if use one makes of his right in stream is not reasonable use, as if it causes substantial and actual damage to proprietor below, by diminishing value of his land, though at the time he has no mill or other works to sustain present damage; Crowther v. Cobourg, 1 D. L. R. 40, holding that riparian owner may sue to restrain fouling of water by municipal drainage works without showing actual injury; St. John v. Barker, 3 N. B. Eq. Rep. 358; Gladfelter v. Walker, 40 Md. 1,—holding no actual damage from pollution need be proved; M'Glone v. Smith, Ir. L. R. 22 C. L. 559, holding actual damage not essential to maintenance of action for raising flow of river; Kensit v. Great Eastern R. Co. L. R. 23 Ch. Div. 566, 48 L. T. N. S. 784, 52 L. J. Ch. N. S. 608, 31 Week. Rep. 603, holding action by ri-

parian proprietor will not lie if there has been no diminution in quantity or purity of water; Howatt v. Laird, 1 Has. & W. (Pr. Edw. Isl.) 157, holding action for detention of water maintainable by one who has not as yet applied water to any particular purpose to preserve his right to do so; Howatt v. Laird, 1 Has. & W. (Pr. Edw. Isl.) 7, holding that action will lie for interrupting natural flow of water without proof of actual damages.

Cited in 1 Cooley Torts 3d ed. 84, 88, on concurrence of wrong and damage as essential to tort.

— Pleading.

Cited in Mills v. Dixon, 4 U. C. C. P. 222, on pleadings in cases involving water rights.

Pollution of flowing waters or interference with flow thereof.

Cited in Brown v. Illius, 27 Can. 84, 71 Am. Dec. 49 (dissenting opinion), on arresting and fouling of subterranean waters; Tampa Waterworks Co. v. Cline, 37 Fla. 586, 33 L.R.A. 376, 53 Am. St. Rep. 262, 20 So. 780, holding doctrine of English common law is that proprietor below has right to receive waters of surface stream from proprietor above undiminished in quantity and uncorrupted in quality; Muncie Pulp Co. v. Martin, 23 Ind. App. 558, 55 N. E. 769, holding that upper proprietor has no right to pollute stream by emptying pulp from mill into it; Gladfelter v. Walker, 40 Md. 1, holding lower proprietor entitled to recover from occupant above who pollutes stream by throwing drainings or refuse matter into it from mill, unless latter has prescriptive right to foul the water; Baltimore v. Warren Mfg. Co. 59 Md. 96, holding at common law, riparian owner has right to natural stream of water flowing by or through his land, in its ordinary natural state both as to quantity and quality; Durham v. Eno Cotton Mills, 141 N. C. 615, 7 L.R.A.(N.S.) 321, 54 S. E. 453, to same effect; Parker v. American Woolen Co. 195 Mass. 591, 10 L.R.A.(N.S.) 584, 81 N. E. 468, holding that no riparian proprietor has right to use waters of natural stream for such purposes or in such manner as will materially corrupt it to substantial injury of lower proprietor; Merrifield v. Lombard, 13 Allen, 16, 90 Am. Dec. 172, granting injunction restraining upper occupant from polluting stream by throwing vitrol and other noxious substances therein; People v. Hulbert, 131 Mich. 156, 64 L.R.A. 265, 100 Am. St. Rep. 588, 91 N. W. 211, holding riparian owner upon lake may bathe therein, though it is source of city's water supply; Hunter v. Richards, 5 D. L. R. 116, 26 Ont. L. Rep. 474, holding that in absence of any easement person may not pollute water of natural watercourse to prejudice of other persons entitled to use of water; St. John v. Barker, 3 N. B. Eq. Rep. 358, holding riparian owner has right to have waters of river flow in their natural state, undeteriorated in quality, unless pollution thereof is justified by grant, prescription, or otherwise; Keith v. Corey, 17 N. B. 400, holding riparian owner entitled to detain water for purposes of mill; M'Lean v. Crosson, 33 U. C. Q. B. 448, holding riparian owner has right to natural flow of stream; Sharp v. Wilson, 93 L. T. 155, 21 Times L. R. 679, holding plaintiffs entitled to damages and injunction for diminution and pollution of water by defendants.

Cited in 2 Cooley Torts 3d ed. 1215, on liability for fouling water of stream; 2 Farnham Waters, 1716, 1717, on contribution by others to pollution of stream as a defense; Thornton Oil & Gas 675, on injunction against nuisance from operation of gas works.

Distinguished in Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453, 18 W. N. C. 181, 43 Phila. Leg. Int. 467, where defendants

did not introduce anything into water to corrupt it, its impurities being from natural causes.

Use of stream for irrigation.

Referred to as leading case in Embrey v. Owen, 10 E. R. C. 179, 6 Exch. 353, 20 L. J. Exch. N. S. 212, 15 Jur. 633, holding use of water of stream for irrigation purposes not prohibited where quantity is not sensibly diminished.

Cited in Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, holding riparian proprietors entitled to reasonable use of waters of stream for purposes of irrigation; Baker v. Brown, 55 Tex. 377, holding that if stream be sufficiently large to admit of necessary irrigation without unreasonably impairing rights of other proprietors, use of water for that purpose would be reasonable and lawful, otherwise it would not; Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, holding irrigation is proper mode of using water by riparian proprietor, lawful extent of use depending upon circumstances of each case.

Rights in artificial watercourses.

Referred to as leading case in Chamber Colliery Co. v. Hopwood, L. R. 32 Ch. Div. 549, 55 L. J. Ch. N. S. 859, 55 L. T. N. S. 449, 51 J. P. 164, holding it is pure inference of fact to be drawn from all circumstances of case whether there has been enjoyment of right as to artificial water course for twenty years as of right.

Cited in Murchie v. Gates, 78 Me. 300, 4 Atl. 698, holding lower proprietor entitled to have water of river continue to flow in artificial channel long maintained by works above; Canton Iron Co. v. Biwabik Bessemer Co. 63 Minn. 367, 65 N. W. 643, holding owner of dominant estate had right to discontinue diversion, and restore water to its original channel and flow whenever diversion became onerous, or ceased to be beneficial to him; Schulz v. Sweeny, 19 Nev. 359, 11 Pac. 253, holding effect of turning waters into channel from flume was to make them part of stream and subject to same rights as water naturally flowing therein; Sparks Mfg. Co. v. Newton, 57 N. J. Eq. 367, 41 Atl. 385, holding where right to control flow of waters in stream has been acquired by owner of dominant tenement it does not follow that because owners of servient tenement, enjoyed incidental benefit from its exercise they are entitled to have it continued; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276, holding fact surface water had passed from plaintiff's over defendant's land for more than twenty years did not change its character and make it water course; Taggart v. Jaffrey, 75 N. H. 473, 28 L.R.A.(N.S.) 1050, 139 Am. St. Rep. 729, 76 Atl. 123, holding that rights of owner of land on permanent artificial channel, which has existed for more than sixty years, are same as though such channel was natural watercourse; Crescent Min. Co. v. Silver King Min. Co. 17 Utah, 444, 70 Am. St. Rep. 810, 54 Pac. 244; Ranney v. St. Louis & S. F. R. Co. 137 Mo. App. 537, 119 S. W. 484,—holding that owner of land cannot acquire by prescription right to drain land through ditches constructed by adjacent owner upon latter's land, when such ditches are of temporary character; Weatherby v. Meiklejohn, 56 Wis. 73, 13 N. W. 697, on making of artificial water course under such circumstances as to confer all such rights as riparian owner would have had in case of natural stream; Fox River Flour & Paper Co. v. Kelley, 70 Wis. 287, 35 N. W. 744, holding right to water of river flowing in natural channel through man's land, and right to water flowing through artificial water course constructed on his neighbor's land do not stand on same footing; Cloyes v. Middlebury Electric Co. 80 Vt. 109, 11 L.R.A.(N.S.) 693, 66 Atl. 1039, holding rights and liabilities of riparian owners in respect of artificial water courses are not necessarily the same

as in case of natural streams, though they may be; L'Esperance v. Great Western R. Co. 14 U. C. Q. B. 187, as to when right to flow of water through natural channel or artificial one may be governed by different principles; Oliver v. Lockie, 26 Ont. Rep. 28, holding owner of servient tenement taking water by artificial stream takes it with notice stream is created for convenience of dominant tenement and may be diverted when purpose has been served; M'Evoy v. Great Northern R. Co. [1900] 2 Ir. Q. B. 325, holding rights to water flowing in artificial water-course constructed by particular person on his own land and for his own benefit are to be ascertained by view of purpose for which original structure was built; Burrows v. Long [1901] 2 Ch. 502, 70 L. J. Ch. N. S. 607, 84 L. T. N. S. 623, 49 Week. Rep. 564, 17 Times L. R. 514, to same effect; Hanna v. Pollock [1900] 2 Ir. Q. B. 664, sustaining distinction between artificial and natural water-courses as respects acquisition of right by user and presumption of grant; Greatrex v. Hayward, 22 L. J. Exch. N. S. 137, 8 Exch. 291, holding flow of water from drain for purposes of agricultural improvements, for twenty years, could not give right to neighbor so as to preclude proprietor from altering level of his drains for greater improvement of his land; Broadbent v. Ramsbotham, 25 L. J. Exch. N. S. 115, 11 Exch. 602, 4 Week. Rep. 290, on dependency of right to artificial watercourses, as against party creating them, upon character of water-course, whether it be of permanent or temporary nature, and upon circumstances under which it was created; Bunting v. Hicks, 7 Reports 293, 70 L. T. N. S. 455, holding owner of land in which water flows through an artificial channel cannot appropriate all such water; Rameshur Pershad Narain Singh v. Koonj Behari Pattuk, L. R. 4 App. Cas. 121, holding right to water of river flowing in natural channel through a man's land, and right to water flowing through it through artificial water course constructed on his neighbor's land do not rest on same principle; also that proposition that right to use of water flowing through artificial channel cannot be presumed from time, manner and circumstances of its enjoyment is too broad and untenable; Baily v. Clark [1902] 1 Ch. 649, 71 L. J. Ch. N. S. 396, 86 L. T. N. S. 309, 50 Week. Rep. 511, 18 Times L. R. 364, holding it must be taken into account in dealing with such rights whether water course is of temporary or permanent character, circumstances under which it was created, and mode in which it has actually been used and enjoyed as matter of fact.

Cited in notes in 50 L.R.A. 839, 840, on rights acquired in an artificial condition of a body of water; 10 Eng. Rul. Cas. 224, on acquisition by riparian owner of easement in artificial stream as against its originator.

Cited in 3 Farnham Waters, 2408, on possibility of acquiring rights in artificial condition of water; 2 Washburn Real Prop. 6th ed. 335, on rights in artificial water courses.

Explained in White v. Chapin, 12 Allen, 516, holding servitude which subjects lower land to continued discharge of water from artificial cut above may be created under circumstances which do not establish correlative right to continuance of discharge for benefit of lower estate.

Diversion or corruption of percolating waters.

Cited in Frazier v. Brown, 12 Ohio St. 294, holding considerations of public policy which apply in case of diversion of percolating waters do not necessarily apply in cases where land owner by positive acts, poisons or corrupts waters which percolate from his lands to those of his neighbor.

Disposition of surface water.

Cited in Livingston v. McDonald, 21 Iowa, 160, 89 Am. Dec. 563, on collection

and discharge of surface water; Dawson v. Murray, 29 U. C. Q. B. 464, holding plaintiff did not have right to have surface drainage continued from defendants land over plaintiff's, though plaintiff had been in habit of using such surface water to profitable or beneficial purposes.

Cited in note in 21 L.R.A. 594, on rights as to flow of surface water.

Acquisition of water rights by user.

Cited in Warin v. London & C. Loan & Agency Co. 7 Ont. Rep. 706, holding mere enjoyment is not enough to give title by prescription, it must be enjoyment by person claiming as of right; Mason v. Shrewsbury & H. R. Co. 10 E. R. C. 22, L. R. 6 Q. B. 578, 40 L. J. Q. B. N. S. 293, 25 L. T. N. S. 239, 20 Week. Rep. 14, holding that active enjoyment in fact for more than statutable period is not enjoyment as of right, if during the period it is known that it is only permitted so long as some particular purpose was served.

Cited in note in 30 L.R.A. 667, on right of prior appropriation of water.

Cited in 2 Farnham Waters, 1738, on rights acquired in water course by priority of use; 3 Farnham Waters, 2435, 2436, on prescriptive rights in water course.

Termination of easement by unity of seisin.

Cited in Howatt v. Laird, 1 Has. & War. (Pr. Edw. Isl.) 21, holding that unity of possession does not extinguish right to natural flow of stream.

Cited in notes in 1 B. R. C. 481, on effect upon easement of unity of seisin; 10 E. R. C. 292, on termination of easement by unity of seisin.

10 E. R. C. 245, GATEWARD'S CASE, 6 Coke, 59b, Cro. Jac. 152.

Profit a prendre by custom.

Cited in Goodman v. Saltash, L. R. 7 App. Cas. 633, 52 L. J. Q. B. N. S. 193, 48 L. T. N. S. 239, 31 Week. Rep. 293, 47 J. P. 276, reversing L. R. 5 C. P. 431 (dissenting opinion); Reg. v. Rollett, L. R. 10 Q. B. 469, 44 L. J. Mag. Cas. N. S. 190, 24 Week. Rep. 26 (dissenting opinion),—as to not being acquired by custom; Hill v. Lord, 48 Me. 83; Littlefield v. Maxwell, 31 Me. 134, 50 Am. Dec. 653; McFarlin v. Essex County, 10 Cush. 304; Waters v. Lilley, 4 Pick. 145, 16 Am. Dec. 333; Perley v. Langley, 7 N. H. 233; Beach v. Morgan, 67 N. H. 529, 68 Am. St. Rep. 692, 41 Atl. 349; Ackerman v. Shelp, 8 N. J. L. 125; Cobb v. Davenport, 32 N. J. L. 369; Albright v. Cortright, 64 N. J. L. 330, 48 L.R.A. 616, 81 Am. St. Rep. 504, 45 Atl. 634; Smith v. Floyd, 18 Barb. 522; Pearsall v. Post, 20 Wend. 111; Post v. Pearsall, 22 Wend. 425; Carr v. Carpenter, 22 R. I. 528, 53 L.R.A. 333, 48 Atl. 805; Delaplane v. Crenshaw, 15 Gratt. 457; Re Christchurch Inclosure Act, L. R. 35 Ch. Div. 355; Tilbury v. Silva, L. R. 45 Ch. Div. 98, 62 L. T. N. S. 254; Rivers v. Adams, L. R. 3 Exch. Div. 361, 48 L. J. Exch. N. S. 47, 39 L. T. N. S. 39, 27 Week. Rep. 381; Constable v. Nicholson, 8 E. R. C. 337, 32 L. J. C. P. N. S. 240, 14 C. B. N. S. 230, 11 Week. Rep. 698; Austin v. Amhurst, L. R. 7 Ch. Div. 689, 47 L. J. Ch. N. S. 467, 38 L. T. N. S. 217, 26 Week. Rep. 312,—holding there can be none by custom in land of another; Watson v. Chicago, M. & St. P. R. Co. 46 Minn. 321, 48 N. W. 1129, holding that at common law dedication of land cannot be made to railroad company for public use for railroad purposes; Payne v. Sheets, 75 Vt. 335, 55 Atl. 656, holding that one who owns exclusive right to hunt, trap and fish upon lands of another, is "owner" of land within meaning of V. S. 4626, and may maintain action therein provided.

Cited in notes in 14 L.R.A. 387, on prescriptive rights of fishery; 8 Eng. Rul. Cas. 345, 348, on right to claim profit in land of another by custom or otherwise; 10 E. R. C. 249, on validity of claim by custom to enjoy a profit a prendre

in soil of another; 12 E. R. C. 191, on public right of fishing in navigable and tidal waters.

Cited in Gray Perpet. 2d ed. 443, 444, on exemption of customary rights from rule against perpetuties; 2 Elliott Railr. 2d ed. 454, on dedication of land to use of railroad.

Easement by custom.

Cited in Brocklebank v. Thompson [1903] 2 Ch. 344, 72 L. J. Ch. N. S. 626, 89 L. T. N. S. 209, 19 Times L. R. 285, holding there may be a lawful and valid custom for the inhabitants of a parish to have a churchway through the demesne of a manor which is within the parish.

Cited in 2 Washburn Real Prop. 6th ed. 275, on distinction between easements and commons.

Distinguished in Sewer Comrs. v. Glasse, L. R. 7 Ch. 456, holding right of common may be acquired by custom.

Pleading public right to easement.

Cited in Coolidge v. Learned, 8 Pick. 503, holding it sufficient to aver that the locus in quo is a public landing place without showing how it became so.

"Prescription" and "custom."

Cited in R. v. Ecclesfield, 12 E. R. C. 671, 1 Barn. & Ald. 348, 19 Revised Rep. 335, as to the distinction.

"Inhabitants."

Cited in M'Namara v. Christie, 9 U. C. Q. B. 682, as to what term includes.

Prescription as presupposing a grant.

Cited in Tinicum Fishing Co. v. Carter, 61 Pa. 21, 100 Am. Dec. 59, 27 Phila. Leg. Int. 172, 2 Legal Gaz. 156, holding prescription cannot have a legal origin where no grant could have been made to support it.

10 E. R. C. 252, Tyrringham's Case, 4 Coke, 36b.

Common appendant.

Cited in Baring v. Abingdon [1892] 2 Ch. 374, 62 L. J. Ch. N. S. 105, 67 L. T. N. S. 6, 41 Week. Rep. 22, as to definition of.

Cited in note in 10 E. R. C. 260, 261, on mode of gaining common appendant.

Cited in 1 Underhill Land. & T. 446, on land not passing as appurtenant to other land by use of word appurtenance.

Apportionable commons.

Cited in Van Rensselaer v. Radcliff, 10 Wend. 639, 25 Am. Dec. 582, holding common of pasture whether appendant or appurtenant is apportionable; Wild's Case, 10 E. R. C. 262, 8 Coke, 78b, Brownlow, pt. 1, p. 180, holding if commoner purchases parcel of land in which he has common appendant the common shall be apportioned; Garr v. Wallace, 7 Watts, 394, as to it being apportioned when appurtenant.

Cited in note in 10 E. R. C. 271, 273, on apportionability of common appurtenant on alienation of fee of part of the land to which the right appertains.

Merger of common appurtenant.

Cited in Bell v. Ohio & P. R. Co. 25 Pa. 161, 64 Am. Dec. 687, holding if one who has a right to common appurtenant, purchase part of the land subject to the easement, all his right of common is extinguished; Livingston v. Ten Broeck, 16 Johns. 14, 8 Am. Dec. 287, holding that where owner of land to which common is appurtenant purchases part of land out of which common is to be taken, right of common becomes extinct as to whole.

Unity of possession as extinguishing easement.

Cited in Magill v. Brown, Brightly (Pa.) 346, note, Fed. Cas. No. 8,952, as to effect of grant from king; MacCrimmon v. Smith, 12 B. C. 377, holding that cancellation of reservation of timber in land grant operated either as extinguishment of reserve or grant in gross to owner of land.

Distinguished in Hazard v. Robinson, 3 Mason, 272, Fed. Cas. No. 6,281, holding unity of possession does not extinguish the right to use a water course appurtenant to a mill.

Right of way from necessity or by implication.

Cited in Goodall v. Godfrey, 53 Vt. 219, 38 Am. Rep. 671, holding where real estate of a deceased person is divided among the heirs by Probate Court, a right of way of necessity or implication, may exist on one part to another part of said real estate.

10 E. R. C. 262, WYAT WILD'S CASE, 8 Coke, 78b.

Merger of common appurtenant.

Cited in Van Rensselaer v. Radcliff, 10 Wend. 639, 25 Am. Dec. 582, holding common of pasture, whether appendant or appurtenant is apportionable; Garr v. Wallace, 7 Watts, 394, as to it being apportionable.

Apportionment of common.

Cited in Livingston v. Ten Broeck, 16 Johns. 14, 8 Am. Dec. 287, holding appurtenant may be apportioned; Bell v. Ohio & P. R. Co. 25 Pa. 161, 64 Am. Dec. 687, holding if one who has a right to common appurtenant and purchase part of the land subject to the easement, all his right of common is extinguished; Hall v. Lawrence, 2 R. I. 218, 57 Am. Dec. 715, holding that upon severance of dominant estate by conveyance of different portions thereof to several persons, right of commons appurtenant, was apportionable among several grantees.

Cited in note in 10 Eng. Rul. Case 272, 273, on apportionability to common appurtenant on alienation of fee of part of the land to which the right appertains.

10 E. R. C. 265, COWLAN v. SLACK, 15 EAST, 108, 13 Revised Rep. 401.

Common appurtenant.

Cited in Nichols v. Romaine, 9 How. Pr. 512, as to it being right affecting land.

— Creation by grant.

Cited in Baring v. Abingdon [1892] 2 Ch. 374, as to it being created by modern grant.

— Merger or apportionment.

Cited in Garr v. Wallace, 7 Watts, 394, as to when apportioned.

10 E. R. C. 273, MELLOR v. SPATEMAN, 2 KEBLE, 527, 550, 570, 1 Wms' Saund. 339, 343.

Common appurtenant and in gross.

Cited in Marzetti v. Williams, 3 E. R. C. 746, 1 Barn. & Ad. 415, 9 L. J. K. B. N. S. 42; Robertson v. Hartopp, L. R. 43 Ch. Div. 484, 59 L. J. Ch. N. S. 553, 62 L. T. N. S. 585,—as to right of commoner to sustain action against lord of manor for having pastured cattle on common.

— Corporate right.

Cited in Johnson v. Barnes, L. R. 7 C. P. 592, 41 L. J. C. P. N. S. 250, 27 L. T. N. S. 152, as to prescriptive common in gross from grant by corporate body.

Right of easement or profit a prendre in inhabitant of corporation.

Cited in Cobb v. Davenport, 33 N. J. L. 223, 97 Am. Dec. 718, holding inhabitant must prescribe in corporation; Perley v. Langley, 7 N. H. 233, 4 Mor. Min. Rep. 235, holding that inhabitants of town cannot claim right to take sand to mix with lime, for purpose of making mortar, from land of another, as a custom; Watson v. Chicago, M. & St. P. R. Co. 46 Minn. 321, 48 N. W. 1129, holding that common law dedication of land cannot be made to railroad company for public use for railroad purposes; Constable v. Nicholson, 8 E. R. C. 337, 32 L. J. C. P. N. S. 240, 14 C. B. N. S. 230, 11 Week. Rep. 698, holding that right to profit in alieno solo cannot be claimed by inhabitants of township unless under presumption of grant which would incorporate them.

Cited in note in 8 Eng. Rul. Cas. 348, on right to claim profit in land of another by custom or otherwise.

Cited in 2 Elliott Railr. 2d ed. 454, on dedication of land to use of railroad.

Actionable injury without proof of damage.

Cited in Webb v. Portland Mfg. Co. 3 Sumn. 189, Fed. Cas. No. 17,322; Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739; Hastings v. Livermore, 7 Gray, 194; Delaware & H. Canal Co. v. Torey, 33 Pa. 143,—holding an action will lie for continuing a tortious act, affecting injuriously the property of another, although no appreciable damage result from it; Mellersh v. Eden, 13 Pa. Dist. R. 13, 29 Pa. Co. Ct. 264, holding that obstruction of alley in violation of plaintiff's rights, gives cause of action without proof of special damage; Whittaker v. Stangvick, 100 Minn. 386, 10 L.R.A.(N.S.) 921, 117 Am. St. Rep. 703, 111 N. W. 295, 10 Ann. Cas. 528; Searles v. Cronk, 38 How. Pr. 320; Embrey v. Owen, 10 E. R. C. 179, 6 Exch. 353, 20 L. J. Exch. N. S. 212, 15 Jur. 633,—as to when action will lie; Harrop v. Hirst, 1 E. R. C. 547, 38 L. J. Exch. N. S. 1, L. R. 4 Exch. 43, 19 L. T. N. S. 426, 17 Week. Rep. 164, as to whether action for interference with flow of water may be maintained by individual without actual damage to himself; Backhouse v. Bonomi, 16 E. R. C. 216, 34 L. J. Q. B. N. S. 181, 9 H. L. Cas. 503, 7 Jur. N. S. 809, 4 L. T. N. S. 754; McCartney v Londonderry & L. S. R. Co. [1904] A. C. 301, 73 L. J. P. C. N. S. 73, 91 L. T. N. S. 105, 53 Week. Rep. 385,—as to right of action against wrongdoers when his wrong-doing may ripen into a right if let continue.

Pleading easement of common.

Cited in Cowlam v. Slack, 10 E. R. C. 265, 15 East, 108, 13 Revised Rep. 401, holding it sufficient to allege that plaintiff was possessed of the land and entitled to a commoner.

Right of municipality to sue in right of predecessors.

Cited in Goodman v. Saltash, L. R. 7 App. Cas. 633, 52 L. J. C. P. N. S. 193, 48 L. T. N. S. 239, 31 Week. Rep. 93, 47 J. P. 276 (dissenting opinion); United Counties v. Bull, 8 U. C. Q. B. 375,—as to their right.

Plea of nul tiel corporation.

Cited in Hoereth v. Franklin Mill Co. 30 Ill. 151, holding where a corporation sues by a wrong name, the defendant can only take advantage of it by plea in abatement; but where there is no misnomer the defendant can only plead nul tiel corporation in bar; Star Brick Co. v. Ridsdale, 36 N. J. L. 229, as to when it may be interposed; Bank of Auburn v. Weed, 19 Johns. 300, holding that in suit by corporation, plea of nul tiel corporation, is bad on special demurrer; Methodist Episcopal Church v. Wood, 5 Ohio, 283, holding that in suit by corporation, its legal organization cannot be questioned, unless upon plea in abatement; Methodist Episcopal Church v. Wood, Wright (Ohio) 12; School Dist. v. Blaisdell, 6

N. H. 197; Water Lot Co. v. Bank of Brunswick, 53 Ga. 30; Prince v. Commercial Bank, 1 Ala. 241, 34 Am. Dec. 773,—holding that in action brought by corporation, it is not necessary, under general issue, to prove its corporate character; Guaga Iron Co. v. Dawson, 4 Blackf. 202, holding that if declaration aver, that plaintiff is corporation by virtue of certain statute, plea denying existence of statute is, in substance denial of existence of corporation; Camden & A. R. & Transp. Co. v. Remer, 4 Barb. 127, holding that on demurrer to bill filed by corporation as assignee of demand, it was sufficient to allege generally, in bill, that they were duly incorporated; Stoddard v. Onondaga Annual Conference, 12 Barb. 573, holding that reply to answer denying that defendant is corporation is sufficient where it alleges due incorporation without giving date or title of act of incorporation; Canal Fund Comrs. v. Perry, 5 Ohio 56, to the point that nonexistence of plaintiff as corporation is matter in bar of which defendant might avail himself, after pleading over; Lewis v. Bank of Kentucky, 12 Ohio, 132, 40 Am. Dec. 469, holding that foreign corporations must prove corporate character, under general issue; Society for Propagation of Gospel v. Pawlett, 4 Pet. 480, 7 L. ed. 927, holding that general issue admits authority of plaintiff to sue in corporate capacity.

Changes preserving identity of corporation.

Cited in Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336, holding an alteration by legislature of company's charter in pursuance of powers reserved by changing its name and increasing its capital stock does not discharge stockholder; Northumberland County Bank v. Eyer, 60 Pa. 436, 26 Phila. Leg. Int. 117; North Whitehall Twp. v. South Whitehall Twp. 3 Serg. & R. 117,—holding that corporation by changing its name does not lose its franchise.

Objection to juror.

Cited in Quinebaugh Bank v. Leavens, 20 Conn. 87, 50 Am. Dec. 272, on relation to stockholder of corporate party being disqualification of juror; Peck v. Essex, 20 N. J. L. 457 (dissenting opinion), on relationship to member of corporation as ground of challenge of juror, in action brought by corporation.

Easement by prescription or by custom.

Cited in Stein v. Burden, 24 Ala. 130, 60 Am. Dec. 453, holding that uniform and interrupted diversion of water from stream for period of twenty years, gives title by prescription; Tillotson v. Smith, 32 N. H. 90, 64 Am. Dec. 355, holding that if owner of mill turn into his mill pond stream which does not naturally flow into it, he is liable to owner below for at least nominal damages; Post v. Pearsall, 22 Wend. 425 (dissenting opinion), on right of way on another's soil as arising by custom; Napier v. Bulwinkle, 5 Rich. L. 311, holding that assent to easement of light from window cannot be inferred from mere unobstructed enjoyment.

Presumption of grant.

Cited in Mitchel v. United States, 9 Pet. 711, 9 L. ed. 283, holding that after long possession of Indian lands law would presume that it was founded on Indian deed, duly conferred; Magill v. Brown, Brightly (Pa.) 346 note, Fed. Cas. No. 8,952, to the point that franchise of corporation will be presumed from prescription, if it could have had legal beginning.

What constitutes trespass.

Cited in Baltimore & O. R. Co. v. Boyd, 67 Md. 32, 1 Am. St. Rep. 362, 10 Atl. 315, holding that every unauthorized entry upon land of another, is trespass, for which at least nominal damages must be allowed; New England Trout & Salmon Club v. Mather, 68 Vt. 338, 33 L.R.A. 569, 35 Atl. 323, holding that crossing un-

cultivated land to reach public waters for purpose of fishing is trespass if done against will of land owner, under Act. 1892 No. 80.

Sufficiency of pleading of tort.

Cited in Stein v. Ashby, 24 Ala. 521, holding that in action on case for damages to plaintiff's mill privileges, by diversion of water, it is not necessary to aver manner or means of diversion; Clark v. Beach, 6 Conn. 142 (dissenting opinion), on necessity of party, who makes allegation material and bearing on question, proving same; Boerum v. Taylor, 19 Conn. 122, to the point that to justify recovery in aggravation of damages, facts and circumstances must be averred with reasonable particularity; Emanuel v. Cocke, 6 Dana, 212, holding that where plea apparently covers whole trespass, but does not, in fact, cover some part of it, plaintiff must new-assign to explain; Squier v. Gould, 14 Wend. 159, holding that where damages claimed do not necessarily arise from act complained of, plaintiff must state in declaration particular damage which he has sustained.

Actions by and against corporations.

Cited in O'Brien v. Credit Valley R. Co. 25 U. C. C. P. 275, holding that contract directly connected in its nature with purpose of corporation need not be under seal.

10 E. R. C. 279, JAMES v. PLANT, 4 Ad. & El. 749, 6 L. J. Exch. N. S. 260, 6 Nev. & M. 282, reversing the decision of the Court of King's Bench, reported in 2 Nev. & M. 517, 5 Barn. & Ad. 791.

Effect of unity of possession upon easement.

Cited in Backus v. Smith, 44 U. C. Q. B. 428, as to suspension of easement by unity; Duncan v. Rogers, 15 Ont. Rep. 699, as to the distinction between the user of a way which has been made by the owner of adjoining closes, and a right of way, which previously to such unity of possession existed from one close to the other, and which has become merged by the fact of the same person having become the owner of both properties: Carter v. Grasett, 14 Ont. App. Rep. 685; Kay v. Oxley, L. R. 10 Q. B. 360, 44 L. J. Q. B. N. S. 210, 33 L. T. N. S. 164; Pinnington v. Galland, 10 E. R. C. 35, 9 Exch. 1, 22 L. J. Exch. N. S. 349,—as to way of necessity not being extinguished by unity of possession.

Cited in note in 1 B. R. C. 480, on effect upon easement of unity of seisin.

Cited in Barkshire v. Grubb, L. R. 18 Ch. Div. 616, 50 L. J. Ch. N. S. 731, 45 L. T. N. S. 383, 29 Week. Rep. 929, holding a grant by the owner of two tenements of one of them, "together with all the ways now used or enjoyed therewith" will pass to the grantee a right of way over a clearly defined path constructed over the other tenement, and at a date of the grant actually used for the purposes of the tenement which is granted even though the path did not exist prior to the unity of possession.

Distinguished in Langley v. Hammond, L. R. 3 Exch. 161, 37 L. J. Exch. N. S. 118, 18 L. T. N. S. 858, 16 Week. Rep. 937, holding that by a grant of hereditaments, with all "ways therewith now used, occupied, and enjoyed," those ways only pass which have at some former period been used as of right therewith; Thomson v. Waterlow, L. R. 6 Eq. 36, 37 L. J. Ch. N. S. 495, 18 L. T. N. S. 545, 16 Week. Rep. 686, holding where the owner of several closes of land adjoining one another, has created for his own convenience a way over one of the closes to another, this right of way will not pass by a conveyance of the close to which the way leads, under the words "all ways heretofore used and enjoyed."

— Subsequent grant with appurtenances or ways enjoyed therewith.

The decision of the Court of King's Bench was cited in Walker Ice Co. v.

American Steel & Wire Co. 185 Mass. 463, 70 N. E. 937; Green v. Collins, 86 N. Y. 246, 40 Am. Rep. 531; Smeltzer v. Barkhouse, 20 N. S. 409; Rogers v. Peck, 2 N. B. 488,—as to easement which has become extinct not passing under.

Easements passing under words "therewith used and enjoyed."

Cited in Edinburgh Life Assur. Co. v. Barnhart, 17 U. C. C. P. 63; Adams v. Loughman, 39 U. C. Q. B. 247,—as to easement existing in point of fact though not in point of law passing thereby; Brown v. Alabaster, L. R. 37 Ch. Div. 490, 57 L. J. Ch. N. S. 255, 58 L. T. N. S. 265, 36 Week. Rep. 155, as to right to use road not a way of necessity not passing thereunder.

Cited in 1 Underhill, Land. & T. 417, on conveyance of right of way held by principal estate by lease of house with all rights "belonging or appertaining or therewith usually held, used, occupied or enjoyed and their appurtenances."

The decision of the Court of King's Bench was cited in Fetters v. Humphreys, 19 N. J. Eq. 471, as to what easements pass thereunder.

Easements passing under term "appurtenances."

Cited in Leonard v. Leonard, 7 Allen, 277, holding right of way passes under such term; Tuttle v. Kilroa, 177 Mass. 146, 58 N. E. 682; Tabor v. Bradley, 18 N. Y. 109, 72 Am. Dec. 498; Doe ex dem. Donahue v. McGarrigle, 14 N. B. 254; Harris v. Smith, 40 U. C. Q. B. 33,—as to what easements pass thereunder.

Cited in notes in 26 L.R.A.(N.S.) 331, 348, 350, on easements created by severance of tract with apparent benefit existing; 10 Eng. Rul. Cas. 56, as to when grant of an easement will be implied.

The decision of the Court of King's Bench was cited in Snow v. Morton, 8 N. S. 237, as to whether a right of way would pass thereunder; Calhoun v. Rourke, 19 N. B. 591, as what easements do not pass thereunder; Knowles v. Nichols, 2 Curt. C. C. 571, Fed. Cas. No. 7,897 as to what passes under.

Right of way of necessity or implication between coparceners.

Cited in Goodalt v. Godfrey, 53 Vt. 219, 38 Am. Rep. 671, holding where the real estate of a deceased person is divided among the heirs by the Probate Court, a right of way of necessity or implication may exist on one part to another part of said real estate.

Deeds of partition made at same time.

Cited in Maughan v. Casci, 5 Ont. Rep. 518, as to their being considered part of same transaction.

10 E. R. C. 295, LUTTREL'S CASE, 4 Coke, 86a.

Title by prescription.

Cited in Hill v. Lord, 48 Me. 83, holding there is nothing that can be prescribed which cannot be the subject of a grant.

Cited in 2 Washburn, Real Prop. 6th ed. 304, on continuous and uninterrupted enjoyment of easement as essential to title by prescription.

Prescription and loss of easements.

Cited in Campbell v. Smith, 8 N. J. L. 140, 14 Am. Dec. 400, holding twenty years of adverse possession of a diverted water course are indispensably necessary to defeat the proprietor of the ancient channel, and to repeal his reclamation of his right; McLean v. Davis, 11 N. B. 266, holding a short cessation of an easement of water for use of mill occasioned by burning of mill will not affect the right, if there was an intention to rebuild the mill, carried into effect within a reasonable time; Eastwood v. Helliwell, 4 U. C. Q. B. O. S. 38, as to prescriptive rights in streams of water; Mellor v. Spateman, 10 E. R. C. 273, 1 Wms'

Saund. 343, 2 Keble, 570, as to corporation not losing by change of name: Aynsley v. Glover, 3 E. R. C. 19, 23 L. J. Ch. N. S. 777, 44 L. J. Ch. N. S. 523, L. R. 18 Eq. 544, L. R. 10 Ch. 283, 31 L T. N. S. 219, 23 Week. Rep. 147, 32 L. T. N. S. 345, 23 Week. Rep. 459, as to destruction of easements.

Cited in note in 68 L.R.A. 645, on right of tenant to cut wood for fires or fences.

Cited in 2 Farnham, Waters, 1662, on rights of tenants in common in water course; 2 Farnham, Waters, 1735, on rights acquired in water course by priority of use; 2 Farnham, Waters, 1758, on extent of right acquired in water course by prescription; 2 Washburn, Real Prop. 6th ed. 320, on prescriptive easement arising from presumed covenant; 2 Washburn, Real Prop. 6th ed. 327, on priority of use determining mining rights.

— Abandonment of.

Cited in Pierson v. Elgar, 4 Cranch, C. C. 454, Fed. Cas. No. 11,157, holding by abandoning old site of mill, and the old race and taking water at a new place the old easement was abandoned; City Nat. Bank v. Van Meter, 59 N. J. Eq. 32, 45 Atl. 280, as to what constitutes.

Cited in notes in 15 L.R.A. 93, on right to change easement; 10 Eng. Rul. Cas. 304, on extinguishment of easement by change in dominant tenement.

Cited in 2 Farnham, Waters, 1760, on abandonment of prescriptive right in water course; 2 Washburn, Real Prop. 6th ed. 352, on change of use evidencing abandonment of easement.

Right to alter use of water right or easement.

Cited in Strong v. Benedict, 5 Conn. 210, holding owner of easement cannot alter use so as to prejudice grantor; Stein v. Burden, 24 Ala. 130, 60 Am. Dec. 453; King v. Tiffany, 9 Conn. 162; Cowell v. Thayer, 5 Met. 253, 38 Am. Dec. 400; Izard v. Mays Landing Water-Power Co. 31 N. J. Eq. 511; Carlisle v. Cooper, 21 N. J. Eq. 576,—holding owner of easement may make alterations or improvements at his pleasure, provided no prejudice thereby arises to the owner of the servient tenement in increase of the burden upon his land; Fountain v. Perth Amboy, 60 N. J. L. 410, 38 Atl. 676, holding that under grant of lands and water privileges, easement being of so much water as will operate mill, grantee is entitled to use of water for any purpose he sees fit provided change in use does not injure others; Johnson v. Rand, 6 N. H. 22, holding person having mill privilege had right to change mode of using water, provided he took no more water than was necessary to work the mill before he made the change; Johnston v. Hyde, 33 N. J. Eq. 632, holding when an easement of a certain quantity of water the owner is not bound to use it in a particular manner though the purpose for which it is used is mentioned in the grant; Elliott v. Rhett, 5 Rich. L. 405, 57 Am. Dec. 750, holding an easement created by the former owner must be enjoyed in the same condition and to the same extent only as he established; Hill v. Cock, 26 L. T. N. S. 185, holding excessive user by proprietor of dominant estate does not give owner of servient estate right to abate nuisance in manner more injurious than necessary.

Actionable injury to ancient light.

Cited in Colls v. Home & Colonial Stores [1904] A. C. 179, 73 L. J. Ch. N. S. 484, 53 Week. Rep. 30, 90 L. T. N. S. 687, 20 Times L. R. 475, holding to constitute an actionable obstruction of ancient lights it is not enough that the light is less than before; Warren v. Brown [1900] 2 Q. B. 722, 69 L. J. Q. B. N. S. 842, 49 Week. Rep. 206, 83 L. T. N. S. 318, 16 Times, L. R. 549, holding where plaintiff's windows for twenty years had received an extraordinary amount

of light; but although during the whole of that period the premises were suitable for purposes of business requiring an extraordinary amount of light, they had in fact been used for those purposes only a portion of the period and the defendant, by the erection of a building materially diminished the amount of light passing through the windows but left sufficient for all ordinary purposes, the plaintiff had no cause of action.

Construction of grants.

Cited in Fisk v. Wilber, 7 Barb. 395; Olmsted v. Loomis, 6 Barb. 152,—holding where is doubt that construction should be adopted which will render grant absolute; Shirley v. Long, 6 Rand. (Va.) 735, appx., on what passes with grant of land.

—Mill grants.

Cited in Whitney v. Olney, 3 Mason, 280, Fed. Cas. No. 17,595, holding a devise of a mill with appurtenances conveys, not the buildings merely, but the land under and adjoining which is necessary to the use and is actually used with it; Kimberly Clark Co. v. Patten Paper Co. 153 Wis. 69, 140 N. W. 1066, holding that in grant of water power words "so much water not exceeding 1,000 inches as (grantee) may need for any machinery which he or his assignees may erect," on certain lot, are construed to mean water for use in driving machinery on designated lot only.

Change in name of corporation.

Cited in Bellows v. Hallowell & A. Bank, 2 Mason, 31, Fed. Cas. No. 1,279; Overseers of the Poor v. Overseers of the Poor, 3 Serg. & R. 117,—as to corporation not losing franchise by; Lea v. American Atlantic & P. Canal. Co. 3 Abb. Pr. N. S. 1; Shankland v. Phillips, 3 Tenn. Ch. 556; O'Connor v. Memphis, 6 Lea, 730, —holding change in name of municipal corporations does not affect their obligations.

Apportionment of commons.

Cited in Van Rensselaer v. Radcliff, 10 Wend. 639, 25 Am. Dec. 582, holding common of estovers cannot be apportioned.

Remedy for diversion or obstruction of water course.

Cited in Gardner v. Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 526, holding court of equity has jurisdiction by injunction to prevent diversion of a stream of water running through plaintiff's land, although he may have a remedy at law.

Sufficiency of allegation by way of recital.

Cited in Winter v. Winter, 8 Nev. 129, holding if a complaint states a substantial allegation by way of recital, the defect should be objected to specifically and cannot be taken advantage of on general demurrer.

What constitutes real estate.

Cited in Mills v. Peierce, 2 N. H. 9, holding description of premises as a "store" bounded etc., is sufficient in writ of entry to show real estate.

10 E. R. C. 307, KREHL v. BURRELL, L. R. 7 Ch. Div. 551, 47 L. J. Ch. N. S. 353, 38 L. T. N. S. 407, affirmed by the Court of Appeal in 40 L. T. N. S. 637, L. R. 11 Ch. Div. 146, 27 Week. Rep. 805, 48 L. J. Ch. N. S. 252, but appeal from the findings denied in L. R. 10 Ch. Div. 420, 48 L. J. Ch. N. S. 383; 39 L. T. N. S. 461, 27 Week. Rep. 234.

Jurisdiction of equity to grant injunction or damages in lieu.

Cited in Institution for Savings v. Puffer, 201 Mass. 41, 87 N. E. 562, holding that where peculiar equitable relief is refused, jurisdiction may be retained by

equity court for assessment of damages; McLaren v. Caldwell, 5 Ont. App. Rep. 363, holding that interlocutory injunction should not be granted to restrain use of improvements for floating logs, where it was not shown that irremediable damage would result or that balance of inconvenience was in plaintiff's favor; Shelfer v. London Electric Lighting Co. 13 E. R. C. 78, [1895] 1 Ch. 289, 64 L. J. Ch. N. S. 216, 72 L. T. N. S. 34, 43 Week. Rep. 238, holding act conferring upon Courts of Equity jurisdiction to award damages instead of an injunction, did not alter the settled principles upon which those courts interfered by way of injunction.

Cited in notes in 20 L.R.A. 162, on power to grant mandatory injunctions; 3 Eng. Rul. Cas. 54, 56, on right to enjoin obstruction of ancient light.

Mandatory injunction to restore easement or damages for injury.

Cited in Atty. Gen. v. Algonquin Club, 153 Mass. 447, 11 L.R.A. 500, 27 N. E. 2, as ordering removal of a building; Tucker v. Howard, 128 Mass. 361, holding a court of equity will not compel an innocent plaintiff, whose right in a passageway has been encroached upon by the building of a wall therein to his injury, to sell his right at a valuation but will compel wrong doer to restore the premises, as nearly as may to their original condition; Martin v. Price [1894] 1 Ch. 276, 63 L. J. Ch. N. S. 209, 7 Reports, 90, 70 L. T. N. S. 202, 42 Week. Rep. 262; Greenwood v. Hornsey, L. R. 33 Ch. Div. 471, 55 L. J. Ch. N. S. 917, 55 L. T. N. S. 135, 35 Week. Rep. 163,—holding where the plaintiff has, at the trial, established his statutory right to ancient lights as against a defendant who has erected a building causing a substantial interference with that right, the court will not compel him to accept damages or compensation instead of an injunction; Holland v. Worley, L. R. 26 Ch. Div. 578, holding under Lord Cairns act the court will use its discretion in allowing a money judgment or an injunction.

Adjustment of remedy to intent of wrongdoer as to permanency of injury.

Cited in Galway v. Metropolitan Elev. R. Co. 128 N. Y. 132, 13 L.R.A. 788, 28 N. E. 479, holding it immaterial, either in law or equity whether the injuries were originally intended by the wrong doer to be permanent or temporary, as regards to relief granted.

Review of court's findings.

The appeal on findings was cited in Jones v. Hough, 49 L. J. Exch. N. S. 211, L. R. 5 Exch. Div. 115, 42 L. T. N. S. 108, as to power of appellate court to deal with questions of fact which lower court tries case without jury; Trude v. Phœnix Ins. Co. 29 Grant, Ch. (U. C.) 426, to the point that findings of judge on matters of fact and his conclusions of law, must be treated as separate acts of judge.

The appeal on findings was distinguished in Dollman v. Jones, L. R. 12 Ch. Div. 553, 27 Week. Rep. 877, 41 L. T. N. S. 258, holding where on a trial in the chancery division, the judge has not found a separate verdict on a question of fact, but has decided the case as a whole according to the old practice of the Court of Chancery, a motion for a new trial on the ground of improper rejection of evidence cannot be made the remedy of the unsuccessful party being by an appeal from the order, and the Court of Appeal having power at the hearing of the appeal to admit any evidence which may have been improperly rejected.

The appeal on findings was explained in Lowe v. Lowe, L. R. 10 Ch. Div. 432, 48 L. J. Ch. N. S. 383, 40 L. T. N. S. 236, 27 Week. Rep. 309, holding if no definite issues of fact are settled at commencement of the trial, the findings of fact as well as the judgment on the whole case may be appealed from at any time within a year; Potter v. Cotton, L. R. 5 Exch. Div. 137, 49 L. J. Q. B. N. S. 158, 41 L.

T. N. S. 460, 28 Week. Rep. 160, holding trial judge's findings are reviewable only by appeal.

Discretion of court in dismissing action for want of prosecution.

The appeal on findings was cited in Burke v. Rooney, L. R. 4 C. P. Div. 226, 48 L. J. C. P. N. S. 601, 27 Week. Rep. 915, as to the exercise of.

10 E. R. C. 315, ANON. Gilb. Eq. Rep. 15.

Election under will.

Cited in Preston v. Jones, 9 Pa. 456, holding that acceptance of provisions of will estops party from disputing right of testator to dispose of property belonging to his devisee; Hamilton v. Buckwalter, 2 Yeates, 389, 1 Am. Dec. 350, holding that where devise to wife is inconsistent with her claim for dower, she shall be put to her election; Philadelphia v. Davis, 1 Whart. 490, to the point that party taking benefit under will was bound to elect; Hawley v. James, 16 Wend. 61, holding that where annuities for life were given, but because trust term was void and estate descended to heirs at law, sons who were named as beneficiaries must elect whether they would take annuities or renounce them.

10 E. R. C. 316, WHISTLER v. WEBSTER, 2 Revised Rep. 260, 2 Ves. Jr. 367.

Election under will.

Cited in Farmington Sav. Bank v. Curran, 72 Conn. 342, 44 Atl. 473; Pitney v. Brown, 39 Ill. 468; Weeks v. Patten, 18 Me. 42, 36 Am. Dec. 696; Ward v. Ward, 15 Pick. 511; Hawley v. James, 16 Wend. 61; Re Noyes, 5 Dem. 309; Van Syckel's Estate, 9 Pa. Dist. R. 367, 24 Pa. Co. Ct. 241; Preston v. Jones, 9 Pa. 456; Hibbs v. Union Cent. L. Ins. Co. 40 Ohio St. 543; White v. Brocaw, 14 Ohio St. 339,—holding no one is permited to claim under and at the same time, adverse to a will; Van Dyke's Appeal, 60 Pa. 481, 26 Phila. Leg. Int. 285, holding if testator annexes an express condition to the bequest of personalty, the duty of election will be enforced; Re Borden, 13 Pa. Dist. R. 1, 29 Pa. Co. Ct. 225, holding a committee of the estate of a lunatic cannot exercise his right to elect to take against the will of the lunatic's wife without authority of the court appointing and qualifying him; Blunt v. Gee, 5 Call. (Va.) 481, holding if the widow does not renounce her husband's will within one year after his death, she loses her distributive share of the personal estate, and is confined to the provisions of the will, but is entitled to her dower in the lands; Rice v. Steger, 3 Tenn. Ch. 328; Pringle v. Ravenel, 3 Rich. Eq. 342; Caborne v. Godfrey, 3 Desauss. Eq. 514, 5 Am. Dec. 593,—on election between will and promise inconsistent therewith; Wollaston v. King, L. R. 8 Eq. 165, 38 L. J. Ch. N. S. 392, 20 L. T. N. S 1003, 17 Week. Rep. 641; White v. White, L. R. 22 Ch. Div. 555,—as to no one having right to claim under will without conforming as far is he is able to terms of it; Re Chesham, L. R. 31 Ch. Div. 466, 55 L. J. Ch. N. S. 401, 54 L. T. N. S. 154, 34 Week. Rep. 321, holding the engrafted doctrine of compensation does not apply to the case of a person electing to take under the instrument which gives rise to the election; Re Wheatley, L. R. 27 Ch. Div. 606, 54 L. J. Ch. N. S. 201, 33 Week. Rep. 275, 51 L. T. N. S. 681, holding in case of a married woman to whom an interest with restraint on anticipation attached thereto is given by the same instrument as that which gives rise to the question of election, the doctrine of election does not apply.

Cited in notes in 10 Eng. Rul. Cas. 340, on necessity of election by heirs of foreign land claiming under will of person domiciled within state or country; 25 Eng. Rul. Cas. 576, on doctrine of election by legatee.

— Where attempted gift of beneficiary's property is made in same will.

Cited in Van Schaack v. Leonard, 164 Ill. 602, 45 N. E. 982 (affirming 63 Ill. App. 389), holding to put a beneficiary, whose property has been disposed of to others by testator's will, to his election it is immaterial whether the testator knew of the beneficiary's rights and intended to deprive him of them, or whether he supposed that he had power to make the disposition; Washburn v. Van Steenwyk, 32 Minn. 336, 20 N. W. 324, holding when a testator bequeaths to his wife something to which she had no right except by force of the will, and by the same instrument disposes of all his lands in which she is entitled to dower or to an estate of inheritance it being apparent that testator intended the bequest to be in lieu of the legal estate, and the devise being valid except for legal rights of wife in the property a case of election arises on part of widow as to whether she will take under the will or against it; Paulus v. Besch, 127 Mo. App. 255, 104 S. W. 1149, holding where a testatrix bequeathed her property to her children dividing it equally among them, leaving to one of them some bank stock in which testatrix only had a life interest, but which on her death belonged in part to her other legatees such other legatees by accepting their legacies elected to take under the will and could not claim their interest in such shares of stock; Re Edwards, 22 Ont. L. Rep. 367, holding that wife is not bound to elect where insurance on husband's wife was payable to her but was given to executors by husband's will which contained legacy in wife's favor.

Cited in note in 10 E. R. C. 323, 326, on necessity of devisee who accepts devise relinquishing all claims to estate devised to another.

Cited in Gray, Perpet. 2d ed. 421, on legatees who are objects of a power of appointment, taking other property under will, on implied condition that they allow appointment to other persons to stand.

— Between testamentary share and share of avoided gift as heir.

Cited in Nutt v. Nutt, Freem. Ch. (Miss.) 128, holding if will is ineffectual as to real estate for want of proper solemnities, the heir at law would be put to election between legacy and void devise; Mitchells v. Johnsons, 6 Leigh, 461, holding no one claiming a legacy under a will shall have any part of the fund devised to the disappointment of those to whom it is given by will.

— Defectively executed powers.

Cited in Re Brooksbank, L. R. 34 Ch. Div. 160, 56 L. J. Ch. N. S. 82, 55 L. T. N. S. 593, 35 Week. Rep. 101, holding when a person purports under a power of appointment to give property which is the subject of the power to persons who are not objects of the power and if to the person who would be defeated by that gift free disposable property belonging to the testator is given by the same instrument that raises a case of election; Re Bradshaw [1902] 1 Ch. 436, 7 L. J. Ch. N. S. 230, 86 L. T. N. S. 253, holding in applying the doctrine of election as to taking under or against an instrument, there is no distinction in principle between an appointment which is void because it is in excess of the power and an appointment which is void as transgressing the rule of perpetuity.

Distinguished in Wallinger v. Wallinger, L. R. 9 Eq. 301, 22 L. T. N. S. 259, 18 Week. Rep. 274, holding where nothing is left unappointed and nothing is claimed in default of appointment there is no question of election; Cooper v. Cooper, 39 L. J. Ch. N. S. 525, holding where donee of power of appointment validly exercised it by deed in favor of her three sons and subsequently by will invalidly appointed the same property to her eldest son, giving her younger sons other benefits under the will the younger sons were not bound to elect between their shares under the deed and the benefits given them by will.

Execution of powers.

Cited in Carver v. Bowles, 21 E. R. C. 425, 9 L. J. Ch. N. S. 91, 2 Russ. & M. 304, 34 Revised Rep. 102, holding where donee of a power executes an instrument purporting to give property to objects absolutely, and by subsequent part of the instrument purports to cut down the gift so as to introduce trusts in favor of persons not objects, the original gift is good, and subsequent restrictions void.

10 E. R. C. 327, BALFOUR v. SCOTT, 6 Bro. P. C. 550.

Conflict of laws as to distribution.

Cited in Lawrence v. Kitteridge, 21 Conn. 577, 56 Am. Dec. 385, holding the law of the state or country in which the owner of personal property had his domicil, at the time of his death, governs.

Cited in note in 2 Eng. Rul. Cas. 74, on extraterritorial effect of grant of administration.

— Jurisdiction over ancillary estate.

Cited in Harvey v. Richards, 1 Mason, 381, Fed. Cas. No. 6,184, holding a court of equity has jurisdiction to decree an account and distribution, according to the lex domicilii, of the estate of a deceased person domiciled abroad, which has been collected under an administration granted here.

10 E. R. C. 344, LAWRENCE v. LAWRENCE, 3 Bro. P. C. 483, 2 Vern. 365, Freem. Ch. 234, 1 Eq. Cas. Abr. 218, pl. 2, 2 Eq. Cas. Abr. 386, pl. 5.

Dower, election against will.

Cited in Stokes v. Pillow, 64 Ark. 1, 40 S. W. 580; Timberlake v. Parish, 5 Dana, 346; O'Brien v. Elliott, 15 Me. 125, 32 Am. Dec. 137; Chase v. Alley, 82 Me. 234, 19 Atl. 397; Stark v. Hunton, 1 N. J. Eq. 216; Adsit v. Adsit, 2 Johns. Ch. 448, 7 Am. Dec. 539; Creacraft v. Wions, Addison (Pa.) 350; Durfee's Petition, 14 R. I. 47; Blunt v. Gee, 5 Call. (Va.) 481; Kennedy v. Nedrow, 1 Dall. 415, 1 L. ed. 202; Rudd v. Harper, 16 Ont. Rep. 422,—holding it must be clear, and beyond all reasonable doubt, that there is a positive intention to exclude widow from dower before she can be put to her election; Kelly v. Stinson, 8 Blackf. 387, holding previously to Revised Statutes of 1843, if a devise to the wife, did not state that it was in lieu of dower, and her claim to dower was not inconsistent with the will, she had a right to take dower and also the provision under the will; Ostrander v. Spickard, 8 Blackf. 227, holding that prior to statutes of 1843, bequest of certain goods to wife, not said to be in lieu of dower, and acceptance of same did not bar her from claiming dower in land; Bailey v. Duncan, 4 T. B. Mon. 256, holding bequest of slave to widow and disposition by will of all the balance of the estate to others, shall not be construed as intended to be in lieu of her dower in lands; Evans v. Webb, 1 Yeates, 424, 1 Am. Dec. 308, holding that at common law widow is not barred from dower by acceptance of legacy under will which is not stated to be in lieu of dower and is not inconsistent therewith; Hamilton v. Buckwalter, 2 Yeates, 389, 1 Am. Dec. 350, holding where the implication is strong and necessary, that the wife shall not have both the devise and dower, or where the devise is inconsistent with her claim, she shall be put to her election; Bailey v. Boyce, 4 Strobh. Eq. 84 (dissenting opinion), as to when bequest will put widow to election; Pickett v. Peay, 3 Brev. 545, 2 Treadway, Const. 746, 6 Am. Dec. 594, holding it cannot be barred by provisions of a will, unless such provisions be given expressly in lieu of it and accepted by widow; Gordon v. Stevens, 2 Hill, Eq. 46, 27 Am. Dec. 445, holding where testator bequeathed to his wife all the property which he obtained by her marriage, and directed that

his estate be sold to pay his debts and provide for his children, the wife was not put to her election; Wilson v. Wilson, 7 Ont. Rep. 177, holding annuity to wife chargeable on testator's lands, which he had devised to his sons, did not put widow to her election; Westacott v. Cockerline, 13 Grant, Ch. (U. C.) 79, holding that widow was bound by election to take under will, which gave her all real and personal property during widowhood; Murphy v. Murphy, 25 Grant, Ch. (U. C.) 81, holding devise of legacy to wife did not put her to election as to whether to choose it or dower.

Distinguished in Marriott v. McKay, 22 Ont. Rep. 320, holding where testator bequeathed his personal estate to his widow absolutely, and devised his real estate to his executors, to be by them sold, and four per cent of proceeds paid to his widow, and balance invested and income paid to widow during her life, and afterwards proceeds divided as directed, the widow was put to her election; Rowland v. Cuthbertson, L. R. 8 Eq. 466, 20 L. T. N. S. 938, 17 Week. Rep. 907, holding where testator, after directing his debts to be paid by his executors, devised his real and personal estate subject as aforesaid to trustees upon certain trusts, being partly for the benefit of the widow, the widow was deprived of her dower under the dower act.

Doubted in Larrabee v. Van Alstyne, 1 Johns. 307, 3 Am. Dec. 333, as to acceptance of legacy barring dower.

Disapproved in Cunningham v. Shannon, 4 Rich. Eq. 135, holding a widow is not entitled to take dower in the same lands in which she takes an estate for life under her husband's will.

— As legal doctrine.

Cited in M'Dowall v. M'Dowall, Bail. Eq. 324, holding a provision for the widow made expressly in satisfaction of dower, if actually received by her, is a good defense to proceedings at law for recovery of dower: Cauffman v. Cauffman, 17 Serg. & R. 6, as to courts of law applying the doctrine of election; Philadelphia v. Davis, 1 Whart. 490, to the point that one is not put to election as to benefits under will where intention of testator is dubious.

10 E. R. C. 351, PUSEY v. DESBOUVRIE, 3 P. Wms. 315, 2 Eq. Cas. Abr. 270, pl. 24.

Equitable election.

Cited in Drake v. Wild, 70 Vt. 52, 39 Atl. 248, holding a legatee under a will which assumes to dispose of the legatee's own property to others, is bound to elect whether he will accept the provisions of the will or claim his own.

— Knowledge of rights in law or fact.

Cited in Harrison v. Harrison, 39 Ala. 489, as to necessity of party making same acting with full knowledge of the facts; Evan's Appeal, 51 Conn. 435; Hindley v. Hindley, 29 Hun, 318,—holding widow's election is not binding unless made with full knowledge of the nature and extent of the estate; Watson v. Watson, 128 Mass. 152; Chipman v. Montgomery, 4 Hun, 739,—holding an act in ignorance of one's rights cannot be deemed an election, whether it be ignorance of law or fact; Blunt v. Gee, 5 Call. (Va.) 481, as to courts of equity not treating certain acts as binding when party making same was ignorant of his rights.

— Grounds for avoidance.

Cited in Macknet v. Macknet, 29 N. J. Eq. 54, holding mistake by widow as to daughter's income which she reckoned on was sufficient to avoid election; Vick v. Vicksburg, 1 How. (Miss.) 379, 31 Am. Dec. 167; Rogers v. Cruger, 7 Johns. 557,— as to when it may be avoided for fraud.

Advancements.

Cited in Sanford v. Sanford, 61 Barb. 293, 5 Lans. 486, holding small, inconsiderable sums of money given to a child to spend or to defray expenses in traveling, etc., are not advancements; Dunham v. Gates, Hoffm. Ch. 185, as to what constitutes; Bradsher v. Cannady, 76 N. C. 445; Cooner v. May, 3 Strobh. Eq. 185,—holding money expended on the education of a child, whether professional or general is not an advancement; Boyd v. Boyd, L. R. 4 Eq. 305, 36 L. J. Ch. N. S. 877, 16 L. T. N. S. 660, 15 Week. Rep. 1071, holding any sum of considerable amount paid out of the common fund of a family to or for the benefit of a child, is an "advance" within the meaning of the statute of distributions.

Provisions for children.

Reporter's note cited in Edwards v. Freeman, 2 E. R. C. 252, 2 P. Wms. 435, on provisions for children resting on precarious security.

Descent of property of freeman of London.

Cited in Pickford v. Brown, 2 Kay & J. 426, 25 L. J. Ch. N. S. 702, 2 Jur. N. S. 781, 4 Week. Rep. 473, holding freeman of London had no authority over distribution of the two thirds of his property descending to his wife and children.

Voidable compromise by distributees of share in estate.

Cited in Nevins's Estate, 7 Phila. 506, 2 Legal Gaz. 257, 27 Phila. Leg. Int. 260, holding where a distributee of decedent's estate has been induced improvidently to sign an agreement, and a receipt, an unconscionable advantage having been taken of her want of information in the power of the executors to impart; a bill of review will be granted; Cassie v. Cochrane, 20 Grant, Ch. (U. C.) 545, as to when it will be set aside.

Mistake of fact as ground for relief.

Cited in Schraeder Min. & Mfg. Co. v. Packer, 129 U. S. 688, 32 L. ed. 760, 9 Sup. Ct. Rep. 385, holding boundary line made under mutual mistake of fact not conclusive; Morrison v. Morrison, 101 Me. 131, 63 Atl. 392; Swedesboro Loan & Bldg. Asso. v. Gans, 65 N. J. Eq. 132, 55 Atl. 82; Champlin v. Laytin, 18 Wend. 407, 31 Am. Dec. 382; Hyde v. Tanner, 1 Barb. 75; Riegel v. American L. Ins. Co. 140 Pa. 193, 11 L.R.A. 857, 23 Am. St. Rep. 225, 21 Atl. 392, 27 W. N. C. 393, 7 Pa. Co. Ct. 445, 46 Phila. Leg. Int. 516,—holding chancery has jurisdiction to relieve party from contract entered into under mutual mistake of facts; Bellas v. Hays, 5 Serg. & R. 427, 9 Am. Dec. 385, holding party would not be bound to purchase a patent right, who had supposed it to be valid, when in fact it was invalid.

Necessity of parties to agreement being acquainted with their rights.

Cited in Chamberlain v. Chamberlain, 3 Lans. 348; Hatfield v. Workman, 35 W. Va. 578, 14 S. E. 153,—as to the necessity of; Kirchner v. New Home Sewing Mach. Co. 59 Hun, 186, 13 N. Y. Supp. 473, holding release did not cover damage of which releasor was ignorant; Perkins v. Gay, 3 Serg. & R. 327, 7 Am. Dec. 653, holding that parties to agreement must be acquainted with extent of their rights or they will not be bound.

Ignorance of law as ground for relief.

Cited in Tompkins v. Hollister, 60 Mich. 470, 27 N. W. 651; Tabor v. Michigan Mut. L. Ins. Co. 44 Mich. 324, 6 N. W. 830,—holding where mistake of law is only one element and is combined with fraud or misconduct of the other party equity will relieve against it; Fellows v. Heermans, 4 Lans. 230 (dissenting opinion), as to it being ground for relief; Reggio v. Warren, 207 Mass. 525, 32 L.R.A. (N.S.) 340, 93 N. E. 805, 20 Ann. Cas. 1244, holding that although mistake was

one of law equity may relieve one of several trustees who was also beneficiary from agreement between them which they all thought to be valid.

Cited in note in 28 L.R.A.(N.S.) 862, on relief from mistake of law as to effect of instrument.

Cited in 1 Page, Contr. 276, on effect of mistake of law involving mistake of fact.

Distinguished in Mills v. Miller, 2 Neb. 299, holding ignorance of law will not excuse, unless accompanied by special circumstances; Trigg v. Read, 5 Humph. 529, 42 Am. Dec. 447, holding an ignorance of the law and a mistake of title founded upon such ignorance, furnishes no ground to rescind agreements when they have been made with full knowledge of the facts in the absence of fraud, misrepresentation or undue influence.

Fraud.

Cited in Emery v. Miller, Taylor, K. B. 336, to there being no distinction between in law and equity.

Plea standing for answer.

Cited in Salmon v. Clagett, 3 Bland, Ch. 125, holding it may stand for answer saving defendant benefit to except.

Pleading act as bar to bill for cancelation of it.

Cited in Greene v. Harris, 11 R. I. 5, holding an account may be pleaded as a bar to a bill to avoid it; Pearse v. Dobinson, L. R. 3 Ch. 1, on practice sanctioning pleading an act against a bill to avoid such act for fraud.

Pleading release.

Cited in Rhode Island v. Massachusetts, 14 Pet. 210, 10 L. ed. 423, as to how pleaded.

Exceptions and objections.

Cited in Snapp v. Moore, 2 Overt. 236, on practice in saving exceptions to evidence.

10 E. R. C. 355, DOUGLAS v. DOUGLAS, 41 L. J. Ch. N. S. 74, L. R. 12 Eq 617, 25 L. T. N. S. 530, 20 Week. Rep. 55.

Change of domicil.

Cited in Dupuy v. Wurtz, 53 N. Y. 556, holding question of intention to change domicil is one of fact; Re Robitaille, 78 Misc. 108, 138 N. Y. Supp. 391, holding that where one, born an English subject, removed to this state, became naturalized, and afterwards declared intention of returning to place of birth to live, then became insane, and was returned to place of birth, courts there had jurisdiction of probate of will; Harrall v. Harrall, 39 N. J. Eq. 279, 51 Am. Rep. 17, holding a person sui juris may change his domicile as often as he pleases; Hartford v. Champion, 58 Conn. 268, 20 Atl. 471; Winans v. Atty. Gen. [1904] A. C. 287, 73 L. J. K. B. N. S. 613, 90 L. T. N. S. 721, 20 Times L. R. 510, as to what determines. Platt v. Atty. Gen. L. R. 3 App. Cas. 336, 47 L. J. P. C. N. S. 26, 38 L. T. N. S. 74, 26 Week. Rep. 516, holding expression of desire to be buried in certain place not an important circumstance in determining domicil.

Cited in notes in 9 E. R. C. 706, on domicil as a permanent home; 9 E. R. C. 803, on maintenance of original domicil until establishment of new domicil.

Cited in 2 Thomas, Estates, 1323, on retention of domicil by testatrix notwithstanding relinquishment of hope of return because of ill health.

Distinguished in Doucet v. Geoghegan, L. R. 9 Ch. Div. 441, 26 Week Rep.

825, where a Frenchman who came to London and always remained and comported himself as a permanent resident was held to have changed.

— By child or incompetent.

Cited in Lamar v. Micou, 112 U. S. 452, 28 L. ed. 751, 5 Sup. Ct. Rep. 22, as to right of guardian to change domicil of ward; Mintzer's Estate, 2 Pa. Dist. R. 584, 13 Pa. Co. Ct. 465, holding where both parents are dead a bona fide change of infant's residence under the care of a kinsman, is sufficient to establish jurisdiction, especially when the new residence is taken in the domicil of the origin.

10 E. R. C. 370, RE VARDON, L. R. 31 Ch. Div. 275, 55 L. J. Ch. N. S. 259, 53 L. T. N. S. 895, 34 Week. Rep. 185, reversing the decision of Kay, J., reported in L. R. 28 Ch. Div. 124, 33 Week. Rep. 297, 54 L. J. Ch. N. S. 244.

Election.

Cited in Farmington Sav. Bank v. Curran, 72 Conn. 342, 44 Atl. 473, holding donee cannot claim and take benefit of a devise, and at the same time assert an independent title of his own which would annul other provisions of the will and defeat testator's gifts to other devisees.

Cited in notes in 3 Eng. Rul. Cas. 238, on validity of restraint against anticipation; 10 Eng. Rul. Cas. 323, 324, on necessity of devisee who accepts devise relinquishing all claims to estate devised to another.

— Between marriage settlement and other provision.

Cited in Carter's Appeal, 59 Conn. 576, 22 Atl. 320, holding wife could take dower or under ante nuptial settlement but not both; Re Tancred [1903] 1 Ch. 715, 72 L. J. Ch. N. S. 324, 51 Week. Rep. 510, 88 L. T. N. S. 164, holding restraint upon anticipation in marriage settlement prevented election: Haynes v. Foster [1901] 1 Ch. 361, 70 L. J. Ch. N. S. 302, 84 L. T. N. S. 139, 49 Week. Rep. 327, holding that testator by adding the restraint on anticipation showed intention inconsistent with doctrine of election, and that the intention was not affected by the fact that his daughter has subsequently become discovert; Hamilton v. Hamilton [1892] 1 Ch. 396, 61 L. J. Ch. N. S. 220, 66 L. T. N. S. 112, 40 Week. Rep. 312, holding where antenuptial settlement was made by infant wife and contained a covenant to settle her after-acquired property, in an action to avoid covenant after divorce her interest in other property under settlement ought to be impounded to compensate those who lost by her election.

Cited in note in 10 Eng. Rul. Cas. 377, on necessity of election between after-acquired property and interest under marriage settlement.

Distinguished in Carter v. Silber [1891] 3 Ch. 553, 60 L. J. Ch. N. S. 716, 65 L. T. N. S. 51, 39 Week. Rep. 552, holding where husband avoided a marriage settlement made when an infant the trustees were entitled to retain the moneys still payable to husband under the settlement to make compensation to persons disappointed by the repudiation.

The decision of Kay, J., was cited in Re Queade, 54 L. J. Ch. N. S. 786, 53 L. T. N. S. 74, 33 Week. Rep. 816, as to whether restraint upon anticipation in marriage settlement prevented election.

Construction of instruments showing general and particular intent.

Cited in Re Wells, L. R. 42 Ch. Div. 646, 58 L. J. Ch. N. S. 835, 61 L. T. N. S. 588, 38 Week. Rep. 229; Re Brooksbank, L. R. 34 Ch. Div. 160, 56 L. J. Ch. N. S. 82, 55 L. T. N. S. 593, 35 Week. Rep. 101,—as to particular intention prevailing over general.

10 E. R. C. 380, GRAVES v. WELD, 5 Barn. & Ad. 105, 2 L. J. K. B. N. S. 176, 2 Nev. & M. 725.

Emblements.

Cited in Lamson v. Patch, 5 Allen, 586, 81 Am. Dec. 765, as to grass not sowed by tenant not being an emblement; Davis v. Brocklebank, 9 N. H. 73, holding where a tenant holding for an uncertain time sowed the land, he is entitled to the crop.

Cited in notes in 41 L.R.A.(N.S.) 406, on right of tenant at will to crops; 12 E. R. C. 222, on what constitutes a fixture; 15 E. R. C. 655, on necessity of notice to quit to tenant denying right of person entitled as successor to landlord.

Cited in Benjamin, Sales 5th ed. 173, on right to emblements.

Nature of property in growing crops.

Cited in Caldwell v. Custard, 7 Kan. 303; Frank v. Harrington, 36 Barb. 415; Phillips v. Keysaw, 7 Okla. 674, 56 Pac. 695,—holding them personal estate.

Cited in note in 23 L.R.A. 258, on crops as personalty for purpose of levy and sale.

Cited in Benjamin, Sales, 5th ed. 183, on industrial growing crops as not being emblements within statute of frauds; Benjamin, Sales, 5th ed. 189, on meaning of industrial growing crops in statute of frauds; 1 Mechem, Sales, 311, on growing crops as chattels within statute of frauds.

Distinguished in Green v. Armstrong, 1 Denio, 550, holding an agreement for sale of growing trees, with right to enter on the land at future time and remove them is a contract for sale of interest in land and must be in writing.

10 E. R. C. 394, CROUCH v. CREDIT FONCIER, 42 L. J. Q. B. N. S. 183, L. R. 8 Q. B. 374, 29 L. T. N. S. 259, 21 Week. Rep. 946.

Negotiability of instrument.

Cited in Re Central Bank, 17 Ont. Rep. 574, on the addition of the words "payable to order or bearer" as how affecting the negotiability of an instrument.

Cited in note in 4 E. R. C. 335, on title of one taking bill or note without indorsement.

Promissory notes.

Cited in Mortgage Ins. Corp. v. Inland Revenue Comrs. L. R. 21 Q. B. Div. 352, 57 L. J. Q. B. N. S. 630, 36 Week. Rep. 833, holding an instrument containing a promise to pay money as part of a contract containing other stipulations would not be promissory note.

— Corporate seal as affecting negotiability.

Cited in Merchants' Bank v. United Empire Club, 44 U. C. Q. B. 168, on whether an instrument under seal could be a promissory note.

Cited in note in 35 L.R.A. 606, on effect of seal on negotiability.

Right to invest non-negotiable instruments with the incidents of negotiability.

Cited in McKenzie v. Montreal & O. Junction R. Co. 29 U. C. C. P. 333; Everitson v. National Bank, 66 N. Y. 14, 23 Am. Rep. 9,— on right of parties to a non-negotiable instrument to invest it with incidents pertaining to negotiable paper.

Rights of assignee of chose in action.

Cited in Scollans v. E. H. Rollins & Sons, 173 Mass. 275, 73 Am. St. Rep. 284, 53 N. E. 863, holding the transferee of a nonnegotiable municipal bond which has

been embezzled and pledged by his depositary is not estopped from asserting his ownership as against an innocent purchaser.

Cited in Hollingsworth, Contr. 302, on assignment in equity of benefits in contract.

Custom or usage as becoming part of a contract.

Cited in Fitzpatrick v. Dryden, 30 N. B. 558; Lee v. Bank of British North America, 30 U. C. C. P. 255; Dashwood v. Magniac [1891] 3 Ch. 306, 60 L. J. Ch. N. S. 809, 65 L. T. N. S. 811 (dissenting opinion); Venables v. Baring Bros. [1892] 3 Ch. 527, 61 L. J. Ch. N. S. 609, 67 L. T. N. S. 110, 40 Week. Rep. 699; Silliman v. Whitmer & Sons, 11 Pa. Super. Ct. 243,—on when usage or custom may become part of a contract.

Cited in note in 21 L.R.A. 444, on banking customs.

Distinguished in Goodwin v. Roberts, 5 E. R. C. 199, L. R. 1 App. Cas. 476, 45 L. J. Exch. N. S. 748, 35 L. T. N. S. 179, 24 Week. Rep. 987, L. R. 10 Exch. 76, 337, holding the script of a foreign government was negotiable having been so by long usage in the commercial world.

Cited, as being overruled, in Bechuanaland Exploration v. London Trading Bank [1898] 2 Q. B. 658, 3 Com. Cas. 285, 67 L. J. Q. B. N. S. 986, 79 L. T. N. S. 270, 14 Times L. R. 587, treating debentures of corporation payable to bearer as negotiable where the usage of the mercantile practice had for many years treated them as negotiable.

Action on bond.

Cited in Twycross v. Dreyfus, L. R. 5 Ch. Div. 605, 46 L. J. Ch. N. S. 510, 36 L. T. N. S. 752, holding no action could be maintained on bonds issued by a foreign government as against agent who held assets of such government.

Negotiability of corporate bonds.

Dissapproved in American Nat. Bank v. American Wood Paper Co. 19 R. I. 149, 29 L.R.A. 103, 61 Am. St. Rep. 746, 32 Atl. 305, holding coupon bonds issued by a corporation payable to a trust company or bearer were negotiable.

Right of corporation to be a party to a bill of exchange.

Cited in Wentworth County v. Hamilton, 34 U. C. Q. B. 585, on corporation for trading purposes as having right to be a party to a bill of exchange.

Right of action on claim against foreign government.

Cited in Chaffraix v. Board of Liquidation, 11 Fed. 638 (dissenting opinion), on existence of cause of action upon claim against foreign sovereign power.

10 E. R. C. 411, BRICE v. BANNISTER, 47 L. J. Q. B. N. S. 722, 38 L. T. N. S. 739, L. R. 3 Q. B. Div. 569, 26 Week. Rep. 670.

Equitable assignment by order to pay.

Cited in Galt v. Smith, 1 Ter. L. Rep. 129, holding an order on company where drawer's account was ordered paid to pay to third party together with his account certified did not constitute an equitable assignment of such account; McDonald v. McDonald, 40 N. S. 71, holding that order made for fund in hands of defendant for which consideration was given constituted equitable assignment of fund; O'Gara v. Union Bank, 22 Can. S. C. 404 (dissenting opinion), on effect of advancement by bank of wages and supplies under arrangement with contractors as equitable assignment where order for amount was given; Johnson v. Braden, 1 B. C. pt. 2, p. 265, holding that order made by contractor upon owner payable to person who furnished lumber for house, constituted equitable assignment of amount to become due; Gray v. McCallum, 5 B. C. 462, holding

that assignment of wages to become due, in trust for assignor, approved of by person liable was binding on latter; Bank of British N. A. v. Gibson, 21 Ont. Rep. 613, holding that order given by contractor to one who furnished material for building church, constituted equitable assignment of fund in hands of trustees due under contract on day stated in order; Farquhar v. Toronto, 26 Ont. Rep. 356, holding that under contract that defendant might deduct from contract price for paving street, amount due for material, defendant might deduct from contract price amount so paid although contractor had assigned rights and defendant was notified; Mitchell v. Goodall, 5 Ont. App. Rep. 164, holding that order for grain to be delivered, which order was accepted by drawee, constituted equitable assignment and bound drawee upon receipt of grain; Garner v. Hayes, 10 Ont. App. Rep. 24, holding that order given by contractor to materialman, and which is accepted by owner, is binding upon latter although contractor did not complete building according to contract; Scarlett v. Nattress, 23 Ont. App. Rep. 297, to the point that if assignor would not permit matters to be tried at law, equity could compel debtor to pay debt, but not without joining assignor as party; Buck v. Robson, L. R. 3 Q. B. Div. 686, 26 Week. Rep. 804, 48 L. J. Q. B. N. S. 250, 39 L. T. N. S. 325, holding an order by a person on another for whom he is employed on a particular piece of work to pay a specific sum due or about to become due to a third person, constitutes an assignment of a debt; Ex parte Hall, L. R. 10 Ch. Div. 615, 48 L. J. Bankr. 79, 40 L. T. N. S. 179, 27 Week. Rep. 385, holding an order by a debtor on his tenant to pay his creditor a specific sum out of the rent due debtor from tenant constituted an assignment of a debt; Percival v. Dunn, L. R. 29 Ch. Div. 128, 54 L. J. Ch. N. S. 570, 52 L. T. N. S. 320, holding an order by a creditor on his debtor to pay a sum of money to a third person was not an equitable assignment where not made out of a particular fund; Fisher v. Calvert, 27 Week. Rep. 301, holding an order by a person on the trustee under his father's will to pay to a creditor a certain sum out of his share of the estate under the will, constituted an equitable assignment; Torkington v. Magee [1902] 2 K. B. 427, 71 L. J. K. B. N. S. 712, 87 L. T. N. S. 304, 18 Times L. R. 703, as questioned on its holding as to what may constitute an equitable assignment.

Cited in notes in 4 E. R. C. 191, on instrument creating liability to payment upon contingency; 10 E. R. C. 423, on what constitutes an equitable assignment; 18 E. R. C. 526, on priority of mortgagee acquiring legal estate.

Distinguished in Thomson v. Huggins, 23 Ont. App. Rep. 191, holding that order given to lumber merchant by contractor on owner, to be paid upon completion of contract and accepted by owner, was not equitable assignment; Brandts v. Dunlop Rubber Co. [1904] 1 K. B. 387, 73 L. J. K. B. N. S. 247, 52 Week. Rep. 501, 90 L. T. N. S. 106, 20 Times L. R. 195, 9 Com. Cas. 149, holding a letter from a party to his debtor directing him to pay money due to a third person which was accepted by such debtor's agent without notifying debtor did not constitute an equitable assignment.

Questioned in Durham Bros. v. Robertson, 67 L. J. Q. B. N. S. 484 [1898] 1 Q. B. 765, 78 L. T. N. S. 438, on what may constitute an equitable assignment of a debt.

— Rights of assignee.

Cited in James v. Newton, 142 Mass. 366, 56 Am. Rep. 692, 8 N. E. 122, holding that assignment for value of part of debt due under existing contract between debtor and assignor may be enforced by will in equity by assignee and assignee in insolvency of assignor, if debtor asks to have rights determined;

Lynch v. Clougher, 1 Manitoba L. Rep. 293, holding that one indorsing order to pay money and agreeing to pay balance of order to person named, after deducting amount due to such indorser is bound by such agreement; Mitchell v. Goodall, 44 U. C. Q. B. 398 (dissenting opinion), on right of one receiving order from person to whom grain of maker of order was to be delivered; Drew v. Josolyne, L. R. 18 Q. B. Div. 590, 56 L. J. Q. B. N. S. 490, 57 L. T. N. S. 5, 35 Week. Rep. 570, holding the assignees of money under a building contract were entitled to, as against a trustee in liquidation, appointed on the bankruptcy of the contractor, who completed the work, where nothing to show that the owners exercised their power to take work out of contractor's hands.

Cited in note in 10 Eng. Rul. Cas. 409, on rights of assignee of chose in action.

Distinguished in Ex parte Nichols, L. R. 22 Ch. Div. 782, 52 L. J. Ch. N. S. 685, 48 L. T. N. S. 492, 31 Week. Rep. 661, holding an assignment by a trader of the future receipts of his business is as regards receipts accruing after the commencement of his bankruptcy inoperative as against the title of trustee in bankruptcy; Western Wagon & Property Co. v. West, 61 L. J. Ch. 244 [1892] 1 Ch. 271, 66 L. T. N. S. 402, 40 Week. Rep. 182, holding a second mortgagee to whom the mortgagor assigns his right to future advances under a first mortgage, cannot recover as against the first mortgagee who notwithstanding notice of the assignment makes further advances to the mortgagor; Crane v. Williamson, 111 Ky. 271, 63 S. W. 610, holding the acceptors of an order payable out of money due the drawers on a timber contract might deduct necessary advances made to drawer.

— Right to assign at law.

Cited in British Waggon Co. v. Lea, L. R. 5 Q. B. Div. 149, 49 L. J. Q. B. N. S. 321, 42 L. T. N. S. 437, 28 Week. Rep. 349, 44 J. P. 440, on right to assign debt accruing due under a contract, as existing at law as well as in equity.

— Validity of assignment.

Cited in National Exch. Bank v. McLoon, 73 Me. 498, 40 Am. Rep. 388, holding that assignment of part of chose in action is valid in equity; Re Miller, 1 Sask. L. R. 91, holding that under statute assignment of undefined portion of future debt is valid; Walker v. Bradford Old Bank, L. R. 12 Q. B. Div. 511, 53 L. J. Q. B. N. S. 280, 32 Week. Rep. 645, holding a valid assignment might be made of present or future balances standing to assignor's account at a bank.

— Sufficiency of pleading.

Cited in Smith v. Ancaster Twp. 45 U. C. Q. B. 86, holding declaration by assignee of chose in action bad, which does not state any fact from which existence of and promise to pay debt would be implied by law.

10 E. R. C. 426, HOLROYD v. MARSHALL, 10 H. L. Cas. 191, 9 Jur. N. S. 213, 33 L. J. Ch. N. S. 193, 7 L. T. N. S. 172, 11 Week. Rep. 171, reversing the decision of the Court of Chancery reported in 2 DeG. F. & J. 596, 30 L. J. Ch. N. S. 385, 7 Jur. N. S. 319, which reversed the decision of the Vice Chancellor reported in 2 Giff 382, 29 L. J. Ch. N. S. 655, 6 Jur. N. S. 931, 3 L. T. N. S. 14.

Equitable assignments of future interests.

Cited in Kornegay v. Miller, 137 N. C. 659, 107 Am. St. Rep. 505, 50 S. E. 315, holding an assignment of a contingent remainder for a nominal consideration rests an equitable title in the assignee; Block v. Shaw, 78 Ark. 511, 95 S. W. 806, on a sale or assignment of property to be acquired at a future time as operating as an equitable assignment; Terrell v. Port Hood Richmond R. & Coal Co. 45 N.

S. 360, holding that attachment could not operate on fund in hands of agent of defendant company after conveyance by it in trust for bondholders; Mitchell v. Goodall, 44 U. C. Q. B. 398, holding that order for grain to be delivered to person accepting order was binding upon latter upon receipt of grain.

Cited in Benjamin, Sales, 5th ed. 134, on equitable assignment of after acquired property.

Validity of assignment of future interest in property.

Cited in Edwards v. Peterson, 80 Me. 367, 6 Am. St. Rep. 207, 14 Atl. 936, holding an assignment of wages to be earned in the future in a specific employment is valid in equity; Hodder v. Kentucky & G. E. R. Co. 7 Fed. 793, on right of railroad company to convey title to future acquired property; Bailey v. Hoppin, 12 R. I. 560; Power's Appeal, 63 Pa. 443, 2 Legal Gaz. 291,—holding an heir might for a valuable consideration make an assignment of his contingent interest in the estate; Ex parte Games, L. R. 12 Ch. Div. 314, 40 L. T. N. S. 789, 27 Week. Rep. 744, holding an assignment of property, present and future in consideration of past debt and future advances is not necessarily void; Walker v. Bradford Old Bank, L. R. 12 Q. B. Div. 511, 53 L. J. Q. B. N. S. 280, 32 Week. Rep. 601, holding a valid assignment might be made of a future balance at a bank; Fraser v. Macpherson, 34 N. B. 417; Royal Canadian Bank v. Ross, 40 U. C. Q. B. 466,—holding a transfer of warehouse receipt for goods not in possession at time was valid; Nicholson v. Temple, 20 N. B. 248; Vassie v. Vassie, 22 N. B. 76; Lloyd v. European & N. A. R. Co. 18 N. B. 194,—on right to make a conveyance of interest in goods not yet in existence; Halifax Graving Dock Co. v. Magliulo, 43 N. S. 174, holding that agreement in writing of master of vessel in foreign port to pay borrowed money out of any money received by him was valid; Wilson v. Fleming, 1 Ont. L. Rep. 599; Kitching v. Hicks, 6 Ont. Rep. 739,—on right to pass by assignment a future interest in property; Re McSharry, [1911] St. R. Qd. 75, on assignment of after acquired property; Re Dallas [1904] 2 Ch. 385, 73 L. J. Ch. N. S. 365, 52 Week. Rep. 567, 90 L. T. N. S. 177; Fuller v. Parmenter, 72 Vt. 362, 47 Atl. 1079,—on the validity of an assignment by an heir of his expectancy; Baghott v. Norman, 41 L. T. N. S. 787, on existence of right to assign after acquired property; Ex parte Nichols, L. R. 22 Ch. Div. 782, 52 L. J. Ch. N. S. 635, 48 L. T. N. S. 492, 31 Week. Rep. 661, on the validity of an equitable assignment of after acquired chattels; Collyer v. Isaacs, L. R. 19 Ch. Div. 342, 51 L. J. Ch. N. S. 14, 45 L. T. N. S. 567, 30 Week. Rep. 70, on the validity of an assignment of a future interest in property; Jamaica v. Lascelles [1894] A. C. 135, 63 L. J. P. C. N. S. 70, 70 L. T. N. S. 179, 42 Week. Rep. 416, 1 Manson, 163, 6 Reports, 445, on right to make a valid assignment of a future interest in property; Greenbirt v. Smee, 35 L. T. N. S. 168, on absence of power to seize expressly given in an assignment of a future interest in property.

Cited in note in 18 L.R.A.(N.S.) 195, on assignability of insurance agent's right to commissions on renewal premiums.

Cited in Hollingsworth, Contr. 298, on assignability at common law of benefits of contract; Smith, Pers. Prop. 148, on subject of transfer as essential element of a valid sale; 2 Underhill, Land. & T. 1428, on necessity in equity of express words in lease showing intention to give lien on future acquired property.

Distinguished in Harding v. Harding, L. R. 17 Q. B. Div. 442, holding a notice by a legatee to trustees under will to pay balance due him under will to his daughter was valid assignment.

Explained in Tailby v. Official Receiver, 10 E. R. C. 445, L. R. 13 App. Cas. 523, 58 L. J. Q. B. N. S. 75, 60 L. T. N. S. 162, 37 Week. Rep. 513 (reversing

L. R. 18 Q. B. Div. 25, which reversed L. R. 17 Q. B. Div. 88), holding an assignment of future book debts passed the equitable title in book debts incurred after the assignment whether in the particular business carried on by the assignor or not.

— Of goods to be acquired by seller.

Cited in First Nat. Bank v. Twinbull, 32 Gratt. 695, 34 Am. Rep. 791, holding a valid equitable assignment might be made of goods to be thereafter purchased; Creighton v. Jenkins, 17 N. S. 352; Lloyd v. European & N. A. R. Co. 18 N. B. 194; Kane v. Lodor, 56 N. J. Eq. 268, 38 Atl. 966,—on sale of after acquired interest in property as being valid; Brayley v. Ellis, 9 Ont. App. Rep. 565 (dissenting opinion); Tennant v. Union Bank, 19 Ont. App. Rep. 1; Re Coleman, 36 U. C. Q. B. 559; Re Saint, Newfoundl. Rep. 477, (1874–84); Cumberland Nat. Bank v. Baker, 57 N. J. Eq. 231, 40 Atl. 850,—on the passing of title of after acquired property.

Cited in 1 Mechem. Sales, 185, on validity of sale of thing not yet acquired by vendor.

— Of property to be placed on certain premises.

Cited in Grass v. Austin, 7 Ont. App. Rep. 511; Watkins v. Wyatt, 9 Baxt. 250, 40 Am. Rep. 90,—holding an assignment of a crop yet to be planted was valid; Leatham v. Amor, 47 L. J. Q. B. N. S. 581, 38 L. T. N. S. 785, 26 Week. Rep. 739, holding an assignment of property to be hereafter on the premises was valid; Lazarus v. Andrade, L. R. 5 C. P. Div. 318, 49 L. J. C. P. N. S. 847, 43 L. T. N. S. 30, 29 Week. Rep. 15, 44 J. P. 697, holding an assignment might be made of stock-in-trade to be brought into the premises.

Mortgage or lien on property to be acquired in future.

Cited in Dupree v. McClanahan, 1 Tex. App. Civ. Cas. (White & W.) 314; Grand Forks Nat. Bank v. Minneapolis & N. Elev. Co. 6 Dak. 357, 43 N. W. 806,—holding a chattel mortgage on crops to be grown on land was valid and when filed was good against subsequent purchasers or creditors; Scharfenburg v. Bishop, 35 Iowa, 60, holding that mortgage of chattels may be made to cover future acquisitions as against all persons having notice; Bacot v. Varnado, 91 Miss. 825, 47 So. 113, holding that husband and wife may execute valid mortgage on property to be thereafter acquired, and such property, although purchased for homestead, will not be exempt from its lien; Morrill v. Noyes, 56 Me. 458, 96 Am. Dec. 486; Georgia Southern & F. R. Co. v. Mercantile Trust & D. Co. (McTighe v. Macon Constr. Co.) 94 Ga. 306, 32 L.R.A. 208, 47 Am. St. Rep. 153, 21 S. E. 701,—holding a corporation could bind by a mortgage or trust deed property to be acquired in the future to aid in the construction of its road; Wright v. Bircher, 72 Mo. 179, 37 Am. Rep. 433 (affirming 5 Mo. App. 322), holding a lien reserved in a lease of a hotel on the furniture to be put therein had priority over a mortgage to a third person who had notice of the terms of the lease; McCaffrey v. Woodin, 65 N. Y. 459, 22 Am. Rep. 644, holding a clause of a lease in effect a chattel mortgage of crops subsequently to be raised and personalty put on the premises was valid; Washington Trust Co. v. Morse Iron Works & Dry Dock Co. 106 App. Div. 195, 94 N. Y. Supp. 495, holding a mortgage might embrace after acquired property of which the vendor retains possession until paid for; Williams v. Briggs, 11 R. I. 476, 23 Am. Rep. 518; Parker v. Jacobs, 14 S. C. 112, 37 Am. Rep. 724; Maxwell v. Wilmington Dental Mfg. Co. 77 Fed. 938; Cooper v. Rouse, 130 N. C. 202, 41 S. E. 98,—holding a valid mortgage may be made of property to be acquired in the future; Central Trust Co. v. Chattanooga, R. & C. R. Co. 89 Fed. 388, holding a railroad mortgage in

terms covering the entire road was valid as to a part yet unbuilt; Coyne v. Lee, 14 Ont. App. Rep. 503; Brett v. Carter, 2 Low. Dec. 458, Fed. Cas. No. 1,844,—holding a mortgage of future additions to a stock of goods in a particular store is valid as soon as such goods are put in the store; Horsfall v. Boisseau, 21 Ont. App. Rep. 663, holding a chattel mortgage of a stock of goods and goods afterwards acquired binds a stock in store into which he afterwards moves; Canada Permanent Loan & Sav. Co. v. Todd, 22 Ont. App. Rep. 515, holding a chattel mortgage of crops which may be sown during the currency of the mortgage, covers crops sown after the mortgage falls due but remains unpaid; Hamlin v. Jerrard, 72 Me. 62; Borden v. Croak, 131 Ill. 68, 19 Am. St. Rep. 23, 22 N. E. 793,—on the acquirement of a lien on property to be acquired in the future; Locke v. New England Brick Co. 73 N. H. 492, 63 Atl. 178; Collins's Appeal, 107 Pa. 590, 52 Am. Rep. 479, 15 W. N. C. 5, 3 Pennyp. 333, 41 Phila. Leg. Int. 55; Cook & Co. v. Corthell, 11 R. I. 482, 23 Am. Rep. 518 (dissenting opinion); American Surety Co. v. Worcester Cycle Mfg. Co. 100 Fed. 40; Hoyt v. Sprague, 103 U. S. 613, 26 L. ed. 585; Miller v. Jones, 15 Nat. Bankr. Reg. 150, Fed. Cas. No. 9,576; Dunham v. Isett, 15 Iowa, 284; Conderman v. Smith, 41 Barb. 404; Miller v. Rutland & W. R. Co. 36 Vt. 452; Blanchard v. Cooke, 144 Mass. 207, 11 N. E. 83,—on the validity of a mortgage of after acquired property; Empire Sash & Door Co. v. Maranda, 21 Manitoba L. Rep. 605, holding that under statute chattel mortgage is good as to fresh advances made to debtor on strength although it also covers pre-existing debt; Re Thirkell, 21 Grant, Ch. U. C. 492, holding that mortgage to vendor of stock, and also any stock purchased thereafter covered stock acquired by mortgagor after execution of mortgage; Ross v. Army & Navy Hotel Co. L. R. 34 Ch. Div. 43, 55 L. T. N. S. 472, 35 Week. Rep. 40, on the validity of a mortgage of a future interest in property.

Cited in notes in 23 L.R.A. 457, on sale or mortgage of future crops; 18 L.R.A. 300, 303, on efficacy of mortgage on chattels to be manufactured or acquired as independent articles and not as increase or fruits of existing property.

Cited in 2 Beach, Contr. 1435, on power of de facto railroad companies to mortgage future property; 2 Washburn, Real Prop. 6th ed. 137, on railway mortgage embracing after acquired property.

Distinguished in Steele v. Ashenfelter, 40 Neb. 770, 42 Am. St. Rep. 694, 59 N. W. 361, holding a mortgage of chattels to be afterwards acquired is invalid as against purchasers and attaching creditors of the mortgagor; Phelps v. Murray, 2 Tenn. Ch. 746, holding a mortgage of a stock of goods and additions thereto to replace any part of stock disposed of, given to secure debts maturing at a future day is void; New Lincoln Hotel Co. v. Shears, 57 Neb. 478, 43 L.R.A. 588, 73 Am. St. Rep. 524, 78 N. W. 25, holding the lien reserved under a lease on furniture to be put in a hotel was subsequent to the lien of a chattel mortgage taken with knowledge of the stipulations contained in the lease.

Agreement with reference to after acquired property, when takes effect.

Cited in Marie v. Garrison, 13 Abb. N. C. 210, on when agreement to do acts to property not yet acquired becomes binding; Woodward's Estate, 1 Chest. Co. Rep. 417, holding that under contract of sale of expectancy, assignor holds thing sold, as soon as acquired, in trust for assignee, whose title requires no act on his part to protect it; Oliver v. Newhouse, 32 U. C. C. P. 90, on when title attaches under an agreement to sell after acquired property; Gault Bros. Co. v. Morrell, 3 N. B. Eq. Rep. 453, on right to convey a present interest in equitable title to property.

When lien attaches to after acquired property.

Cited in Williamson v. New Jersey Southern R. Co. 29 N. J. Eq. 311; Ludlum, v. Rothschild, 41 Minn. 218, 43 N. W. 137,—holding the lien of a mortgage of property to be acquired in the future attaches as soon as the mortgagor acquires possession; Brown v. Neilson, 61 Neb. 765, 54 L.R.A. 328, 87 Am. St. Rep. 525, 86 N. W. 498; Medina Gas & Electric Light Co. v. Buffalo Loan, T. & S. D. Co. 119 App. Div. 245, 104 N. Y. Supp. 625; Boston Safe-Deposit & T. Co. v. Bankers' & M. Teleg. Co. 36 Fed. 288; Re Adamant Plaster Co. 137 Fed. 251; Brockenbrough v. Brockenbrough, 31 Gratt. 580; Cole v. Kerr, 19 Neb. 553, 26 N. W. 598,—on when lien of mortgage of after-acquired property attaches; Re Canadian Shipbuilding Co. 6 D. L. R. 174, 26 Ont. L. Rep. 564, holding that title to vessel passes to navigation company, from time of first payment under agreement to construct vessel payments to be made every two months to extent of 80% of work done, and balance on completion.

Effect of agreement to convey a future interest.

Cited in Canadian P. R. Co. v. Rat Portage Lumber Co. 10 Ont. L. Rep. 273, holding an agreement that property should be that of a partnership as soon as it came into existence vested in the partnership as soon as it came into existence; St. Paul, M. & M. R. Co. v. Western U. Teleg. Co. 55 C. C. A. 263, 118 Fed. 497, on agreement to convey an interest not yet in being as creating an equitable right; Joseph v. Lyons, L. R. 15 Q. B. Div. 280, 54 L. J. Q. B. N. S. 1, 51 L. T. N. S. 740, 33 Week. Rep. 145, on the interest acquired by the assignee on an assignment of an after acquired stock in trade; Morris v. Delobbel-Flipo [1892] 2 Ch. 352, 61 L. J. Ch. N. S. 518, 66 L. T. N. S. 320, 40 Week. Rep. 492, on whether right to after-acquired property is a legal or an equitable one.

Title acquired under mortgage of future interest in property.

Cited in France v. Thomas, 86 Mo. 80, holding a mortgage of after acquired property did not pass the legal title; McAllister v. Forsyth, 17 N. S. 151, on right to legal title to goods where party has equitable title.

Cited in note in 10 Eng. Rul. Cas. 476, 478, on legal title of assignee under assignment of future chattels as security.

Nature of mortgage or assignment of after acquired interest.

Cited in Daly v. New York & G. L. R. Co. 55 N. J. Eq. 595, 38 Atl. 202, on mortgage of after acquired property as being in nature a contract to convey when acquired; Triumph Electric Co. v. Empire Furniture Co. 70 W. Va. 164, 73 S. E. 325, holding that deed of trust upon personal property to be acquired by grantor after delivery of deed, is contract to give lien, which court of equity will enforce; Roper v. Scott, 16 Manitoba L. Rep. 594; Flangan Bank v. Graham, 42 Or. 403, 71 Pac. 137,—on the construction of a mortgage of after acquired property.

Equitable lien.

Cited in Richardson v. Washington, 88 Tex. 339, 31 S. W. 614, on the creation of an equitable lien; Re Raney, 202 Fed. 996, to the point that equitable lien may be acquired upon after acquired property in state of Texas; McPherson v. McDonald, 18 N. S. 242, holding that under agreement to forward goods for sale to pay advances one making advances has equitable title to goods; Re Pyle Works, L. R. 44 Ch. Div. 534, 59 L. J. Ch. N. S. 489, 62 L. T. N. S. 887, 38 Week. Rep. 674, 2 Megone, 83, on validity of equitable charges on property.

Cited in 1 Elliott, Railr. 2d ed. 688, on railroad debentures as equitable mortgages.

Equitable aid in execution of assignment or lien.

Cited in Husted v. Ingraham, 75 N. Y. 251, holding an agreement for the execution of a mortgage on chattels might be enforced in equity where there had been a delivery of the property; Hickson Lumber Co. v. Gay Lumber Co. 150 N. C. 282, 21 L.R.A.(N.S.) 843, 63 S. E. 1045, holding that equity will give effect to clause in mortgage of lumber company covering after acquired property real and personal; Knickerbocker Trust Co. v. Carteret Steel Co. 79 N. J. Eq. 501, 82 Atl. 146, holding that provision in mortgage that it shall cover after acquired property is provision which can be given effect only in equity; Milliken v. Barrow, 65 Fed. 888, holding equity would enforce an assignment of future profits of an enterprise when realized; Laughlan v. Prescott, 1 N. B. Eq. Rep. 406, holding an agreement to sell rights which vendor had under a license and the same rights under the renewals of the license was enforceable in equity; Jones v. Brewer, 1 N. B. Eq. Rep. 630, holding specific performance will be decreed of an agreement to give a bill of sale upon ascertained furniture sold and delivered upon credit in reliance on such an agreement; Abell v. Middleton, 2 Ont. L. Rep. 209, holding an agreement to charge a specific parcel of land with the purchase money of personalty was enforceable in equity; Re Clarke, L. R. 36 Ch. Div. 348, 56 L. J. Ch. N. S. 981, 57 L. T. N. S. 823, 36 Week. Rep. 293 (affirming 35 Ch. Div. 109), holding equity would enforce an assignment of all the moneys the assignor might get under a will; Campbell v. Dexter, 17 App. D. C. 454, on when equity will lend its aid to the enforcement of an assignment of a chose of action; Campbell v. Gemmell, 6 Manitoba L. Rep. 355; Sawyer v. Long, 86 Me. 541, 30 Atl. 111,—on the enforcement in equity of a mortgage of after acquired property; National Bank of Deposit v. Rogers, 44 App. Div. 357, 61 N. Y. Supp. 155; Clark v. Hagar, 22 Can. S. C. 510; Box v. Provincial Ins. Co. 18 Grant, Ch. (U. C.) 280; Equitable Gaslight Co. v. Baltimore Coal Tar & Mfg. Co. 63 Md. 285,—on when equity will lend its aid to the enforcement of a contract; Clark v. Scottish Imperial Ins. Co. 4 Can. S. C. 706, on the enforcement in equity of an agreement to convey property; Churcher v. Johnston, 34 U. C. Q. B. 528, on when specific performance of a contract relating to after-acquired property will be made; dissenting opinion in McAllister v. Forsyth, 12 Can. S. C. 1 (affirming 17 N. S. 151), on the enforcement of an assignment in equity of after-acquired property.

— In case of defective contracts generally.

Cited in Schmulbach v. Caldwell, 115 C. C. A. 650, 200 Fed. 16, holding that equity may establish prior equitable lien although mortgage executed by company by agent was invalid for want of power; Mason v. Norris, 18 Grant, Ch. (U. C.) 500, on when equity will grant relief against a contract executed with authority; Mitchell v. Goodall, 44 U. C. Q. B. 398 (dissenting opinion), on right to specific performance of contract relating to chattels where no specific chattels are specified.

Sufficiency of description of property in mortgage.

Cited in Hughes v. Menefee, 29 Mo. App. 192, on sufficiency of description of property in mortgage; Mason v. MacDonald, 25 U. C. C. P. 435, holding that describing property in chattel mortgage as "Two sets of blacksmithing and one set of waggon-maker's tools complete," was insufficient as regarded tools.

Sufficiency of description of property in assignment of after acquired interest.

Cited in Clements v. Matthews, L. R. 11 Q. B. Div. 808, 52 L. J. Q. B. N. S. 772, holding an assignment of crops thereafter to be grown on the premises was sufficiently specific to be valid.

Distinguished in Re D'Epineuil, 20 Ch. Div. 758, 47 L. T. N. S. 157, 30 Week.

Rep. 702; Belding v. Read, 3 Hurlst. & C. 955, 34 L. J. Exch. N. S. 212, 11 Jur. N. S. 547, 13 L. T. N. S. 66, 13 Week. Rep. 867,—holding an assignment of an interest which the assignor had no property in at the time of the assignment might be void because not sufficiently specific with reference to the property to be assigned.

Recording of mortgage as constructive notice of rights of parties.

Cited in Smith-Wallace Shoe Co. v. Wilson, 63 Mo. App. 326, on a mortgage of an after acquired interest duly recorded as being constructive notice of the rights of the mortgagee.

Necessity of registration of assignment of future interest.

Cited in Banks v. Robinson, 15 Ont. Rep. 618, holding an agreement creating an equitable interest in future acquired property was not within an act requiring registration to be valid as against subsequent creditors; Traves v. Forrest, 42 Can. S. C. 514, holding that agreement creating equitable interest in ore to be mined is not instrument requiring registration under provisions of Bills of Sale Act; Thomas v. Kelly, 5 E. R. C. 117, 58 L. J. Q. B. N. S. 66, L. R. 13 App. Cas. 506, 60 L. T. N. S. 114, 37 Week. Rep. 353, on construction of phrase "capable of complete transfer by delivery."

"Bills of sale."

Cited in Manchester v. Hills, 34 N. S. 512, on instrument in form a transfer of goods in possession or thereafter to come into possession as being a "bill of sale."

Cited in note in 5 Eng. Rul. Cas. 133, 138, on requisites to validity of bill of sale.

Distinguished in Reeves v. Barlow, L. R. 12 Q. B. Div. 436, 53 L. J. Q. B. N. S. 192, 50 L. T. N. S. 782, 32 Week. Rep. 672, holding an agreement by a clause in a builder's contract that materials brought upon the land by the builder shall be the property of the landowner is not a bill of sale.

Acquirement of beneficial interest in property.

Cited in Clark v. Scottish Imperial Ins. Co. 4 Can. S. C. 192, on how a beneficial interest in property may be passed; Box v. Provincial Ins. Co. 18 Grant, Ch. (U. C.) 280 (dissenting opinion), on passing of beneficial interest in property under contract for valuable consideration, by which it is agreed to make present transfer of property.

Distinguished in dissenting opinion in McDonald v. McPherson, 12 Can. S. C. 416 (affirming 18 N. S. 242), on the creation of an equitable interest in property.

Equitable priorities.

Cited in Clifford v. Logan, 9 Manitoba L. Rep. 423, on when the acquirement of an equitable interest in property will avail as against a subsequent execution creditor.

Distinguished in Thompson v. Cohen, L. R. 7 Q. B. 527, 41 L. J. Q. B. N. S. 221, 26 L. T. N. S. 693, holding a license to seize and sell after acquired property in satisfaction of a debt is lost by the satisfaction of the debt.

10 E. R. C. 445, TAILBY v. OFFICIAL RECEIVER, L. R. 13 App. Cas. 523, 58 L. J. Q. B. N. S. 75, 60 L. T. N. S. 162, 37 Week. Rep. 513, reversing the decision of the Court of Appeal, reported in L. R. 18 Q. B. Div. 25, which reverses the decision of the Queen's Bench Division, reported in L. R. 17 Q. B. Div. 88.

Sale and conveyance of future interest in property.

Cited in Block v. Shaw, 78 Ark. 511, 95 S. W. 806, holding that contract for

sale of after acquired property is valid only as to specific articles that can be identified as thing sold; Hale v. Hollon, 90 Tex. 427, 36 L.R.A. 75, 59 Am. St. Rep. 819, 39 S. W. 287, holding a mere expectancy of inheritance as heir of one living is subject to equity to sale; Lynberg v. Tarbox, 1 Sask. L. R. 492, holding that equitable assignment may be made of mere possibility or expectancy of future property; Re McSharry, [1911] St. R. Qd. 75, on assignability of future interest in property; Molson's Bank v. Carscaden, 8 Manitoba L. Rep. 451, holding moneys arising out of future contracts was assignable; Canadian P. R. Co. v. Rat Portage Lumber Co. 10 Ont. L. Rep. 273, holding under a partnership agreement for the cutting of ties under a permit, on crown lands, the ties became the property of the partnership as soon as they came into existence.

Cited in notes in 18 L.R.A.(N.S.) 195, on assignability of insurance agent's right to commissions on renewal premiums; 5 E. R. C. 133, on assignment of after-acquired chattels; 10 E. R. C. 474, on legal title of assignee under assignment of future chattels as security.

Cited in Benjamin, Sales, 5th ed. 134, 135, on equitable assignment of after acquired property.

— Assignment in futuro.

Cited in Ward, L. & Co. v. Long [1906] 2 Ch. 550, 75 L. J. Ch. N. S. 732, 95 L. T. N. S. 345, 22 Times L. R. 798, holding a good equitable assignment might be made to rights to a story not yet written; Wilson v. Fleming, 1 Ont. L. Rep. 599; Re Ellenborough [1903] 1 Ch. 697, 72 L. J. Ch. N. S. 218, 51 Week. Rep. 315, 87 L. T. 714; Re Dallas [1904] 2 Ch. 385, 73 L. J. Ch. N. S. 365, 52 Week. Rep. 567, 90 L. T. N. S. 177; Re Pyle Works, L. R. 44 Ch. Div. 534, 59 L. J. Ch. N. S. 489, 62 L. T. N. S. 887, 38 Week. Rep. 674, 2 Megone, 83; Canada Permanent Loan & Sav. Co. v. Todd, 22 Ont. App. Rep. 515 (dissenting opinion),—on after acquired property as being the subject matter of a valid assignment.

Distinguished in Re Clarke, L. R. 35 Ch. Div. 109, L. R. 36 Ch. Div. 348, 56 L. J. Ch. N. S. 981, 57 L. T. N. S. 823, 36 Week. Rep. 293, holding the terms of an assignment of after acquired property included a share of a testator's residuary estate to which the mortgagor became entitled subsequently to the date of the mortgage.

— Of book debts and accounts.

Cited in Sovereign Bank v. International Portland Cement Co. 14 Ont. L. Rep. 511, holding an assignment of a balance of an account as security was valid; Norton v. Canadian Bank, 1 Sask. L. R. 448, holding that assignments of book debts, not existing at time of assignment are valid; Bank of British N. A. v. Wood, 19 Manitoba L. Rep. 633, holding that creditors of assignor were equitable assignees of all moneys received by them under permission to collect debts due their debtor before notice of assignment of such claims to another creditor; Re Yorkshire Woolcombers' Asso. [1903] 2 Ch. 284, 72 L. J. Ch. N. S. 635, 88 L. T. N. S. 811, 10 Manson, 276, on the validity of an assignment of present and future book debts.

Validity of mortgage of after acquired property.

Cited in Campbell v. Gemmell, 6 Manitoba L. Rep. 355, holding a mortgage of a stock of goods and all goods that might be added to it as security for a debt was valid as against attaching creditors of mortgagor; Kirkpatrick v. Cornwall Electric Street R. Co. 2 Ont. L. Rep. 113, holding it was within the powers of a corporation to execute a mortgage of after acquired property.

The decision of the Court of Appeal was cited in Coyne v. Lee, 14 Ont. App. Rep. 503, holding that under chattel mortgage covering after acquired property, such property became subject to mortgage as against execution creditors.

After acquired property as subject to lien.

Cited in United States v. Groome, 13 App. D. C. 460, holding the lien created by an agreement between partners that the interest of one of them should be subject to a lien in favor of the other for the purchase money was a continuing one and would attach to additions to stock; Cogan v. Conover Mfg. Co. 69 N. J. Eq. 358, 60 Atl. 408, holding on an equitable assignment of money to be earned in the future, the assignee acquires no lien unless the assignor has earned the money; Union Trust Co. v. Bulkeley, 80 C. C. A. 328, 150 Fed. 510, holding a parol assignment of accounts and bills which the assignor should acquire in the course of that particular business created a lien as against the assignor's trustee in bankruptcy; Edward Nelson & Co. v. Faber & Co. [1903] 2 K. B. 367, 72 L. J. K. B. N. S. 771, 89 L. T. N. S. 21, 10 Manson, 427, on the nature and effect of debentures issued by a trading company as a floating security for their undertakings.

Sufficiency of description of property covered by a lien.

Cited in Re Kelcey [1899] 2 Ch. 530, 68 L. J. Ch. N. S. 742, 48 Week. Rep. 59, 81 L. T. N. S. 354, on sufficiency of description of property covered by a lien.

Sufficiency of description of after acquired property covered by assignment or mortgage.

Cited in Horsfall v. Boisseau, 21 Ont. App. Rep. 663, holding the description in a chattel mortgage of the after acquired property covered thereby was sufficient; Halifax Graving Dock Co. v. Magliulo, 43 N. S. 174, holding that assignment of contribution from cargo to ship sufficiently described fund, where it provided that any money received by master should be covered; McKean v. Randolph, 39 N. B. 37, holding that no lien for advance can arise as to property to be acquired unless it is sufficiently described to be identified.

Enforcement in equity of agreement for conveyance of future interest in property.

Cited in Re Turcan, L. R. 40 Ch. Div. 5, 58 L. J. Ch. N. S. 101, 59 L. T. N. S. 712, 37 Week. Rep. 70; Re Reis [1904] 2 K. B. 769, 73 L. J. K. B. N. S. 929, 20 Times L. R. 547, 11 Manson, 229,—holding a covenant of marriage settlement to settle all after acquired property except business assets upon wife and children was sufficiently definite to be enforced in equity; Western Wagon & Property Co. v. West [1892] 1 Ch. 271, 61 L. J. Ch. N. S. 244, 66 L. T. N. S. 402, 40 Week. Rep. 182; Milliken v. Barrow, 65 Fed. 888,—on the enforcement in equity of contract for the sale of after acquired property; Wheless v. Meyerschmid Grocer Co. 140 Mo. App. 572, 120 S. W. 708, holding that equitable assignment creates present title in assignee to proceeds of assigned obligation, and such title may be enforced in equity.

Essentials of assignment of chose in action.

Cited in Meriden Brittania Co. v. Bowell, 4 B. C. 520, on what essential to validity of an assignment of a chose in action.

Unregistered transfers valid as against creditors or assignees for them.

Cited in Gault Bros. Co. v. Morrell, 3 N. B. Eq. Rep. 453, holding one who resumed possession of goods to which he had kept the title and who by virtue of the same contract took possession of books and accounts to pay himself was in equity superior to assignees for creditors; Thibaudeau v. Paul, 26 Ont. Rep. 385, on unrecorded transfer of book debts as being valid as against assignee for creditors; National Trust Co. v. Trusts & G. Co. 5 D. L. R. 459, 26 Ont. L. Rep.

279, holding that transfer of book debts is not within Bills of Sales Act, and does not require registration in order to be valid against creditors.

Rights of creditors in expectant interests.

Cited in Re Fitzgerald [1904] 1 Ch. 573, 73 L. J. Ch. N. S. 436, 52 Week. Rep. 432, 9 L. T. N. S. 266, 20 Times L. R. 332, holding a marriage settlement of heritable bonds of wife in trustees for the use of husband if he survived wife was valid as against husband's creditors.

10 E. R. C. 478, DEARLE v. HALL, 27 Revised Rep. 1, 3 Russ. Ch. 1.

Priorities as between successive assignees or lienors of chose in action.

Cited in Haldeman v. Hillsborough & C. R. Co. 2 Handy (Ohio) 101, holding that prior assignee of stock, transferred to him for benefit of creditors, will be preferred to subsequent attaching creditor, though not transferred on books of company; Farmers' & M. Bank v. Farwell, 7 C. C. A. 391, 19 U. S. App. 256, 58 Fed. 633, holding that by assignment of entire interest in policies of fire insurance, assignee became equitable owner of proceeds, and was entitled to same as against creditor to whom proceeds was given; Adams v. Blodgett, 2 Woodb. & M. 233, Fed. Cas. No. 46, holding assignment of property by debtor to portion of creditors valid as against others; Whitten v. Little, Ga. Dec. (pt. 2) 92, holding that assignment of chose in action will transfer interest, to assignee, notwithstanding garnishment in favor of creditor of assignor; Bank of Harlem v. Bayonne, 48 N. J. Eq. 246, 21 Atl. 478, holding that on notice of assignment to debtor, such debtor becomes quasi trustee of amount of debt assigned, subject to existing equities; Long Branch School Dist. v. Duparquet, 50 N. J. Eq. 234, 24 Atl. 922, holding that after assignment of debt and notice to debtor, latter no longer owes assignor, but does owe assignee; Jack v. National Bank, 17 Okla. 430, 89 Pac. 219; O'Dell v. Boyden, 80 C. C. A. 397, 10 A. & E. Ann. Cas. 239, 150 Fed. 731; Hall v. Queen Ins. Co. 39 N. S. 295; O'Deady v. McLoughlin, Newfoundl. Rep. (1884-96) 457; Cottingham v. Cottingham, 11 Ont. Rep. 294; Warburton v. Hill, 23 L. J. Ch. N. S. 633, 1 Kay, 470, 2 Eq. Rep. 441, 2 Week. Rep. 365; West of England Bank v. Batchelor, 51 L. J. Ch. N. S. 199, 46 L. T. N. S. 132, 30 Week. Rep. 364; Graham Paper Co. v. Pembroke, 124 Cal. 117, 44 L.R.A. 632, 71 Am. St. Rep. 26, 56 Pac. 627,—on priority as between successive assignees of a chose in action.

Cited in notes in 66 L.R.A. 761, 763, 766, 768, 769, 774, 777, on priority rights of different assignees of fund in hands of third person; 18 E. R. C. 521, on priority between mortgages; 21 Eng. Rul. Cas. 812, on priority as between equitable and legal mortgage.

Cited in 2 Dillon Mun. Corp. 5th ed. 1300, on equities between successive holders of municipal warrant.

— As dependent on notice or claim.

Cited in Continental Nat. Bank v. Eliot Nat. Bank, 7 Fed. 369, holding that unrecorded transfer of national bank stock will take precedence of subsequent attachment in behalf of creditor without notice; Re Gillespie, 15 Fed. 734, holding that subsequent assignee of debt who takes possession of evidence of debt and gives notice to debtor has superior equity over prior assignee who gives no notice; Methven v. Staten Island, Light, Heat & P. Co. 13 C. C. A. 362, 35 U. S. App. 67, 66 Fed. 113, holding that where two assignments of chose in action are made to different persons, assignee who first gives notice of his assignment to debtor has prior right; The Elmbank, 72 Fed. 610, holding that one taking equitable assignment of part of fund as security for pre-existing debt alone, can-

not acquire priority over previous assignment of same character by first giving notice to person holding fund; Judson v. Corcoran, 17 How. 612, 15 L. ed. 231, holding that second assignment of claim against Mexico gave best title, where assignee presented same to court and was adjudged owner of fund, and no notice was given by first assignee; Vanbuskirk v. Hartford F. Ins. Co. 14 Conn. 141, 36 Am. Dec. 473, holding a creditor attaching a chose of action would have priority over a prior assignee thereof who failed to give notice of such assignment to the debtor; Merchants & M. Bank v. Hewitt, 3 Iowa, 93, 66 Am. Dec. 49, holding an assignee of a receipt for grain to be delivered could not maintain an action against the maker to whom he failed to give notice of the assignment and who still had claims against the assignor; New York Chemical Mfg. Co. v. Peck, 6 N. J. Eq. 37, holding that bona fide assignee of mortgage first in execution and registry, without notice of agreement under seal, between first and second mortgagees, that second mortgage should be considered prior incumbrance, has equity superior to that of second mortgage; Wallston v. Braswell, 54 N. C. (1 Jones, Eq.) 137, holding an executor of an estate taking a note from a legatee without security for property of the estate would be protected as against an assignee of the legatee who failed to give notice of the assignment; Parks v. Innes, 33 Barb. 37, holding that subsequent assignment will be preferred to later one of which no notice has been given if received in good faith and notice given to trustees; Tingle v. Fisher, 20 W. Va. 497, holding that as between prior and subsequent assignees of same debt it is not necessary to validity of first assignment, that notice thereof should be given to debtor; Winslow v. William Richards Co. 3 N. B. Eq. Rep. 481, holding notice of assignment of chose in action is necessary to be given to debtor to fix title as between debtor and assignee; Copeland v. Manton, 22 Ohio St. 398, holding the lien of subcontractor on the sum due contractor took priority in the order in which they served notice of the amounts due them on the owner; Re Dallas [1904] 2 Ch. 385, 73 L. J. Ch. N. S. 365, 52 Week. Rep. 567, 90 L. T. N. S. 177, holding notice, by an assignee of an expectant interest in a legacy, to the executor of the estate was necessary to perfect title in the assignee; Société Générale de Paris v. Tramways Union Co. L. R. 14 Q. B. Div. 424, 54 L. J. Q. B. N. S. 177, 52 L. T. N. S. 912, on effect of notice in determining the priorities of equitable rights; Timson v. Ramsbottom, 2 Keen, 35; Wigram v. Buckley [1894] 3 Ch. 483, 63 L. J. Ch. N. S. 689, 7 Reports, 469, 71 L. T. N. S. 287, 43 Week. Rep. 147; Phillips's Estate, 205 Pa. 515, 66 L.R.A. 760, 97 Am. St. Rep. 746, 55 Atl. 213,—holding as between successive assignees of a chose in action the first giving notice of his assignment will have priority over the others; Re Lake [1902] W. N. 230, [1903] 1 K. B. 151, 72 L. J. K. B. N. S. 117, 51 Week. Rep. 319, 87 L. T. N. S. 655, 19 Times L. R. 116, 10 Manson, 17, holding same as between mortgagees of interest in insurance policy; Lloyd's Bank v. Pearson [1901] 1 Ch. 865, 70 L. J. Ch. N. S. 422, 84 L. T. N. S. 314, holding as between successive mortgagees of an heir's share of the proceeds of an estate, the one first giving notice to the trustees of the estate would have priority; Re Wasdale [1899] 1 Ch. 163, 68 L. J. Ch. N. S. 117, 47 Week. Rep. 169, 79 L. T. N. S. 520, 15 Times L. R. 97, holding an assignee of a reversionary interest in a trust fund who gave notice there to all trustees at time of assignment had priority over a subsequent assignee who gives his notice to new trustee appointed; Montefiore v. Guedalla [1903] 2 Ch. 26, 72 L. J. Ch. N. S. 442, 88 L. T. N. S. 496, 19 Times L. R. 390, holding the assignees of wife's share in the estate of her mother who obtained a stop order from the courts upon the share had priority over the interest of the wife's children in such share by reason of a marriage settlement of which the assignees had no knowledge; Ward v.

Duncombe, 62 L. J. Ch. N. S. 881 [1893] A. C. 369, 1 Reports, 224, 69 L. T. N. S. 121, 42 Week. Rep. 59, holding as between a marriage settlement of a wife's share in a personal fund held in trust under a will, of which one of trustees had knowledge and one had not and a subsequent mortgage of this share, the priority of the marriage settlement was not affected by the death of the trustee with notice; Stephens v. Green, 64 L. J. Ch. N. S. 546 [1895] 2 Ch. 148, 12 Reports 252, 72 L. T. N. S. 574, 43 Week. Rep. 465, holding as between successive assignees of a contingent interest in a fund set aside by testator, the one giving notice to the personal representative of the legatee had priority over the assignee obtaining a stop order from the court on the fund; Scott v. Hastings, 4 Kay & J. 633, 5 Jur. N. S. 450, 6 Week. Rep. 862, holding a judgment creditor obtaining a stop order on a fund will be postponed to a subsequent mortgage of the equitable interest in the fund who gave notice of such mortgage to the trustee of the fund; Foster v. Cockerell, 3 Clark & F. 456, 9 Bligh, N. R. 377, holding a second encumbrancer of an equitable interest giving notice to trustees of such interest obtains a priority over a previous encumbrancer who fails to give notice; Ex parte Allen, L. R. 11 Eq. 209, 40 L. J. Bankr. N. S. 17, 19 Week. Rep. 274, holding as between successive holders of bills of sale of a certain stock of goods, the one first giving notice of his bill of sale had priority over the other who took possession of the goods before receiving such notice; Mack v. Postle [1894] 2 Ch. 449, 63 L. J. Ch. N. S. 593, 8 Reports, 339, 71 L. T. N. S. 153, holding the mortgagees of the interest of a tenant for life of a fund who obtained a stop order had priority over the trustees of a prior settlement of the fund not disclosed by the mortgage; English & S. Mercantile Invest. Trust v. Brunton [1892] 2 Q. B. 1, holding debentures containing a condition that the charge created was to be a floating security was subsequent to mortgagees of an interest in a fund due debtor from an insurance company, who had given notice to the insurance company of the mortgage.

Cited in note in 10 E. R. C. 503, on priorities of second assignee first giving notice of assignment.

Distinguished in Bishop v. Holcomb, 10 Conn. 446, holding a third person attacking a rate in the hands of an assignor with knowledge of its assignment could not prevail as against the assignee; Jones v. Jones, 7 L. J. Ch. N. S. 164, 8 Sim. 633, 2 Jur. 589; Rochard v. Fulton, 7 Ir. Eq. Rep. 131; Garside v. King, 2 Grant, Ch. (U. C.) 673,—holding the relative positions assignees of equitable interests in land not affected by priority in the giving of notice.

Essentials of an assignment.

Cited in Spain v. Hamilton (Spain v. Brent) 1 Wall. 604, 17 L. ed. 619, holding that in order to perfect assignment of debt immediate notice of assignment must be given, to protect assignee against subsequent assignment; Planters' & M. Ins. Co. v. Tunstall, 72 Ala. 142, holding a valid assignment of a promissory note, as between the assignor and assignee may be made by a separate instrument in writing; Re Richards, L. R. 45 Ch. Div. 589, 59 L. J. Ch. N. S. 728, 63 L. T. N. S. 451, 39 Week. Rep. 186, on delivery as essential to validity of an assignment of personalty.

Necessity of notice of assignment of chose in action.

Cited in Meier v. Hess, 23 Or. 599, 32 Pac. 755, holding that assignment of chose in action is complete upon mutual consent of assignor and assignee, without notice to anyone; Lambert v. Morgan, 110 Md. 1, 132 Am. St. Rep. 412, 72 Atl. 407, 17 Ann. Cas. 439; Mercantile M. Ins. Co. v. Corcoran, 1 Gray, 75; Richards v. Griggs, 16 Mo. 416, 57 Am. Dec. 240,—holding that to constitute valid assign-

ment of debt not evidenced by bond, bill or note, as against debtor, notice must be given to him; Jenkinson v. New York Finance Co. 79 N. J. Eq. 247, 82 Atl. 36; Houser v. Richardson, 90 Mo. App. 134,—holding that when equitable owner assigns his interest in chose in action, legal title to which is held by trustee, assignee must notify trustee, to protect himself against claim of subsequent assignee; Thayer v. Daniels, 113 Mass. 129, holding that as to third persons, assignment of chose in action is valid without notice to debtor; Breedlove v. Stump, 3 Yerg. 257, holding that if one take assignment of trust fund with notice of trust, he takes it clothed with trust; State Ins. Co. v. Sax, 2 Tenn. Ch. 507, holding that title of assignee of corporate stock is not complete as against creditors of assignor until notice to corporation; Ward v. Morrison, 25 Vt. 593, holding that to perfect assignment of chose in action, notice must be given to debtor of such assignment; Albert Brick, Lime & Cement Co. v. Nelson, 27 N. B. 276; Meux v. Bell, 11 L. J. Ch. N. S. 77, 1 Hare, 73, 6 Jur. 123; Re Freshfield, L. R. 11 Ch. Div. 198, 40 L. T. N. S. 57, 27 Week. Rep. 375; Palmer v. Locke, L. R. 18 Ch. Div. 381, 51 L. J. Ch. N. S. 214, 45 L. T. N. S. 229, 30 Week. Rep. 419; M'Creight v. Foster, L. R. 5 Ch. 604; Gorringe v. Irwell India Rubber & Gutta Percha Works, L. R. 34 Ch. Div. 128, 56 L. J. Ch. N. S. 85, 55 L. T. N. S. 572, 35 Week. Rep. 86; Dunster v. Glengall, 3 Ir. Ch. Rep. 47; Gault Bros. Co. v. Morrell, 3 N. B. Eq. Rep. 453,—on notice to debtor as essential to perfect title in assignee of chose in action; Murdock v. Finney, 21 Mo. 138; Cogan v. Conover Mfg. Co. 69 N. J. Eq. 809, 115 Am. St. Rep. 629, 64 Atl. 973; Lipscomb v. Condon, 56 W. Va. 416, 67 L.R.A. 670, 107 Am. St. Rep. 938, 49 S. E. 392; Joseph v. Heaton, 5 Grant, Ch. (U. C.) 636; Arden v. Arden, L. R. 29 Ch. Div. 702, 54 L. J. Ch. N. S. 655, 52 L. T. N. S. 610, 33 Week. Rep. 593; Societe Generale de Paris v. Walker, 5 E. R. C. 157, L. R. 11 App. Cas. 20, 55 L. J. Q. B. N. S. 169, 54 L. T. N. S. 389, 34 Week. Rep. 662; National Bank v. United Security L. Ins. & T. Co. 17 App. D. C. 112, on necessity of notice of an assignment of a chose in action.

Cited in note in 67 L.R.A. 657, on validity of pledge or other transfer of stock when not made in books of corporation, as against attachments, executions, or subsequent transfers.

Cited in 2 Beach Trusts, 1116, on necessity of notice on delay of trustee to assume control of personalty; 3 Page Contr. 1959, on necessity of notice of assignment.

Personal and landed interests.

Cited in Daniel v. Freeman, Ir. Rep. 11 Eq. 233, holding the interests of legatees in a sum derived from the sale of leaseholds were not interests in land.

Implied trusts.

Cited in 1 Beach Trusts, 175, on determination of implied trust by intention.

10 E. R. C. 507, RICE v. RICE, 2 Drew. 73, 2 Eq. Rep. 341, 23 L. J. Ch. N. S. 289, 2 Week. Rep. 139.

Equitable priorities.

Cited in Hansen v. Berthelsen, 19 Neb. 433, 27 N. W. 423, holding that where grantor remains in possession of land after execution of warranty deed therefor, party purchasing must ascertain by what right he retains possession; McKillop v. Alexander, 45 Can. S. C. 551, 1 D. L. R. 586, holding that stipulation in agreement for sale of land that no assignment thereof by purchaser shall be valid unless approved of by vendor is effective only for protection of vendor; Ogilvie v. Squair, 10 Grant, Ch. (U. C.) 444, holding a person could not have a mistake in a mortgage corrected so as to extend to land and be prior to another mortgage on

the same land without showing that the holder of such other mortgage had notice of the error; Union Bank v. Kent, L. R. 39 Ch. Div. 238, 57 L. J. Ch. N. S. 1022, 59 L. T. N. S. 714, 37 Week. Rep. 364, on the postponement of equities by acts or omissions.

Cited in notes in 18 Eng. Rul. Cas. 522, 523, on priority between mortgages; 21 E. R. C. 723, on rights of purchaser for value without notice.

— Affected by possession of title deeds.

Cited in Lloyds Bank v. Bullock [1896] 2 Ch. 192, 65 L. J. Ch. N. S. 680, 74 L. T. N. S. 687, 44 Week. Rep. 633, holding the equities of a prior mortgagee were superior to the equities of one taking an assignment of the title deeds of the property and a conveyance all fraudulently procured from a devisee of the original mortgagor; Bank of Ireland v. Cogry Flax Spinning Co. [1900] 1 Ir. Ch. 219; Spencer v. Clarke, L. R. 9 Ch. Div. 137, 27 Week. Rep. 133, 47 L. J. Ch. N. S. 692; Roper v. Castell [1898] 1 Ch. 315, 78 L. T. N. S. 109, 46 Week. Rep. 248, 67 L. J. Ch. N. S. 169, 14 Times L. R. 194, on the possession of the title deeds as determining the priorities between incumbrances of equal rank; Hunter v. Walters, L. R. 11 Eq. 292, 24 L. T. N. S. 276, holding the equities of mortgagees who allowed another to obtain a fraudulent conveyance of the land to himself by reason of his having possession of the title deeds were postponed to equity of a subsequent mortgagee from such fraudulent vendee.

Cited in notes in 8 Eng. Rul. Cas. 705, 710, on right of mortgagee to obtain possession of title deeds; 18 E. R. C. 137, on right of mortgagee of land to muniments of title.

— Dependent on laches and diligence.

Cited in Salter v. Baker, 54 Cal. 140, holding the equity of a mortgagee of land was superior to that of a person who contributed to the purchase of the land, but allowed the title to remain in the mortgagor for a long period of time; Rohde v. Rohn, 232 Ill. 180, 83 N. E. 465 (reversing 127 Ill. App. 579) holding negligence would as between two lienholders postpone priority; Hafter v. Strange, 65 Miss. 323, 7 Am. St. Rep. 659, 3 So. 190, holding that one who has been induced by fraud to give deed which has been recorded, cannot make claim as against innocent purchaser, where she failed to take steps against fraudulent grantee after notice that he was about to sell land; Joseph v. Heaton, 5 Grant. Ch. (U. C.) 636, holding that one who holds securities for payment of debt is liable to execution creditor for loss occasioned by delivering securities to creditor upon payment of debt after notice from execution creditor; Bickerton v. Walker, L. R. 31 Ch. Div. 151, 55 L. J. Ch. N. S. 227, 53 L. T. N. S. 731, 34 Week. Rep. 141, holding the equity of plaintiffs who mortgaged their equitable interest in a sum of stock for a particular sum the whole of which they did not get was inferior to that of purchasers of the mortgage at its face value, because they left an instrument acknowledging receipt of the full amount in the hands of the fraudulent mortgagee; Carritt v. Real & Personal Advance Co. L. R. 42 Ch. Div. 263, 58 L. J. Ch. N. S. 688, 61 L. T. N. S. 163, 37 Week. Rep. 677, holding the negligence of plaintiff in allowing their confidential clerk to hold an assignment of equity of redemption which was in her name, there being a declaration of trust in their favor did not postpone their equities to that of defendants to whom clerk fraudulently assigned as security for a loan; R. v. Shropshire Union R. & Canal Co. L. R. 8 Q. B. 420, 42 L. J. Q. B. N. S. 193, 21 Week. Rep. 953; Rimmer v. Webster [1902] 2 Ch. 163, 71 L. J. Ch. N. S. 561, 86 L. T. N. S. 491, 50 Week. Rep. 517, 18 Times L. R. 548,—holding a principal transferring property to a trustee and acknowledging he paid full consideration for it cannot assert his

equitable title as against one to whom such trustee has disposed of the property for value; Kelly v. Munster & L. Bank, Ir. L. R. 29 Eq. 19, holding the equities of a bank negligently leaving a certificate of stock outstanding was inferior to that one purchasing from a party who because of such negligence was able to represent himself as the owner thereof; Re Sloane [1895] 1 Ir. Ch. 146, holding the equity of a bank taking a lease as security for a debt was superior to the interest of the assignor's wife and children therein where the trustees of the fund had expended the funds in making improvements on the leased premises without securing an assignment of the lease or possession of the title deeds; Neslin v. Wells, F. & Co. 104 U. S. 428, 26 L. ed. 802; Moore v. Kane, 24 Ont. Rep. 541; Shropshire Union R. & Canal Co. v. R. L. R. 7 H. L. 496, 45 L. J. Q. B. N. S. 31, 32 L. T. N. S. 283, 23 Week. Rep. 709; Farrand v. Yorkshire Bkg. Co. L. R. 40 Ch. Div. 182, 58 L. J. Ch. N. S. 238, 60 L. T. N. S. 669, 37 Week. Rep. 318; Re Eyton, L. R. 45 Ch. Div. 458, 63 L. T. N. S. 336, 59 L. J. Ch. N. S. 733, 39 Week. Rep. 135; Taylor v. Russell, 59 L. J. Ch. N. S. 756 [1891] 1 Ch. 8, 62 L. T. N. S. 922, 38 Week. Rep. 663; Re Vernon, E. & Co. L. R. 33 Ch. Div. 402, 56 L. J. Ch. N. S. 12, 55 L. T. N. S. 416, 35 Week. Rep. 225, on neglect or want of diligence postponing priorities or rights.

Distinguished in Kettlewell v. Watson, 51 L. J. Ch. N. S. 281, L. R. 21 Ch. Div. 685, 46 L. T. N. S. 83, 30 Week. Rep. 402, holding a vendor of real estate did not loose his lien for unpaid purchase money as against purchasers from the vendee, by the registration of the conveyance where vendor retains the deed in his possession; Layard v. Maud, L. R. 4 Eq. 397, 36 L. J. Ch. N. S. 669, 16 L. T. N. S. 618, 15 Week. Rep. 897, holding the equity of a person loaning money to another with which to purchase an advowson upon his covenant to convey the advowson to the lender, postponed to that of a subsequent party to whom a covenant to convey the advowson as security for a loan was made and who received a deposit of the title deeds.

— Dependent on priority of time.

Cited in Rohde v. Rohn, 127 Ill. App. 579, holding that equitable mortgage takes precedence of statutory mortgage prior in time where former was received with understanding that it was first lien and latter was taken after a merger had been effected between it and the equity; Cave v. Cave, L. R. 15 Ch. Div. 639, 49 L. J. Ch. N. S. 505, 42 L. T. N. S. 730, 28 Week. Rep. 793, holding the equitable estate of a cestui que trust being prior in point of time had priority over the estates of equitable mortgagees; Hume v. Dixon, 37 Ohio St. 66; Campbell v. Sidwell, 61 Ohio St. 179, 55 N. E. 609; Dueber Watch Case Mfg. Co. v. Daugherty, 62 Ohio St. 589, 57 N. E. 455; Frost v. Wolf, 77 Tex. 455, 19 Am. St. Rep. 761, 14 S. W. 446; Wasserman v. Metzger, 105 Va. 744, 7 L.R.A.(N.S.) 1019, 54 S. E. 893 (dissenting opinion); Merchants' Bank v. Morrison, 19 Grant, Ch. (U. C.) 1 (dissenting opinion); Smith v. Union Bank, 11 Manitoba L. Rep. 182; Taylor v. Russell [1891] 1 Ch. 8, 10 Eng. Rul. Cas. 545 [1892] A. C. 244, 61 L. J. Ch. N. S. 657, 66 L. T. N. S. 565, 41 Week. Rep. 43, 59 L. J. Ch. N. S. 756, 62 L. T. N. S. 922, 38 Week. Rep. 663; Re French, Ir. L. R. 21 Eq. 283; Re Roche, Ir. L. R. 25 Eq 284; Keith v. Burrows, L. R. 1 C. P. Div. 722; Indiana Match Co. v. Kirk, 118 Ill. App. 102,—on equities of parties as dependent on priority of time.

Equality of equities.

Cited in Sawyer & M. Co. v. Bennett, 2 Sask. L. R. 516, holding that where equities between two assignees of land contract are equal, one receiving approval of assignor would have better equitable estate, where land contract required approval of assignment by assignor; Capell v. Winter [1907] W. N. 154; Nevitt v.

McMurray, 14 Ont. App. Rep. 126,—on equality of equity in vendor's lien and equitable mortgage; Ortigosa v. Brown, 47 L. J. Ch. N. S. 168, 38 L. T. N. S. 145, on what must be taken into consideration in determining the superiority of equities.

10 E. R. C. 516, NORTHERN COUNTIES F. INS. CO. v. WHIPP, L. R. 26 Ch. Div. 482, 53 L. J. Ch. N. S. 629, 51 L. T. N. S. 806, 32 Week. Rep. 626.

Priorities between equitable and legal rights.

Cited in Hudson's Bay Co. v. Kearns, 3 B. C. 330, on the priorities as between an equitable mortgage and a subsequent registered conveyance; Kelly v. Munster & L. Bank, Ir. L. R. 29 Eq. 19; Garside v. Liverpool Railway Permanent Benefit Bldg. Soc. 13 Times L. R. 189; Manners v. Mew, 8 E. R. C. 682, L. R. 29 Ch. Div. 725, 54 L. J. Ch. N. S. 909, 53 L. T. N. S. 84; Re Ingham [1893] 1 Ch. 352, 62 L. J. Ch. N. S. 100, 3 Reports, 126, 68 L. T. N. S. 152, 41 Week. Rep. 235, on negligence or want of care necessary to postpone a legal title to an equitable one.

Cited in notes in 21 E. R. C. 724, on rights of purchaser for value without notice; 21 E. Rul. C. 762, on purchaser being affected with constructive notice of all facts which would have been discovered by requiring usual title; 21 E. R. C. 808, on priority as between equitable and legal mortgage.

— Dependent on laches or diligence.

Cited in Taylor v. London & C. Bkg. Co. [1901] 2 Ch. 231, 70 L. J. Ch. N. S. 477, 49 Week. Rep. 451, 84 L. T. N. S. 397, 17 Times L. R. 413; Taylor v. Russell, 59 L. J. Ch. N. S. 756 [1891] 1 Ch. 8, 62 L. T. N. S. 922, 38 Week. Rep. 663, on the determination of prior equities as between equitable mortgagees; Hudson's Bay Co. v. Kearns, 4 B. C. 536, on neglect to make inquiry as to prior equities as evidence of fraudulent intent to escape notice of such equities.

Distinguished in Farrand v. Yorkshire Bkg. Co. L. R. 40 Ch. Div. 182, 58 L. J. Ch. N. S. 238, 60 L. T. N. S. 669, 37 Week. Rep. 318; National Provincial Bank v. Jackson, L. R. 33 Ch. Div. 1, 55 L. T. N. S. 458, 34 Week. Rep. 597,—holding as between equitable mortgagees carelessness or want of prudence on the part of one would postpone his equities to that of the other.

— Bona fide purchasers from faithless agent.

Cited in Re Castell [1898] 1 Ch. 315, 67 L. J. Ch. N. S. 169, 78 L. T. N. S. 109, 14 Times L. R. 194, 46 Week. Rep. 248, holding debenture holders leaving their title deeds with the corporation could not assert their prior charge as against a bank which took the title deeds from the corporation as a security for an overdraft.

Right to follow funds wrongfully converted into hands of a bona fide holder.

Cited in Babcock v. Standish, 53 N. J. Eq. 376, 30 L.R.A. 604, 51 Am. St. Rep. 633, 33 Atl. 385, holding money paid by one partner to his individual creditor who had no knowledge that it was partnership funds may be held by him as against the claims of the other partners; Brocklesby v. Temperance Permanent Bldg. Soc. [1893] 3 Ch. 130, holding a father placing title deeds to lands in the hands of his son to borrow money could not maintain an action to redeem the property where the son fraudulently obtained an excessive loan on the strength of it together with forged deed without paying the full amount raised by the son.

Negligence as estopping person from asserting a right.

Cited in Ruben v. Great Fingall Consolidated [1904] 2 K. B. 712, 73 L. J. K. B.

N. S. 872, 53 Week. Rep. 100, 91 L. T. N. S. 619, 20 Times L. R. 720, 11 Manson, 353, on negligence as estopping a person from asserting a right.

Cited in note in 12 E. R. C. 313, on estoppel to claim title by fraudulent failure to disclose same.

10 E. R. C. 533, PHILLIPS v. PHILLIPS, 4 De G. F. & J. 208, Jur. N. S. 145, 31 L. J. Ch. N. S. 321, 5 L. T. N. S. 655, 10 Week. Rep. 236, affirming the decision of the Vice Chancellor, reported in 3 Giff. 200, 7 Jur. N. S. 1094.

Equitable priorities over legal rights.

Cited in Wenz v. Pastene, 209 Mass. 359, — L.R.A.(N.S.) —, 95 N. E. 793, holding that one who acquires equitable interest by contract of sale and advancement of part of consideration, cannot after notice of prior equity destroy prior equitable estate by getting conveyance in fee; McKillop v. Alexander, 45 Can. S. C. 551, 1 D. L. R. 586, holding that approval by vendor of assignment under contract requiring such approval cannot be set up by second sub-purchaser to defeat claim of prior subpurchaser whose claim had legal priority under registry act; Forrester v. Campbell, 17 Grant, Ch. (U. C.) 379, holding that registry act of 1865 does avoid equity against subsequent instrument which is registered, but was taken with notice of adverse claim; Totten v. Douglas, 18 Grant, Ch. (U. C.) 341, holding an assignee for value of a mortgage executed by a father to a son on a pretended consideration and assigned under an arrangement with the father would be protected as against subsequent execution creditors of the mortgagor; Manners v. New, L. R. 29 Ch. Div. 725, 54 L. J. Ch. N. S. 909, 53 L. T. N. S. 84, 8 E. R. C. 682, holding a legal mortgagee where the mortgagor put him off with excuses for not giving the deeds could not be postponed to a mortgagee as security for money advanced without notice of the legal mortgage.

Cited in note in 18 E. R. C. 523, on priority between mortgages.

— Dependent on priority of time.

Cited in Fairbanks v. Sargent, 104 N. Y. 108, 58 Am. Rep. 490, 9 N. E. 870, holding as between different assignees of a chose in action the one prior in point of time will be protected although he gave no notice of the assignment; King v. Keith, 1 N. B. Eq. Rep. 538; Claxton v. Gilbert, 24 U. C. C. P. 500; Re French, Ir. L. R. 21 Eq. 283; Re Roche, Ir. L. R. 25 Eq. 284; Merchants' Bank v. Morrison, 19 Grant, Ch. (U. C.) 1,—on priority of time as determining the superior equities of the parties.

Defence of bona fide purchaser as against legal titles.

Cited in Bausman v. Kelley, 38 Minn. 197, 8 Am. St. Rep. 661, 36 N. W. 333; Utterson Lumber Co. v. Rennie, 21 Can. S. C. 218; Calvert v. Linley, 21 Grant, Ch. (U. S.) 470; Forse v. Sovereen, 14 Ont. App. Rep. 482; Cave v. Cave, L. R. 15 Ch. Div. 639, 49 L. J. Ch. N. S. 505, 42 L. T. N. S. 730, 28 Week. Rep. 793; Knobloch v. Mueller, 123 Ill. 554, 17 N. E. 696,—on when the defense of a bona fide purchaser would be availing; Wigle v. Setterington, 19 Grant, Ch. (U. C.) 512, holding a mutual mistake in the conveyance of land as to the quantity conveyed might be rectified by the vendee and it could not be prevented by one purchasing the equity to such omitted portion where the vendee held the legal title to it; Ind. v. Emmerson, L. R. 12 App. Cas. 300, 56 L. J. Ch. N. S. 989, 56 L. T. N. S. 778, 36 Week. Rep. 243, 21 E. R. C. 706 (affirming L. R. 33 Ch. Div. 323, 54 L. T. N. S. 757), holding a defense of bona fide purchaser without notice was unavailing in an action for the recovery of land, in the chancery division, when trying legal titles in its concurrent jurisdiction.

Cited in note in 21 Eng. Rul. Cas. 719, 720, 722, 724, 748, on protection of purchaser for value without notice.

Cited in Underhill Am. Ed. Trusts, 492, on following trust funds into hands of third parties.

— Pleading.

Cited in Day v. Rutledge, 12 Manitoba, L. Rep. 290, on necessity that defense of bona fide purchaser be pleaded.

Nature of equitable title.

Cited in Harrison v. Morton, 83 Md. 456, 35 Atl. 99, on the nature of an equitable title; Sawyer & M. Co. v. Bennett, 2 Sask. L. R. 516, holding that one obtaining assignment of land contract without approval of assignor in contract in pursuance of such contract, takes equitable estate in land.

Purchaser of equity as taking only such title as held by vendor.

Cited in Claxton v. Gilbert, 24 U. C. C. P. 500, as laying down principles as to grantees and encumbrances of equitable estates; Kettlewell v. Watson, L. R. 21 Ch. Div. 685, 51 L. J. Ch. N. S. 281, 46 L. T. N. S. 83, 30 Week. Rep. 402, holding a purchaser from one having only an equity of redemption subject to a mortgage took only such equitable interest; Connolly v. Munster Bank, Ir. L. R. 19 Eq. 119; Actien Gesellschaft für Cartonnagen Industrie v. Templer, 18 R. P. C. 6,— on an equitable assignee as taking no better title than his assignor.

Legal rights cognizable in equity.

Cited in Burrowes v. De Blaquiere, 34 U. C. Q. B. 498, holding transferor of an equity had no action in equity on covenants running with the land.

10 E. R. C. 545, TAYLOR v. RUSSELL [1892] A. C. 244, 61 L. J. Ch. N. S. 657, 66 L. T. N. S. 565, 41 Week. Rep. 43, affirming the decision of the Court of Appeal, reported in [1891] 1 Ch. 8, 60 L. J. Ch. N. S. 1, 63 L. T. N. S. 593, 39 Week. Rep. 81, which reverses the decision of Kay, J., reported in 59 L. J. Ch. N. S. 756, 62 L. T. N. S. 922, 38 Week. Rep. 663.

Equitable priorities over legal estates.

Cited in Powell v. London & P. Bank [1893] 1 Ch. 610, 68 L. T. N. S. 386, 62 L. J. Ch. N. S. 795 [1893] 2 Ch. 555, 2 Reports, 482, 69 L. T. N. S. 821, 41 Week. Rep. 545, on the postponement of prior legal estates to subsequent equitable estates.

Cited in notes in 8 E. R. C. 711, on right of mortgagor to obtain possession of title deeds from mortgagee by deposit; 10 E. R. C. 530, on priority between equities in case of act or omission due to negligence or misplaced confidence; 18 E. R. C. 522, on priority between mortgages; 21 E. R. C. 723, 745–747, on rights of purchaser for value without notice.

The decision of the Court of Appeal was cited in Taylor v. London & C. Bkg. Co. [1901] 2 Ch. 231, 70 L. J. Ch. N. S. 477, 84 L. T. N. S. 397, 49 Week. Rep. 451, 17 Times L. R. 413, on the postponement of prior legal estates to subsequent equitable estates.

Trust outstanding as affecting legal estate.

Cited in London & C. Bkg. Co. v. Goddard [1897] 1 Ch. 642, 76 L. T. N. S. 277, 45 Week. Rep. 310, 66 L. J. Ch. N. S. 261, on the equities of one taking title from a trustee for holders of title deeds.

The decision of the Court of Appeal was cited in Henninger v. Boyer, 10 Pa. Co. Ct. 506, on when holder of legal estate is affected by a trust or equity in another.

10 E. R. C. 570, ANGLO-ITALIAN BANK v. DAVIES, L. R. 9 Ch. Div. 275, 47 L. J. Ch. N. S. 833, 27 Week. Rep. 3, 39 L. T. N. S. 244.

Equitable execution.

Cited in Henderson v. Hall, 134 Ala. 455, 63 L.R.A. 673, 32 So. 840, as to when courts of equity would give relief to enforce a legal judgment; Davidge v. Kirby, 10 B. C. 231, on the appointment of a receiver as equivalent to execution under a writ of elegit; Fisken v. Brooke, 4 Ont. App. Rep. 8, holding that object of equitable execution is to impose on equitable interest liability which would attach at law on corresponding legal interest; Re Barrett, 5 Ont. App. Rep. 206, holding that assignee of insolvent mortgagor, can for benefit of creditors, impeach chattel mortgage for noncompliance with chattel mortgage act; Stuart v. Grough, 15 Ont. App. Rep. 299, holding that effect of order for receiver was absolutely to preclude judgment creditor from enforcing order to pay over and garnishees from disposing of money when received by them, without leave of court; Ex parte Evans, L. R. 11 Ch. Div. 691, L. R. 13 Ch. Div. 252, 49 L. J. Bankr. N. S. 7, 41 L. T. N. S. 565, 28 Week. Rep. 127, holding that the appointment of a receiver amounted to an equitable execution.

Cited in note in 10 E. R. C. 591, on right to appointment of receiver on interlocutory application in judgment creditor's suit.

Cited in High Receiv. 4th ed. 33, on occasions and terms upon which receiver will be appointed.

— As affected by the Judicature act.

Cited in Boscowitz v. Belyea, 4 B. C. 527, on the effect of the Judicature Act upon the right to equitable execution; Hudson Bay Co. v. Green, 1 B. C. pt. 1, 247, on effect of Judicature Act on application for receiver; Harris v. Beauchamp Bros. [1894] 1 Q. B. 801, 63 L. J. Q. B. N. S. 480, 9 Reports, 653, 70 L. T. N. S. 636, 42 Week. Rep. 451, holding that a court had no jurisdiction to appoint a receiver by way of equitable execution, if they did not have it prior to the passage of the judicature acts.

— Necessity of first issuing a writ of elegit.

Cited in Re Pope, L. R. 17 Q. B. Div. 743, 55 L. J. Q. B. N. S. 522, 55 L. T. N. S. 369, 34 Week. Rep. 693, 10 E. R. C. 595, holding the appointment of a receiver is the equivalent of the execution of a writ of elegit; Re Whiteley, 56 L. T. N. S. 846, on the necessity of issuing a writ of elegit before the appointment of a receiver.

Cited in note in 33 L.R.A. 547, on exhausting remedies at law as condition of right of judgment creditor to procure receivership.

— Prior legal action as predicate.

Cited in Harper v. Harper, 2 B. C. 15, on the necessity of maintaining two actions to procure equitable execution; Smith v. Port Dover & L. H. R. Co. 12 Ont. App. Rep. 288; MacDonald v. McCall, 12 Ont. App. Rep. 593,—on the right to move for an equitable execution in the original action; Smith v. Cowell, L. R. 6 Q. B. Div. 75, 50 L. J. Q. B. N. S. 38, 43 L. T. N. S. 528, 29 Week. Rep. 227, 10 Eng. Rul. Cas. 588, on the right to have a receiver appointed during the course of the first action; Holmes v. Millage, 10 E. R. C. 604, [1893] 1 Q. B. 551, 62 L. J. Q. B. N. S. 380, 68 L. T. N. S. 205, 41 Week. Rep. 354, 4 Reports, 332, 57 J. P. 551, 9 Times L. R. 331, holding that the existence of a legal right is necessary to the appointment of a receiver by way of equitable execution.

— Against what property.

Cited in Black v. Moore, 2 N. B. Rep. Eq. 98, on the right to equitable execution

to reach property not subject to attachment: Smith v. Port Dover & L. H. R. Co. 12 Ont. App. Rep. 288, holding that a receiver would not be appointed where by statute all the earnings of a railroad were made applicable to pay the encumbrances; MacDonald v. McCall, 12 Ont. App. Rep. 593, on the right to treat a fraudulent transferee as a trustee and reach the property by equitable execution; Stuart v. Grough, 15 Ont. App. Rep. 299, holding that equitable execution may be obtained of property which is not subject to attachment; Central Bank v. Ellis, 20 Ont. App. Rep. 364, on the appointment of a receiver to reach moneys incapable of being reached by common law processes; Boscowitz v. Belyea, 4 B. C. 527, holding that proceeding by originating summons was warranted under Rule 591, to compel trustees to account, where they had received money under decree in one of several actions relating to same subject matter; Canadian P. R. Co. v. Silzer, 3 Sask. L. R. 162, holding that no lien is created by execution against land, only such rights being acquired as one given by Land Titles Act, and which are not available as against equitable interests; Bryant v. Bull, L. R. 10 Ch. Div. 153, 48 L. J. Ch. N. S. 325, 39 L. T. N. S. 470, 27 Week. Rep. 246, holding that the plaintiff was entitled to have a receiver appointed to reach the dividends of stock held by trustees, who were not parties to the action; Westhead v. Riley, L. R. 25 Ch. Div. 413, 53 L. J. Ch. N. S. 1153, 49 L. T. N. S. 776, 32 Week. Rep. 273, holding that equitable execution will be granted to reach moneys which are not subject to garnishment proceedings; Cadogan v. Lyric Theatre [1894] 3 Ch. 338, 63 L. J. Ch. N. S. 775, 7 Reports, 594, 71 L. T. N. S. 8, holding that a receiver would not be appointed at the instance of the judgment creditor to receive by way of equitable execution the receipts of a theatre, where a judgment had been recovered against the company leasing the theatre, but would to receive the rents and profits of the theatre; Thompson v. Gill [1903] 1 K. B. 760, 72 L. J. K. B. N. S. 411, 88 L. T. N. S. 714, 51 Week. Rep. 484, 19 Times L. R. 366, holding that where a judgment had been recovered against a person holding an equitable interest in a trust estate, the creditors were entitled to have a receiver appointed by way of equitable execution to reach such property.

Cited in note in 11 E. R. C. 664, on what may be taken under writ of fieri facias.

— Enforcement of charge.

Cited in Re Pope, 10 E. R. C. 592, L. R. 17 Q. B. Div. 743, 55 L. J. Q. B. N. S. 522, 55 L. T. N. S. 369, 34 Week. Rep. 693, on the distinction between the enforcement of a charge and the operation of the order appointing a receiver as the equivalent of a legal execution.

10 E. R. C. 588, SMITH v. COWELL, 50 L. J. Q. B. N. S. 38, 43 L. T. N. S. 528, L. R. 6 Q. B. Div. 75, 29 Week. Rep. 227.

Appointment of receiver by way of equitable execution.

Cited in Smith v. Port Dover & L. H. R. Co. 12 Ont. App. Rep. 288; McLean v. Allen, 14 Ont. Pr. 84,—holding that receiver is properly appointed in action in which judgment has been recovered; MacDonald v. McCall, 12 Ont. App. Rep. 593, holding that action by simple contract creditor may be maintained in behalf of himself and all other creditors to set aside fraudulent mortgage of goods by debtor; London & C. Loan & Agency Co. v. Merritt, 32 U. C. C. P. 375, holding that writ of sequestration could not issue, under Rule 339, on ordinary common law judgment for debt recovered before passing of Judicature Act; Manchester & L. Dist. Bkg. Co. v. Parkinson, L. R. 22 Q. B. Div. 173, 58 L. J. Q. B. N. S. 262, 37 Week. Rep. 264, holding that where there are no special circumstances showing

that it is just and convenient that a receiver be appointed, none will be appointed if the legal remedies are adequate.

Cited in note in 11 E. R. C. 681, on necessity of setting out by metes and bounds lands taken in execution under an elegit.

Cited in High Receiv. 4th ed. 33, on occasions and terms upon which receiver will be appointed.

— As part of original action.

Cited in Re Brookfield, 12 Ont. Pr. Rep. 485, holding that section 17 of Judicature Act contemplates pendency of action; Holmes v. Millage, 10 E. R. C. 604, [1893] 1 Q. B. 551, 62 L. J. Q. B. N. S. 380, 68 L. T. N. S. 205, 41 Week. Rep. 354, 4 Reports, 332, 57 J. P. 551, holding that a receiver by way of equitable execution could be appointed upon motion in the original action without commencing a new action on the judgment.

What is interlocutory order.

Cited in Hately v. Merchants' Despatch Co. 12 Ont. App. Rep. 640, holding that order rescinding order to give security for costs is interlocutory order; Clarke v. Creighton, 14 Ont. Pr. Rep. 34, holding that proceedings may be considered "interlocutory" within meaning of Rule 1205 till satisfaction is obtained in respect to moneys, costs or subject matter in controversy; Elgie v. Butt, 18 Ont. Pr. Rep. 469, holding that costs of motion, and appeals following, to discharge defendant out of custody, under order of arrest before judgment are properly interlocutory costs, although partly incurred after judgment; Tai Yun Co. v. Blum, 2 B. C. 348, holding that application ex parte for leave to issue concurrent writs of summons against defendants, who are residents, is not interlocutory matter; Barrowman v. Fader, 32 N. S. 284, to the point that words "interlocutory order" in section 25 of Judiciary Act, mean an order other than final judgment, whether order is before or after judgment.

10 E. R. C. 592, RE POPE, 55 L. J. Q. B. N. S. 522, 55 L. T. N. S. 369, L. R 17 Q. B. Div. 743, 34 Week. Rep. 693.

Equitable execution.

Cited in Stuart v. Grough, 15 Ont. App. Rep. 299, holding that effect of order for receiver was absolutely to preclude judgment creditor from enforcing order to pay over and garnishee from disposing of money, when received by them, without order of court; Kirk v. Burgess, 15 Ont. Rep. 608, holding that under Judicature Act court has power to award equitable execution after judgment, in any case where it is just and convenient to do so; Jones v. Miller, 24 Ont. Rep. 268, holding that where money in defendant's hands is money owing to judgment creditor, such creditor is entitled to equitable relief by appointment of receiver.

Cited in notes in 10 Eng. Rul. Cas. 591, on right to appointment of receiver on interlocutory application in judgment creditor's suit; 11 Eng. Rul. Cas. 680, on necessity of setting out by metes and bounds lands taken in execution under an elegit.

— Necessity of registration.

Cited in Spiers v. Reg. 4 B. C. 388, holding that registration of judgment in Land Registry office before delivery of fi. fa. lands thereunder to sheriff is condition precedent to sale, under Execution Act.

10 E. R. C. 604, HOLMES v. MILLAGE, 57 J. P. 551, 62 L. J. Q. B. N. S. 380, 68 L. T. N. S. 205, [1893] 1 Q. B. 551, 4 Reports, 332, 41 Week. Rep. 345, 9 Times L. R. 331, reversing 9 Times L. R. 217.

Equitable execution.

Cited in Henderson v. Hall, 134 Ala. 455, 63 L.R.A. 673, 32 So. 840, on when equity will afford relief to enforce the collection of a debt.

Cited in notes in 21 L.R.A. 623, on rights of creditors in personal services of debtor; 33 L.R.A. 547, on exhausting remedies at law as condition of judgment creditor's right to procure receivership; 63 L.R.A. 704, on equitable remedy to subject choses in action to judgment after return of no property found; 2 E. R. C. 128, on interposition of equity for protection of decedent's estate where no executor or administrator has been appointed; 10 E. R. C. 591, on right to appointment of receiver on interlocutory application in judgment creditor's suit; 10 E. R. C. 613, on appointment of receiver for property capable of being taken by legal execution.

Cited in High, Receiv. 4th ed. 33, on occasions and terms upon which receiver will be appointed.

— Property subject to.

Cited in Slemin v. Slemin, 7 Ont. L. Rep. 67, to the point that unearned pension cannot be reached either by attachment or by appointment of receiver; Manufacturers' Lumber Co. v. Pigeon, 22 Ont. L. Rep. 36, holding that fund held by municipality to secure fulfillment of contract to keep pavement in repair could be reached by receivership; Central Bank v. Ellis, 27 Ont. Rep. 583, holding that receiver will not be appointed to receive amount of claim for unliquidated damages which his debtor is seeking to recover in pending action; Edwards v. Picard [1909] W. N. 191, 78 L. J. K. B. N. S. 1108, 101 L. T. N. S. 416, 25 Times L. R. 815, holding that letters patent were not such property as could be reached by equitable execution, and no receiver would be appointed.

— Against future earnings.

Cited in Central Bank v. Ellis, 20 Ont. App. Rep. 364, holding that salary of judgment debtor, not actually due at time of service of attaching order, cannot be attached to answer judgment debt; Blakely v. Gould, 24 Ont. App. Rep. 153, holding that receiver could not be appointed in respect to money to be earned under contract; Cadogan v. Lyric Theatre [1894] 3 Ch. 338, 63 L. J. Ch. N. S. 775, 7 Reports, 594, 71 L. T. N. S. 8, holding that a receiver would be appointed to take the rents and profits of a theatrical company's land, which consisted of a theatre, which was subject to a mortgage, and apply them on the judgment, subject to the rights of the mortgagees; Manning v. Mullins [1898] 2 Ir. Q. B. 34, on the power of the court to appoint a receiver over the pension of a retired army officer; Re Johnson [1898] 2 Ir. Q. B. 551, holding that a receiver by way of equitable execution cannot be appointed over the amount payable on a contract, for public work, until the work has all been completed according to the contract; Picton v. Cullen [1900] 2 Ir. Q. B. 612, on the right to have a receiver appointed by way of equitable execution over the future earnings of a person.

Cited in High, Receiv. 4th ed. 620, on right to receiver for future earnings or salary of debtor which have not been by him assigned or charged with payment of the debt.

— Against money not subject to garnishment.

Cited in Lake of Woods Mill. Co. v. Collin, 13 Manitoba L. Rep. 154, on the

right to reach by equitable execution, the amount of money due under a fire insurance policy, which gives an option of paying cash or rebuilding.

Distinguished in Imperial Bank v. Motton, 29 N. S. 368, holding that where the defendant was residing outside of the jurisdiction of the court a receiver by way of equitable execution would be appointed to receive the pension payable to him, to satisfy a judgment.

—As affected by the Judicature Act.

Cited in McFadden v. Kerr, 12 Manitoba L. Rep. 487, on the appointment of a receiver by way of equitable execution where one could not have been appointed before the Judicature act.

— Where "just and convenient."

Cited in North Sydney Min. & Transp. Co. v. Greener, 31 N. S. 189, on the appointment of a receiver by way of equitable execution because it was the most convenient way to satisfy a judgment; Harris v. Beauchamp [1894] 1 Q. B. 801, 63 L. J. Q. B. N. S. 480, 9 Reports, 653, 70 L. T. N. S. 636, 42 Week. Rep. 451, holding that a receiver would not be appointed to enforce a legal judgment merely because it was the most convenient method.

10 E. R. C. 614, BURGESS v. WHEATE, 1 Eden, 177, 1 W. Bl. 123.

Doctrine of escheat.

Cited in De Peyster v. Michael, 6 N. Y. 467, 57 Am. Dec. 470; Van Rensselaer v. Smith, 27 Barb. 104,—on escheat as one of the incidents of feudal tenure; Johnston v. Spicer, 107 N. Y. 185, 13 N. E. 753, holding that all rights of property, of whatever nature they may be, revert to People, where owner dies intestate, and there is failure of heirs or next of kin; Mercer v. Atty. Gen. 5 Can. S. C. 538 (dissenting opinion), on the nature of escheat; Gallard v. Hawkins, 10 E. R. C. 661, L. R. 27 Ch. Div. 298, 53 L. J. Ch. N. S. 834, 51 L. T. N. S. 689, 33 Week. Rep. 31, holding that there can be escheat only where there is want of a tenant, not where there is want of title in the tenant.

Cited in notes in 40 L. ed. (U. S.) 691, 692, on escheat of property of the state; 8 E. R. C. 168, on escheat of government.

Cited in Gray, Perpet. 2d ed. 168, 169, on right of escheat as a vested interest not within rule against perpetuities.

— Where applicable.

Cited in Atty. Gen. v. O'Reilly, 6 Ont. App. Rep. 576 (affirming 26 Grant Ch. (U. C.) 126), holding that the doctrine of escheat applied to lands held in Ontario.

— As applicable to trust estates.

Cited in Com. v. Blanton, 2 B. Mon. 393, on the doctrine of escheats as applying to trust estates; Re Adams, 4 Ch. Cham. 29, holding that rule that there is no escheat of trust estate, applies to equity of redemption of mortgage in fee.

Cited in 1 Beach, Trusts, 16, on sovereign or state as trustee; 2 Beach, Trusts, 966, on liability of trust estate to escheat; 2 Washburn, Real Prop. 6th ed. 456, on inapplicability to trusts of rules growing out of tenure.

— Right of trustee to retain estate if cestui que trust dies without heirs.

Cited in Davall v. New River Co. 18 L. J. Ch. N. S. 299, 3 DeG. & S. 394, 13 Jur. 761, holding that where the testator left no heir, the trustee took the property beneficially; Re Gosman, L. R. 15 Ch. Div. 67, 49 L. J. Ch. N. S. 590, 42 L. T. N. S. 804, 29 Week. Rep. 14; Re Van Hagan, L. R. 16 Ch. Div. 18, 50 L. J.

Ch. N. S. 1, 44 L. T. N. S. 161, 29 Week. Rep. 84,—on the right of the trustees to retain the estate if the cestui que trust died without any heirs.

Distinguished in Methodist Episcopal Church v. Bell, 5 U. C. Q. B. O. S. 344, holding that where land is granted in trust for a corporation, and the corporation is dissolved the land reverts to the grantor; Marshall v. Lovelass, 1 N. C. pt. 2, p. 325 (Conference, p. 217), holding that lands owned in trust by one who became an alien by the Revolutionary War, were not confiscated by the Confiscation acts; Fox v. Horah, 36 N. C. (1 Ired. Eq.) 358, 36 Am. Dec. 48, holding that where a corporation is dissolved the real property belonging to it and not otherwise disposed of, reverts to the donor or grantor; Com. v. Naile, 88 Pa. 429, 7 W. N. C. 203, 36 Phila. Leg. Int. 383, holding that under the statute of Pennsylvania, a trust estate may be escheated when the trust has expired and the trustee no active duties to perform; Williams v. Lonsdale, 3 Ves. Jr. 752, 4 Revised Rep. 149, holding that the heir of the trustee has no equity to compel the lord to admit him if the cestui que trust dies without heirs; Onslow v. Wallis, 19 L. J. Ch. N. S. 27, 1 Macn. & G. 506, 1 Hall & Tw. 513, 13 Jur. 1085, holding that where there are other persons under the will who are to take the property, the trustees do not take title for themselves; Middleton v. Spicer, 8 E. R. C. 161, 1 Bro. Ch. 201, holding that a man dying possessed of leasehold property which he orders sold and the money paid to a charity, which was prevented by the statutes of Mortmain, the executor is trustee for the crown, there being no next of kin.

Disapproved in Matthews v. Ward, 10 Gill & J. 443, holding that equitable titles would escheat where the owner dies without heirs.

Mortgagee as trustee.

Cited in Clark v. Beach, 6 Conn. 142 (dissenting opinion), on the mortgagee in equity as being considered as a trustee.

Rights of mortgagee to hold land after death of mortgagor without heirs.

Cited in Simpson v. Corbett, 10 Ont. App. Rep. 32, on the rights of the mortgagee to hold the land if the mortgagor dies without heirs.

Distinguished in Downe v. Morris, 13 L. J. Ch. N. S. 337, 3 Hare, 394, 8 Jur. 486, holding that the lord of the manor taking land by escheat, which were subject to a mortgage, is entitled to redeem.

Right of equity of redemption.

Cited in Sheldon v. Chisholm, 3 Grant, Ch. (U. C.) 655 (affirming 2 Grant, Ch. (U. C.) 178), holding that sale by sheriff, under writ of fieri facias against lands, of reversion after term of 1000 years, had been created by way of mortgage, carries with it right to redeem term.

Equitable lien for purchase price of land.

Cited in Colquitt v. Thomas, 8 Ga. 258; Selby v. Stanley, 4 Minn. 65, Gil. 34,—on the equitable lien of the vendor for the purchase price of the land; Fish v. Howland, 1 Paige, 20, holding that the vendor of land has an equitable lien upon the land sold for the purchase price; Sternberger v. McGovern, 4 Daly, 456, holding that vendor, not parting with possession, cannot enforce vendor's lien for price; Brown v. Chesley, 7 N. S. 315, holding that vendor of land by accepting bond for unpaid purchase money waived right to vendor's lien.

Distinguished in Ahrend v. Odiorne, 118 Mass. 261, 19 Am. Rep. 449, holding that the vendor of real estate has no lien for the purchase price if he gives an absolute deed.

Lien on land for part of purchase money paid, if contract fails.

Cited in Felkner v. Tighe, 39 Ark. 357, holding that purchase money prematurely

ly paid constitutes a lien upon the land upon which it was paid; Devore v. Devore, 138 Mo. 181, 39 S. W. 68, holding that the purchaser of land under a parol contract therefor has a lien for that part of the purchase price paid if the contract is not completed; Craft v. Latourette, 62 N. J. Eq. 206, 49 Atl. 711; Elterman v. Heyman, 192 N. Y. 113, 127 Am. St. Rep. 862, 84 N. E. 937, 15 Ann. Cas. 819,—holding that a vendee has a lien on the land for that part of the purchase price paid, where the contract fails through no fault of his; Brown v. Bigley, 3 Tenn. Ch. 618; Wickman v. Robinson, 14 Wis. 494, 494, 80 Am. Dec. 789,—on the right of the vendee to a lien on land for the part of the purchase money paid where the contract is not completed through the vendor's act; Wythes v. Lee, 3 Drew. 396, 25 L. J. Ch. N. S. 177, 26 L. T. O. S. 192, holding that a purchaser of land has a lien for money paid as a deposit on the purchase price if the contract fails.

Cited in note in 20 L.R.A.(N.S.) 176, on right of vendee under land contract to lien for amount paid where contract fails or is rescinded.

Cited in 2 Washburn, Real Prop. 6th ed. 86, on vendee's lien for title.

Equity treats that as done which ought to be done.

Cited in Adams v. Smith, 20 Abb. N. C. 60; Eakin v. Raub, 12 Serg. & R. 330,—holding that equity will treat as done that which ought to be done, and not which might have been done; Com. v. Martin, 5 Munf. 117, on equity treating that as done which ought to be done.

Legal claims in equity.

Cited in Rowell v. Jewett, 71 Me. 408, on the caution of equity in interfering with a legal claim.

What constitutes trust.

Cited in Allen v. McGee, 158 Ind. 465, 62 N. E. 1002, holding that a grant of land to her sons for the use and benefit of their children, created a trust in favor of the grandchildren; Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762, as to what constitutes a trust.

Cited in 1 Beach, Trusts, 3, on rise and progress of trusts; 1 Beach, Trusts, 263, 264, on trust resulting to grantor from voluntary conveyance; 1 Beach, Trusts, 298, on resulting trusts from gifts by will; 2 Washburn, Real Prop. 6th ed. 365, on uses modeled on the fidei-commission; 2 Washburn, Real Prop. 6th ed. 366, defining "use."

Trust interfering with rights of third parties.

Cited in Freedman's Sav. & T. Co. v. Earle, 110 U. S. 710, 28 L. ed. 301, 4 Sup. Ct. Rep. 226, holding that the creation of a trust will not be permitted to interfere with the rights of third parties.

Trust estate as governed by legal principles.

Cited in Goddard v. Whitney, 140 Mass. 92, 3 N. E. 30, holding whatever would be deemed the rule of law if it were a legal estate, is applied in equity to a trust estate; Loring v. Eliot, 16 Gray, 568, holding that trusts are subject to the same rules of descent and are deemed capable of the same limitations as legal estates; Miller v. Bingham, 36 N. C. (1 Ired. Eq.) 423, 36 Am. Dec. 58, holding that equity considers a trust as an estate in possession; Slifer v. Beates, 9 Serg. & R. 166, holding that a trust is coextensive with the legal estate and will be considered as such, and the trustee as the legal owner; Hubbard v. Goodwin, 3 Leigh, 492, on the trust as being an estate in lands and governed by the same laws as govern real estate in general; Croxall v. Shererd, 5 Wall. 268,

18 L. ed. 572, holding that trust estate is descendable, devisable, alienable and barrable by act of parties and by matter of record.

Cited in 2 Beach, Trusts, 1277, on devolution of trust estate; 2 Washburn, Real Prop. 6th ed. 451, on declaration of trust in land as disposition of the land.

Estate and rights cestui que trust.

Cited in Wilhelm v. Folmer, 6 Pa. 296, on the estate of the cestui que trust in the trust property; Campbell v. Morris, 3 Harr. & McH. 535, to the point that equitable interest of cestui que use of land is not subject to attachment at law.

Cited in 1 Beach, Trusts, 41, on right of corporation to be beneficiary of trust; 1 Beach, Trusts, 42, on right of alien to be beneficiary of a trust; 1 Beach, Trusts, 432, on constructive trust from purchase with notice; 2 Beach, Trusts, 1572, on execution of trust by the court; 2 Washburn, Real Prop. 6th ed. 366, on remedy by subpœna for enforcing rights of cestui que use; 2 Washburn, Real Prop. 6th ed. 376, as to how uses may be lost.

Objections to jurisdiction of court of equity.

Cited in Miller v. Furse, Bail. Eq. 187, holding that an objection to a bill in equity for want of jurisdiction should be by pleadings unless the defect is such that equity has no jurisdiction at all.

Cross-bill in equity.

Cited in Thomason v. Neeley, 50 Miss. 310, on the office of the cross bill in chancery practice.

Suit against state.

Cited in Hepburn's Case, 3 Bland, Ch. 95; Tessier v. Wyse, 3 Bland, Ch. 28,— on the power of creditors to enforce their claims against lands which have escheat to the state; Briggs v. The Upper Cedar Point, 11 Allen, 157, on the right of a private person to maintain a suit in equity against the state; Re Irish, 2 Manitoba L. Rep. 361, holding that lands unalienated, by patent, on July 1, 1885, remain under old law until brought under provisions of Real Property Act.

Incidents of forfeiture.

Cited in Wallach v. Van Riswick, 92 U. S. 202, 23 L. ed. 473, on the incidents of forfeiture.

Attorney General as representative of state.

Cited in Florida v. Georgia, 17 How. 478, 15 L. ed. 181 (dissenting opinion), on the Attorney General as the proper party to represent the state in an action.

Settled rules of law as binding upon courts.

Cited in Martin v. Martin, 25 Ala. 201, holding that a rule that has become settled law is binding upon the courts and must be followed.

Right of state to choose its tribunal, in which to sue.

Cited in Bradlaugh v. Clarke, 1 E. R. C. 667, L. R. 8 App. Cas. 354, 52 L. J. Q. B. N. S. 505, 48 L. T. N. S. 681, 31 Week. Rep. 677, 47 J. P. 405, on the right of the Crown to choose in what court it will sue to enforce a penalty.

Effect of grant of land to man and his heirs and assigns.

Cited in Brookman v. Smith, L. R. 6 Exch. 291, 40 L. J. Exch. N. S. 161, 24 L. T. N. S. 625, 19 Week. Rep. 1029, on the effect of a grant to a man and his heirs and assigns; Baughman v. Baughman, 2 Yeates, 410, to point that where lands are given to husband and wife and to heirs of husband, and if they die without heirs, remainder over, husband has estate in tail general.

Validity of grant of land with limitation over after failure of heirs generally.

Cited in Bailey v. Seabrook, Rich. Eq. Cas. 419, on the effect of a grant of land limited over after a failure of heirs.

Lands subject to dower.

Cited in Collins v. Torrey, 7 Johns. 278, 5 Am. Dec. 273, on the right of the widow to dower in a trust estate; Hicks v. Stebbins, 3 Lans. 39, holding that widow is not entitled to dower out of lands held under contract of purchase, where husband's interest has been aliened during coverture; Robertson v. Robertson, 25 Grant, Ch. (U. C.) 486, holding that woman is entitled to dower in lands on which she and her husband had joined in creating mortgage to secure husband's debt.

Discretion of court.

Cited in Heyward v. Bradley, 102 C. C. A. 509, 179 Fed. 325 (affirming 164 Fed. 107), holding that court in its discretion would not be authorized to deny specific performance of contract, independent of fraud, because specific performance would result in hardship to defendant.

10 E. R. C. 661, GALLARD v. HAWKINS, L. R. 27 Ch. Div. 298, 53 L. J. Ch. N. S. 834, 33 Week. Rep. 31, 51 L. T. N. S. 689.

Escheat.

Cited in Gray, Perpet. 2d ed. 169, on right of escheat as a vested interest not within rule against perpetuities.

10 E. R. C. 673, FLETCHER v. SMITON, 1 Revised Rep. 575, 2 T. R. 656.

Sufficiency of words of a will to constitute a devise of whole estate.

Cited in Harper v. Blean, 3 Watts, 471, 27 Am. Dec. 367, 42 Phila. Leg. Int. 336, on the sufficiency of a devise to create a fee simple estate; French v. M'Ilhenny, 2 Binn. 13, holding that in construing will intention of testator must prevail, only in so far as such intentions are consistent with rules of law, and with rules of construction as to what he does give; Taylor v. Peterson, 3 U. C. Q. B. O. S. 497, holding that where the husband devised to the wife all his real estate for life, and by mistake included the front half of a lot instead of the rear half which he owned, she took the life estate in the latter; Swart v. Gregory, 15 U. C. Q. B. 335, on the sufficiency of the words of a will to carry every interest which the testator has.

Cited in notes in 10 E. R. C. 776, on estate created by devise to person and his children or issue; 10 E. R. C. 843, on necessity of words of inheritance to passing of fee.

— Use of word, estate, as conveying an estate in fee.

Cited in Newkerk v. Newkerk, 2 Caines, 345, on the intention of the testator to give an estate in fee as being implied from the use of the word estate; Bradstreet v. Clarke, 12 Wend. 602, on the word estate as used in a will as conveying a fee; Jackson ex dem. Decker v. Merrill, 6 Johns. 185, 5 Am. Dec. 213, holding that the word, estate, in a will is sufficient to pass a fee; Turbett v. Turbett, 3 Yeates, 187, 2 Am. Dec. 369, holding that the word estate in a will, will carry every thing unless restrained by particular expressions; Hall v. Goodwyn, 2 Nott. & M'C. 382, on the use of the word estate in a will as conveying an estate of inheritance; O'Neil v. Carey, 8 U. C. C. P. 339, holding that

the words "all my right, interest and estate of, in and to the estate of Garret Miller," passed all the estate of the grantor therein.

10 E. R. C. 689, PERRIN v. BLAKE, 1 Dougl. K. B. 343, note, Hargrave, Law Tracts, 489, reversing the decision of the Court of King's Bench, reported in 1 W. Bl. 672, 4 Burr. 2579.

Rule in Shelley's Case.

Cited in Montgomery v. Montgomery, 3 Jo. & Lot. 47, 87 Ir. Eq. Rep. 740, holding that the rule in Shelley's case forbids the words heirs of the body to raise an estate by purchase in the heirs, where the ancestor takes a previous estate of freehold.

Cited in note in 29 L.R.A.(N.S.) 976, 978, 979, 981 983, 989, 993, 1001, 1016, 1042, 1051, 1060, 1061, 1067, on rule in Shelley's case.

The decision of the Court of King's Bench was cited in Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762, on the history of the litigation concerning the rule in Shelley's case; Starnes v. Hill, 112 N. C. 71, 22 L.R.A. 598, 16 S. E. 1011, on the operation and force of the rule in Shelley's case; Crosby v. Davis, 2 Clark (Pa.) 403, holding that the rule in Shelley's case is confined to cases literally within it; Evans v. Evans [1892] 2 Ch. 173, 61 L. J. Ch. N. S. 456, 67 L. T. N. S. 152, 40 Week. Rep. 465, on the origin of the rule in Shelley's case.

— Contrary intention of testator.

Cited in Martling v. Martling, 55 N. J. Eq. 771, 39 Atl. 203, holding that where the rule in Shelley's Case is applicable it cannot be prevented from operating by expressions to the contrary in the will; Pedder v. Hunt, L. R. 18 Q. B. Div. 565, 56 L. J. Q. B. N. S. 212, 56 L. T. N. S. 687, 35 Week. Rep. 371, holding that where it was clearly the intent that the rule should not apply, the word heirs will not be treated as a word of limitation but as one of purchase.

Cited in 2 Washburn, Real Prop. 6th ed. 564, on application of rule in Shelley's case contrary to expressed intention.

The decision of the Court of King's Bench was cited in Mallery v. Dudley, 4 Ga. 52, holding that the operation of the rule was affected by the intention of the parties; Beacroft v. Strawn, 67 Ill. 28, holding that a devise to one for his own life and to the children of his body is not affected by the operation of the rule, and the first takes a life estate only; Butler v. Huestis, 68 Ill. 594, 18 Am. Rep. 589, holding that the intention of the testator would govern to operation of the rule; Carpenter v. Van Olinder, 129 Ill. 42, 2 L.R.A. 455, 11 Am. St. Rep. 92, 19 N. E. 868, holding a devise to one for life and then to the heirs of the life tenant, will be construed as a devise in fee even though contrary to the intention of the testator; Tanner v. Livingston, 12 Wend. 83, holding that the rule in Shelley's case must give way to the plain, apparent intention of the testator; Warnock v. Wightman, 1 Brev. 331, holding that if the intention of the testator be clear, the word, heirs, may be construed as a word of description and they shall take as purchasers; Chipps v. Hall, 23 W. Va. 504, on immateriality of intention or of wording where limitations fall within the rule.

— Applications of rule.

Cited in Doyle v. Andis, 127 Iowa, 426, 69 L.R.A. 953, 102 N. W. 177, 4 Ann. Cas. 18, holding that a grant to one for life and then to his heirs is a grant in fee; Montgomery v. Montgomery, 3 Jo. & Lot. 47, 8 Ir. Eq. Rep. 740, holding that a devise to the son, and in case he died leaving heirs by a second wife then to go to those heirs otherwise to other grandchildren was a devise for life only;

Van Grutten v. Foxwell [1897] A. C. 658, 66 L. J. Q. B. N. S. 745, 77 L. T. N. S. 170, on the application of the rule in Shelley's case.

Cited in notes in 10 E. R. C. 757, 758, on creation of estate tail by gift to "heirs of the body" following gift of same subject to the praepositus; 25 E. R. C. 667, on words in will creating an estate for life.

The decision of the Court of King's Bench was cited in Norris v. Hensley, 27 Cal. 439, holding a devise of one third of land to each of three persons for life and then to go to their heirs, was a grant in fee of one third to each of them; Baker v. Scott, 62 Ill. 86, holding a devise of rents and profits, the principal to go to the person's heirs, is a devise of the principal; Hageman v. Hageman, 129 Ill. 164, 21 N. E. 814, holding that the application of the rule depends not upon the quantity of estate devised to the ancestor but upon the estate devised to the heir; Vangieson v. Henderson, 150 Ill. 119, 36 N. E. 974, holding that a devise to one for life and then to go to her heirs in fee, was a devise of the land to the first in fee; Dick v. Ricker, 222 Ill. 413, 113 Am. St. Rep. 426, 78 N. E. 823, holding a grant to a daughter for her life and then to her children of her body begotten in fee tail forever creates a fee tail estate in her; Siceloff v. Redman, 26 Ind. 251, holding a devise to one for his use and benefit during his life and then to his heirs and assigns is a devise in fee under the rule in Shelley's case; Stephenson v. Hagan, 15 B. Mon. 282, holding that under deed to J. P. and D. P. his wife, for life, and then to "heirs of their bodies," fee simple vested in their children; Jones v. Dimmock, 2 Mich. 87, holding that under will devising to son land during his lifetime and then to become property to male heirs of such son, estate tail was created, which by statute of 1827, was changed into allodial estate; Lytle v. Beveridge, 58 N. Y. 592, holding a devise to a son for life, but if he died without legitimate heirs the property to go to another son was a devise to the first for life and the second in fee if the first left no children; Rogers v. Rogers, 3 Wend. 503, 20 Am. Dec. 716, holding a devise to one for life and after his death to his children, and to their heirs and assigns forever gives a life estate to him and a fee to the children; Doe ex dem. Ross v. Toms, 15 N. C. (4 Dev. L.) 376, holding a devise to one for life and after her death to be equally divided among the male and female heirs of her body, and for want of such heirs over to another, gives an estate tail; Mills v. Thorne, 95 N. C. 362; Miller v. Lynn, 7 Pa. 443,—holding a devise to the son of all the estate, and after his death to his children equally, was a life estate to him and in fee to his children; Jones v. Rees, 6 Penn. (Del.) 504, 16 L.R.A.(N.S.) 734, 69 Atl. 785, holding that rule in Shelley's case does not extend to bequests of personalty; Buist v. Dawes, 4 Rich. Eq. 421 (dissenting opinion), on construction of will giving estate to one and at his death to heirs of his body; Tidball v. Lupton, 1 Rand. (Va.) 194, holding that a devise to the daughter and to her and to the heirs of her body and to them and their heirs and assigns forever was a devise of an estate tail to her; Re Cleator, 10 Ont. Rep. 326, holding that a devise to a son for his life and then to the heirs of his body, or if there were none, to others, was a grant of an estate tail to the son; Evans v. King, 23 Ont. Rep. 404, holding that a grant to the son for life and then to his lawful issue in fee, or to his daughter upon the same conditions if there were no living issue of the son, gave an estate in tail to the son, according to the rule in Shelley's case.

The decision of the Court of King's Bench was distinguished in Smith v. Hastings, 29 Vt. 240, holding that a devise to one for life, with remainder to his heirs in fee, was a devise of an estate for life if such was the testator's intention, under the state statutes.

The decision of the Court of King's Bench was doubted in Schoonmaker v. Sheely, 3 Denio, 485, holding that a devise to one for life and after his death to his heirs and their heirs and assigns forever, gave a fee to the estate.

Intention of the testator as governing the construction of the will.

Cited in Doe ex dem. Small v. Allen, 8 T. R. 497; Cholmondeley v. Clinton, 14 E. R. C. 578, 2 Meriv. 171, 2 Jac. & W. 1, 22 Revised Rep. 83, 16 Revised Rep. 167, 4 Bligh, 1,—on the courts giving effect to the intention of the testator in the construction of a will; Re Johnson, L. R. 2 Eq. 716, 12 Jur. N. S. 616, holding that the general intention of the testator will control the disposition of property rather than an apparent intention which is contrary to law; Price v. Johnson, 90 N. C. 592; Bilger v. Nunan, 118 C. C. A. 23, 199 Fed. 549,—holding that in construction of will, first and paramount duty of court is to ascertain from its terms, if possible, intention of testator; Westcott v. Meeker, 144 Iowa, 317, 29 L.R.A.(N.S.) 947, 122 N. W. 964; Anderson v. Messinger, 7 L.R.A.(N.S.) 1094, 77 C. C. A. 179, 146 Fed. 929,—holding that intention of testator, expressed in his will, shall prevail, provided it is consistent with rules of law.

The decision of the Court of King's Bench was cited in Smith v. Bell, 6 Pet. 68, 8 L. ed. 322; Shaw v. Hassey, 41 Me. 495,—holding that the testator's intention as expressed in his will shall prevail, provided it be consistent with the rules of law; Stevens v. Underhill, 67 N. H. 68, 36 Atl. 370 (dissenting opinion),—on the intention of the testator as governing the construction of the will even though contrary to a rule of law; Johnson v. Currin, 10 Pa. 498, holding that the intention of the testator will govern the construction of the will; Colton v. Colton, 127 U. S. 300, 32 L. ed. 138, 8 Sup. Ct. Rep. 1164; Adams v. Cowen, 177 U. S. 471, 44 L. ed. 851, 20 Sup. Ct. Rep. 668; Shriver v. Lynn, 2 How. 43, 11 L. ed. 172; Armstrong v. Galusha, 43 App. Div. 248, 60 N. Y. Supp. 1; Bank of Florence v. Gregg, 46 S. C. 169, 24 S. E. 64,—on the intention of the testator as expressed in the will as prevailing in the construction of the will; Phillips v. Phillips, 10 Ir. Eq. Rep. 513, on the testator's intention as governing the construction of a will.

— Words having technical legal meaning.

The decision of the court of King's Bench was cited in Deemer v. Kessinger, 206 Ill. 57, 69 N. E. 28, holding that if the words used by a testator have a settled legal meaning, the intention expressed by such words must be given effect, whatever the intention of the testator; Blagge v. Miles, 1 Story, 426, Fed. Cas. No. 1,479, on the establishment of the rule that in a will intention controls; Glendenning v. Dickinson, 15 B. C. 254, holding that if words are added to devise showing that word "heirs" was not intended to be used in ordinary sense, but to designate some particular person, effect may be given to intention of testator.

10 E. R. C. 714, JESSON v. WRIGHT, 2 Bligh, 1, 21 Revised Rep. 1.

"Heirs of the body" and "issue."

Cited in Holt v. Pickett, 111 Ala. 362, 20 So. 432, holding that under devise to daughter during natural life, and at her decease to be equally divided among heirs of her body, addition of words "equally divided" does not change "heirs of her body," as used in devise, into words of purchase, so as to prevent operation of rule in Shelley's case; Burtis v. Doughty, 3 Bradf. 287, holding that word "heirs" will not be interpreted as word of limitation, if intention be apparent to use it in another sense; Monroe v. Douglass, 5 N. Y. 447, holding that the words, heirs of the body, will give an estate tail when used in a testamentary

settlement; Kingsland v. Rapelye, 3 Edw. Ch. 1, holding that words, "lawful issue," as used in a devise are synonymous in effect with the words, heirs of the body; Grimes v. Shirk, 12 Lanc. L. Rev. 233, holding that superadded words of limitation alone will not make "heirs of body" words of purchase; Buist v. Dawes, 4 Rich. Eq. 421 (dissenting opinion), on construction of will giving estate to one and at his death to heirs of his body; Hancock v. Butler, 21 Tex. 804, holding that a grant to one for his natural life and then to the lawful issue forever, the words lawful issue are words of purchase; Moore v. Brooks, 12 Gratt. 135, holding that the words heirs lawfully begotten were words of limitation; King v. Evans, 24 Can. S. C. 356 (affirming 21 Ont. App. Rep. 519, which reversed 23 Ont. Rep. 404), holding the word issue though primarily equivalent to the words heirs of the body, is a more flexible expression and more easily diverted by context; Re Cleator, 10 Ont. Rep. 326, on the meaning of the words, heirs of the body; Fuller v. Anderson, 20 Ont. Rep. 424, holding that the words, "heirs of her body through her marriage with me" imported no different meaning than heirs of her body; Lees v. Mosley, 25 E. R. C. 643, 5 L. J. Exch. N. S. 78, 41 Revised Rep. 348, 1 Younge & C. Exch. 589, holding that the word issue as used in a will was not as technical a word as heirs of the body and does not require as much evidence to make it yield to the intention of the testator; Doe ex dem. Bosnall v. Harvey, 4 Barn. & C. 610, 7 Dowl. & R. 78, 4 L. J. K. B. 18, on the words, heirs of the body as being words of limitation and not of purchase; Woodhouse v. Herrick, 24 L. J. Ch. N. S. 649, 1 Kay & J. 352, 3 Eq. Rep. 817, 3 Week. Rep. 303, holding that in will the word issue will be construed to mean heirs of the body, and includes descendants for all time; Gummoe v. Howes, 26 L. J. Ch. N. S. 323, 23 Beav. 184, 3 Jur. N. S. 176, 5 Week. Rep. 219, holding that the words, heirs of the body, and children, will in the construction of a will, be held to mean the same; Roddy v. Fitzgerald, 6 H. L. Cas. 823, holding that a gift over to the issue meant the same as one to the heirs of the body.

Cited in notes in 10 Eng. Rul. Cas. 772, on construing word "issue" in a will as a word of limitation or otherwise; 10 E. R. C. 750, 753, on creation of estate tail by gift to "heirs of the body" following gift of same subject to the praepositus.

Distinguished in Prescott v. Prescott, 10 B. Mon. 56, holding that the words, heirs of the body, in a devise, are properly used as words of limitation, but they may be used as words of purchase.

Rule in Shelley's Case.

Cited in Doyle v. Andis, 127 Iowa, 36, 69 L.R.A. 953, 102 N. W. 177, 4 Ann. Cas. 18, holding that a grant to one for his natural life and then to his heirs, under the rule in Shelley's case, gives the grantee a fee simple; Hall v. Gradwohl, 113 Md. 293, 29 L.R.A.(N.S.) 954, 77 Atl. 480, holding that request of stock to be invested and income paid to testator's daughter for life, and at her death to be equally divided among her children, or legal heirs, does not under rule in Shelley's case, vest fee in daughter; Kensett v. Safe Deposit & T. Co. 116 Md. 526, 82 Atl. 981, holding that where deed of trust provides that trustees are to pay to grantor or his wife or either of them income of property, and upon death of survivor property is to vest in "next of kin of grantor" rule in Shelley's case did not apply; Quick v. Quick, 21 N. J. Eq. 13, holding that a devise to the widow for life, and then to the heirs as the law directs in case of dying intestate, prevents the operation of the rule in Shelley's case; Carroll v. Burns, 42 Phila. Leg. Int. 153, holding that devise to daughters for life and after their death to their issue and heirs of issue, is within rule; Ferris v. Ferris, 9

Ont. Rep. 324, holding a grant by anti-nuptial agreement to the survivor of either for life and then to his heirs, was a grant in fee; Re Jeaffreson, L. R. 2 Eq. 276, 35 L. J. Ch. N. S. 622, 12 Jur. N. S. 660, 14 Week. Rep. 759, on the operation of the rule in Shelly's case; Van Grutten v. Foxwell [1897] A. C. 658, 66 L. J. Q. B. N. S. 745, 77 L. T. N. S. 170, on the application of the rule in Shelley's case.

Cited in notes in 29 L.R.A.(N.S.) 989, 1048, 1050, 1080, on rule in Shelley's case; 10 E. R. C. 801, on invalidity of condition attempting to fetter right of tenant in tail to enlarge his estate into a fee simple; 10 E. R. C. 847, on necessity of words of inheritance to passing of fee.

Cited in 2 Washburn Real Prop. 6th ed. 564, on case to which rule in Shelley's case cannot apply.

— Use of synonym for heirs.

Cited in Clifford v. Koe, L. R. 5 App. Cas. 447, 43 L. T. N. S. 322, 28 Week. Rep. 633, holding that the use of the word children in place of heirs did not affect the application of the rule.

— Over to heirs or issue "share and share alike."

Cited in Burges v. Thompson, 13 R. I. 712, holding that a devise to a son for life and then to his surviving heirs at law, share and share alike, did not come under the operation of the rule in Shelley's case; Davenport v. Eskew, 69 S. C. 292, 104 Am. St. Rep. 798, 48 S. E. 223, holding that the words, "then to be distributed equally between her remaining heirs," is not sufficient to take the devise out of the operation of the rule in Shelley's case; Sims v. Georgetown College, 1 App. D. C. 72, holding that the addition of the words share and share alike, after the words heirs, does not change its legal import.

Distinguished in Mills v. Thorne, 95 N. C. 362, holding that the adding of the words, equally divided amongst them, referring to the heirs, prevents the application of the rule in Shelley's case.

Construction of a devise to one for life then over to his heirs.

Referred to as leading case in Clarke v. Smith, 49 Md. 106, holding that a devise to the son to hold for life and no longer and then to be divided amongst his heirs equally, gives the son a fee.

Cited in Watts v. Clardy, 2 Fla. 369, holding a devise to one for life and then to the heirs of her body, share and share alike, gives an estate tail; Tucker v. Adams, 14 Ga. 548, holding a bequest to be held for life and then equally divided amongst their heirs of the body as their own property grants but a life estate to the ancestor; Norris v. Hensley, 27 Cal. 439, holding that a devise to three persons of one third of the property, and after their death to go to their heirs and assigns gives to each a fee simple estate in one third; Daniel v. Thompson, 14 B. Mon. 533, holding that a devise to two sons and their heirs forever gives them a defeasible fee according to a codicil giving the land to the daughters in case of no heirs; Jordan v. Roach, 32 Miss. 481, holding that death of issue under twenty one years of age does not import definite failure of issue, or failure of issue within that period, under words providing for limitation upon contingency of issue; Den ex dem. McMurtrie v. McMurtrie, 15 N. J. L. 276, holding that an estate to two persons for life and then to their male issue, or if none to return to the two former and descend according to law gave the first two an estate in tail male; Doe ex dem. Ross v. Toms, 15 N. C. (4 Dev. L.) 376, holding that a devise to one for life and then to be equally divided among the heirs of her body, if there are none then over, gives an estate tail; Swain v. Rascoe, 25 N. C. (3 Ired. L.) 200, 38 Am. Dec. 720, on the effect of a bequest of personalty to a

person and then to the heirs of his body; Bradley v. Jones, 37 N. C. (2 Ired. Eq.) 245, holding bequest to the daughter for life and to be equally divided amongst her heirs gives an estate tail; Powell v. Board of Domestic Missions, 22 Phila. Leg. Int. 60, holding that devise to son for life and, if he shall leave issue, to issue, creates life estate only in son; Bullock v. Waterman Street Baptist Soc. 5 R. I. 273, holding that a devise to a son for life and then to his heirs forever is devise in fee, although a subsequent clause states that all bequests to heirs shall be to share and share alike; Polk v. Faris, 9 Yerg. 209, 30 Am. Dec. 400, holding that a devise to a person for life and then to the heirs of his body in fee, or in default of such heirs to another vests the fee in the first; De Vaughn v. Hutchinson, 165 U. S. 566, 41 L. ed. 827, 17 Sup. Ct. Rep. 461, holding that a devise to one for life and then to be equally divided amongst his heirs in fee share and share alike, gives to the ancestor a life estate; Osborne v. Shrieve, 3 Mason, 391, Fed. Cas. No. 10,598, holding a devise to one for life and then to his male heir and his heirs for ever, or if none such male heir, then to another, gives to the former an estate in tail; Sisson v. Seabury, 1 Sumn. 235, Fed. Cas. No. 12,913, holding that a devise to one person for life and then to his male children and their heirs forever, to be equally divided amongst them gives the ancestor a life estate, with a contingent remainder to the children; Evans v. King, 23 Ont. Rep. 404 (reversed in 21 Ont. App. Rep. 519 and 24 Can. S. C. 356), holding that a devise to a son for life and then to the lawful issue of the son if there be any, then over, was a devise of an estate tail to the son; Sisson v. Ellis, 19 U. C. Q. B. 559, holding that a devise to the widow for life, and then equally to her two children for life, and after the death of either, their shares to be divided among their children if any, otherwise to another, gave the children an estate in tail; Doe ex dem. Atkinson v. Featherstone, 1 Barn. & Ad. 944, 9 L. J. K. B. 163, 35 R. R. 491, holding a devise to one for life and then to her heirs of her body by her husband to be divided equally amongst them share and share alike, the first devisee took an estate tail; Dunk v. Fenner, 2 Russ. & M. 557, holding that a devise of the rents and profits of land to a daughter for her life and then to her heirs as tenants in common, and if she should die without issue, then over, the daughter took an estate tail; Heather v. Winder, 5 L. J. Ch. N. S. 41, holding that a devise to one for life, and at her death to go to her lawful issue, share and share alike, or if none then over, gave the former an estate tail; Key v. Key, 22 L. J. Ch. N. S. 641, 4 DeG. M. & G. 73, 1 Eq. Rep. 82, 17 Jur. 769, holding that where the estate was given to one for life, charged with certain annuities and then to his eldest surviving son, but in default of male issue to go to another, the first took an estate in tail male; Warren v. Travers, I. R. Rep. 2 Eq. 455, holding a provision in a will that in case of the death of the heirs of the body the estate should go over was not inconsistent with the first taker having an estate tail; Anderson v. Anderson, 30 Beav. 209, 7 Jur. N. S. 1067, 4 L. T. 198, 9 Week. Rep. 492, holding a devise to one for life then to the heirs of his body in fee as tenants in common or if there were no such heirs then to others, gave an estate in tail to the ancestor; Roddy v. Fitzgerald, 6 H. L. Cas. 823, holding that a devise of lands to one for life and then to his lawful issue in such proportions as he should appoint, gave the first devisees an estate tail by implication; Bowen v. Lewis, L. R. 9 App. Cas. 890, 54 L. J. Q. B. N. S. 55, 52 L. T. N. S. 189, holding a devise to a son for life and after his death to his legitimate children or if there are none to another was a devise of an estate tail; Sandes v. Cooke, Ir. L. R. 21 Eq. 445, holding a devise to the daughter for her life and to her lawfully begotten issue, or none such to another, was a devise in tail; Clinton v. Newcastle [1902] 1 Ch. 34, 69 L. J.

Ch. N. S. 875, 49 Week. Rep. 12, holding a devise to Charles if he marries a fit and worthy gentlewoman and has male issue, then to such issue and their descendants, gives an estate tail male to Charles.

Cited in note in 20 L.R.A. 517, on effect on prior takers of failure of gift because of remoteness.

Explained in Grimson v. Downing, 4 Drew. 125, 5 Week. Rep. 767, holding a devise to one for life remainder to the heirs of his body forever, equally, share and share alike, but if no heirs, then over, gave the ancestor an estate tail.

Intention of the testator as governing the construction of a will.

Referred to as a leading case in De Vaughn v. De Vaughn, 3 App. D. C. 50, holding that the intention of the testator must govern the construction of a will unless it conflicts with some rule of law which will not give way to it.

Cited in Cox v. Britt, 22 Ark. 567, holding that where the intention of the testator is incorrectly expressed, the court will give effect to the intention which is made manifest by the context; Bacon v. Nichols, 47 Colo. 31, 105 Pac. 1082, holding that rule that as between absolutely irreconcilable clauses in will, last shall prevail, is to be applied only where all other rules of interpretation fail to disclose testator's intention; Fowler v. Duhme, 143 Ind. 248, 42 N. E. 623, holding that the intention of the testator should be carried out as far as possible in construing a will; Pue v. Pue, 1 Md. Ch. 382, holding that the general intention of the testator though first expressed shall govern the particular intent; Covenhoven v. Shuler, 2 Paige, 122, 21 Am. Dec. 73, holding that the intention of the testator as gathered from the whole will is to govern in the construction of the will; Angell's Petition, 13 R. I. 630, holding that the intention of the parties will govern the construction of technical words only when the intention to change their effect is clear; Jones's Appeal, 3 Grant, Cas. 169; Pell v. Mercer, 14 R. I. 412,—holding that the paramount intention will prevail where it is inconsistent with the particular special direction in a will; Carson v. Kennerly, 8 Rich. Eq. 259, holding that the intention of the testator is to govern the construction of a will; Price v. Cole, 83 Va. 343, 2 S. E. 200, holding that the general intention of a testator must prevail over the rule that of two repugnant clauses the last must prevail; Neville v. Dulaney, 89 Va. 842, 17 S. E. 475, holding that the intention of the testator shall be ascertained and enforced if possible; Wood v. Humphreys, 12 Gratt. 333, holding that if there is general intention in the will the courts are bound to give effect to it; Hooe v. Hooe, 13 Gratt. 245, holding that a will should be construed if possible so as to give effect to the evident intention of the testator; Meyers v. Hamilton Provident & Loan Co. 19 Ont. Rep. 358, on the rules of construction of wills; Re Richardson [1904] 1 Ch. 332, 73 L. J. Ch. N. S. 153, 52 Week. Rep. 119, 91 L. T. N. S. 169, on the construction of a devise according to the intention of the testator.

Technical words as being effective according to their technical meaning.

Cited in Young v. Kinnebrew, 36 Ala. 97, holding that there must be strong evidence of a contrary intention to warrant a court from giving technical words a meaning other that their technical one; Price v. Taylor, 28 Pa. 95, 70 Am. Dec. 105; Peterborough Real Estate Invest. Co. v. Patterson, 13 Ont. Rep. 142, on giving effect to the technical words in a will according to their technical meaning; Martling v. Martling, 55 N. J. Eq. 771, 39 Atl. 203, holding that if grantor or testator did not use word "heirs" in its technical sense, such word will be construed in its untechnical sense as word of purchase and not of limitation; Travers v. Casey, 36 N. B. 229, holding that if plain words are used,

such as are sufficient in themselves to pass property by will, they will be given their usual meaning and effect, and will not be controlled by previous recitals; Doe ex dem. Bosnall v. Harvey, 4 Barn. & C. 610, 7 Dowl. & R. 78, 4 L. J. K. B. 18; Doe ex dem. Gallini v. Gallini, 3 L. J. K. B. N. S. 71, 5 Barn. & Ad. 621, 2 Nev. & M. 619; Winter v. Perratt, 9 Clark & F. 606,—on the giving the technical words their technical meaning in the construction of a will.

Cited in Gray Perpet. 2d ed. 599, on effect of general and particular intent in connection with rule against perpetuities; 2 Sutherland Stat. Const. 2d ed. 747, on general rule for interpretation of words and phrases.

— Meaning varied by intention of testator as disclosed by will.

Referred to as a leading case in Miller v. Fleming, 7 Mackey, 139, on the power to qualify the meaning of technical words as used in a will.

Cited in Dudley v. Porter, 16 Ga. 613, holding that the words heirs of the body may be construed as words of purchase if there is any thing in the instrument to denote such intention; Williams v. Allen, 17 Ga. 81; Griswold v. Hicks, 132 Ill. 494, 22 Am. St. Rep. 549, 24 N. E. 63; Allen v. Craft, 109 Ind. 476, 58 Am. Rep. 425, 9 N. E. 919,—holding that the word, heirs, may be read to mean children if it decisively appears from the context that such was the intention of the testator; Shimer v. Mann, 99 Ind. 190, 50 Am. Rep. 82, holding that "heirs" might have been, but was not, used in the sense of children; Granger v. Granger, 147 Ind. 95, 36 L.R.A. 190, 46 N. E. 80, holding that if in connection with the words of inheritance the testator uses modifying words, these will be given effect; McNutt v. McNutt, 116 Ind. 545, 2 L.R.A. 372, 19 N. E. 115; Borgner v. Brown, 133 Ind. 391, 33 N. E. 92; Martling v. Martling, 55 N. J. Eq. 771, 39 Atl. 203,—holding that words will be given their technical effect unless it appears that the contrary was intended by the testator; Lasher v. Lasher, 13 Barb. 106, holding that wherever the intention of the testator is plain it will control the legal operation of the words, however technical they are; Kennedy v. Kennedy, 29 N. J. L. 185; Auman v. Auman, 21 Pa. 343,—holding that technical works, in a will, will be given their technical meaning unless it is explained away; Walker v. Lewis, 90 Va. 578, 19 S. E. 258, holding that technical words used in a will must be given effect in their technical meaning unless shown otherwise by the text; Reid v. Stuart, 13 W. Va. 338, holding that technical words should have their legal effect, unless from subsequent inconsistent words it is very clear, that testator meant otherwise; Re Manuel, 12 Ont. L. Rep. 286; Wright v. Wright, 16 U. C. Q. B. 184,—holding that technical words shall have their legal effect, unless from subsequent portions of the will, or inconsistent words it is clear that the testator meant otherwise; Barrett v. Winnipeg, 7 Manitoba L. Rep. 273 (dissenting opinion), on rule that technical words shall have their effect, unless from other words it is very clear testator meant otherwise; Fetherston v. Fetherston, 3 Clark & F. 67 (affirming 9 Bligh, N. R. 237), holding that where by plain words an estate tail is given in a will, it cannot be cut down to a life estate unless the intention of the testator to use the words as words of purchase is made clear; Montgomery v. Montgomery, 3 Jo. & Lat. 47, 8 Ir. Eq. Rep. 740, holding that where the intention of the testator is clearly shown to the contrary, words heirs of the body will be construed as words of purchase and not of limitation; Phillips v. Phillips, 10 Ir. Eq. Rep. 513, holding that the words heirs of the body as used in a will could be varied in meaning if the intent to so change then was clearly shown; Bradley v. Cartwright, 25 E. R. C. 661, L. R. 2 C. P. 511, 36 L. J. C. P. N. S. 218, 16 L. T. N. S. 587, 15 Week. Rep. 922, holding an estate to one for life with the power

of appointment to his heirs in fee, gave the ancestor but a life estate; Toller v. Attwood, 20 L. J. Q. B. N. S. 40, 15 Q. B. 929; Dodds v. Dodds, 11 Ir. Ch. Rep. 374; Allgood v. Blake, L. R. 7 Exch. 339, 41 L. J. Exch. N. S. 217, 21 Week. Rep. 58; Hampton v. Holman, L. R. 5 Ch. Div. 183, 46 L. J. Ch. N. S. 248, 36 L. T. N. S. 287, 25 Week. Rep. 459,—holding that the meaning of technical words in a will could be controlled by the context: Colclough v. Colclough, Ir. Rep. 4 Eq. 263, on the power of the testator to limit the legal effect of the word "issue:" Symons v. Leaker, L. R. 15 Q. B. Div. 629, 54 L. J. Q. B. N. S. 480, 53 L. T. N. S. 227, 33 Week. Rep. 875, 49 J. P. 775, holding that technical words are to be given their technical meaning unless some clear expression of a contrary intention is given.

10 E. R. C. 759, SLATER v. DANGERFIELD, 16 L. J. Exch. N. S. 51, 15 Mees. & W. 263.

Meaning of word "issue" as used in a will.

Cited in Drake v. Drake, 134 N. Y. 220, 17 L.R.A. 664, 32 N. E. 114, holding that in the absence of any indication of a contrary intention, the word issue in a devise means all descendants; Robins v. Quinliven, 79 Pa. 333, holding that word "issue" in will prima facie means heirs of body, and in absence of words showing it was used in restricted sense, is word of limitation; Pearce v. Rickard, 18 R. I. 142, 19 L.R.A. 472, 49 Am. St. Rep. 755, 26 Atl. 38, on the meaning of the words issue as used in testamentary dispositions; King v. Dougherty, 11 U. C. C. P. 481, holding that the word issue as used in the will in connection with the word aforesaid, gave the word issue a special meaning, and referred to a stated child.

Cited in 2 Thomas Estates, 1456, as to who take under gift to "issue."

—As word of purchase or of limitation.

Cited in Limanus v. Dugan, 46 Md. 402; Taylor v. Taylor, 63 Pa. 481, 3 Am. Rep. 565, 27 Phila. Leg. Int. 53,—holding that issue as used in a will is to be construed as a word of purchase or limitation as best suited the intention of the testator; Wistar v. Scott, 105 Pa. 200, 51 Am. Rep. 197, 15 W. N. C. 461, 42 Phila. Leg. Int. 48, holding, where the devise was to the male heirs then living of testator's son, the word issue was a word of purchase; O'Rourke v. Sherwin, 156 Pa. 285, 27 Atl. 43, 33 W. N. C. 38, holding that the word issue, uncontrolled by any explanatory words will be construed as word of limitation; Powell v. Board of Domestic Missions, 22 Phila. Leg. Int. 60, holding that devise to son and, if he shall leave issue, to issue, creates life estate only in son; Morgan v. Quinlevin, 33 Phila. Leg. Int. 109, holding that under devise to one for life, with remainder to his issue as tenants in common, with limitation to heirs of issue, issue take as purchasers in fee; Carroll v. Burns, 42 Phila. Leg. Int. 153, holding that devise to daughters for life and after their death to their issue and heirs of issue, vests in daughters an estate tail; Ferguson v. Ferguson, 2 Can. S. C. 497 (dissenting opinion), on the words issue as being construed words of limitation and not of purchase.

Cited in notes in 29 L.R.A.(N.S.) 1076, 1092, on rule in Shelley's case; 10 E. R. C. 751, on creation of estate tail by gift to "heirs of the body" following gift of same subject to the praepositus.

Cited in 2 Washburn Real Prop. 6th ed. 565, on limitations which are not within the rule in Shelley's case.

Construction of a will.

Cited in Gernet v. Lynn, 31 Pa. 94, 2 Phila. 312, 14 Phila. Leg. Int. 228,

holding a devise to one and then after his death to his children share and share alike gives a life estate to the first and the fee to the children; Gourley v. Gilbert, 12 N. B. 80, holding that where the construction of the will is doubtful from the context the court will construe it so as to be of the most benefit to the testator's family generally.

Cited in notes in 10 Eng. Rul. Cas. 815, as to when remainder is vested; 10 Eng. Rul. Cas. 832, as to when cross remainders will be implied.

10 E. R. C. 773, WILD'S CASE (RICHARDSON v. YARDLEY) 6 Coke, 16b, F. Moore, 397, Goldsborough 139, case 47.

Construction of will.

Cited in Dudley v. Mallery, 4 Ga. 52, holding that courts in construing disposition of personalty take hold of any words, to qualify or explain technical terms which otherwise would create estate tail; Hayes v. Marty, 45 Ind. App. 704, 84 N. E. 546 (on rehearing 45 Ind. App. 710, 87 N. E. 837), holding that under will devising to grandson certain land, and in subsequent clause providing that if grandson should die before reaching 21, property should be divided between testator's two children, but if said grandson should die leaving issue, land should descend to them gives grandson fee simple; Lee v. Baird, 132 N. C. 755, 44 S. E. 605, holding that where will provides that certain property shall be sold and proceeds divided amongst heirs of testator, grandchildren of testator take per stirpes; Chambers v. Union Trust Co. 235 Pa. 610, 84 Atl. 512, holding that under devise to nephew and to his children if any, and if not to heirs of testator's father in accordance with intestate laws, estate vested in heirs of testator's father upon death of nephew without children.

Cited in note in 10 E. R. C. 776–782, on estate created by devise to person and his children or issue.

Word children as word of limitation or of purchase.

Cited in Echols v. Jordan, 39 Ala. 24, holding that where the testator shows that such is his intention, the word, children, will be construed as a word of limitation; Scott v. Nelson, 3 Port. (Ala.) 452, 29 Am. Dec. 266, holding that word, "heirs" will be accepted as word of purchase if such was intention of testator; Caulk v. Caulk, 3 Penn. (Del.) 528, 52 Atl. 340, on the words, child or children, as being words of purchase; Sanford v. Sanford, 58 Ga. 259, holding that a devise to one for life and after his death to his children or if none then to another, did not create an estate tail; Sumpter v. Carter, 115 Ga. 893, 60 L.R.A. 274, 42 S. E. 324, holding that a devise to a person and his children, the word children was a word of purchase; Beacroft v. Strawn, 67 Ill. 28, holding a devise to a person and the children of his body the word children is a word of purchase; Allen v. Hoyt, 5 Met. 324, holding that a devise to a woman and her children, the word children was word of purchase; Den ex dem. Howell v. Howell, 20 N. J. L. 411; Chrystie v. Phyfe, 19 N. Y. 344,—on the word children as a word of limitation; Crandell v. Barker, 8 N. D. 263, 78 N. W. 347, to the point that when devise of remainder is not to "heirs" or "heirs of body" but to "children" they take as new stock, and not as heirs; Gernet v. Lynn, 31 Pa. 94, 2 Phila. 312, 14 Phila. Leg. Int. 228, holding that a devise to one for life and then to his children equally, gives the devisee a life estate; Guthrie's Appeal, 37 Pa. 9, holding that the word children will be construed as a word of purchase unless a contrary intention of the devisee was clearly shown; Yarnall's Appeal, 70 Pa. 335, 4 Legal Gaz. 177, 29 Phila. Leg. Int. 189, holding that the words, issue, children and the like are words

of limitation or of purchase according to the intention of the testator. Peale's Estate, 31 W. N. C. 551, on the word children as word of purchase; Buckalew's Estate, 5 Luzerne Leg. Reg. 47, holding that word "children" in its usual import, is word of purchase; Ferril v. Talbot, Riley, Eq. 247. Reported fully in Bailey Eq. 535, holding that an express gift to issue, generally and a limitation over in the event of the first takers' dying without issue living at his death, will confine the gift to such issue as are living at that time and they will take as purchasers; Gourley v. Gilbert, 12 N. B. 80, holding that where absolutely necessary to effectuate the testator's intention these words will be converted into words of limitation; McKay v. Annand, 5 N. S. 247, holding a devise to one for life and then to devolve to his eldest son in a line of succession forever, gave the ancestor a life estate only; Peterborough Real Estate Co. v. Patterson, 15 Ont. App. Rep. 751 (affirming with variation 13 Ont. Rep. 142), holding that a devise to a man and his wife for life and then to their children and their children's children, the word children was a word of purchase, and the words children's children words of limitation; Stokes v. Heron, 3 E. R. C. 160, 12 Clark & F. 161, on the application of the rule in Wild's case to personalty.

Cited in note in 12 L.R.A.(N.S.) 283, 285, 286, 289, 299, 307, 308, on "children" as word of purchase of limitation.

Distinguished in Connor v. Gardner, 230 Ill. 258, 15 L.R.A.(N.S.) 73, 82 N. E. 640, holding that under a statute making words of inheritance unnecessary to pass a fee, the devise to a person and his children passes a fee, if such is the testator's intention; Akers v. Akers, 23 N. J. Eq. 26, holding that the word children will not be construed as a word of limitation and synonymous with the word heirs, if contrary to the testator's intention; Re Mordecai Jones [1909] W. N. 228, 101 L. T. N. S. 549, holding that where the gift is in succession to the ancestor and not concurrently therewith the rule in Wild's case does not apply.

— As dependent on existence or nonexistence of children at time.

Cited in Catterlin v. Hardy, 10 Ala. 511, on a devise to a person and his children, where there are children living at the date of the devise, as necessitating the construction of the word children as one of purchase; Re Sanders, 4 Paige, 293, holding that if an estate is given to a man and his children, where there are no children in esse at the time the testator made the will, the word children is a word of limitation; Reeder v. Spearman, 6 Rich. Eq. 88, holding a devise of land to a son for life and to his children after his death, and if there were none then living, over to another, the son took a life estate and the children a remainder as purchasers.

Children as synonymous with word descendants.

Cited in Edwards v. Gaulding, 38 Miss. 118, on the word children as being synonymous with the word descendants; Mason v. Pate, 31 Ala. 379; Frowitt v. Rodman, 37 N. Y. 42; Com. v. Gilkeson, 9 Pa. Dist. R. 679, on the word children as comprehending grandchildren or issue generally; Wiley v. Smith, 3 Ga. 551, holding that word children, as applied to testamentary instruments means all descendants; whether mediate or immediate; Johnson v. Johnson, 2 Met. 331, holding that word "children" in will embraces immediate descendants only; Smith v. Hilliard, 3 Strobh. Eq. 211, on word "children" when relating to persons unborn as synonymous with word "issue."

Devise to ancestor and his living children as making all joint tenants.

Cited in McCroan v. Pope, 17 Ala. 612, holding that if devise be to one and his children, and he have children at date of will and death of testator, parent

and children living at testator's death take jointly under will: Berry v. Hubbard, 30 Ala. 191, holding a deed of gift to a wife and her children, naming them, and to their heirs, gives them all a joint tenancy in the property; Jackson v. Coggin, 29 Ga. 403, holding that a bequest to a woman and her children gave her and her children a joint tenancy in the property; Baird v. Brooklyn, 86 Ga. 709, 12 L.R.A. 157, 12 S. E. 981, on a deed to one and to her children, as giving afterborn children any interest in the land; King v. Rea, 56 Ind. 1, on a deed to a woman and her children as giving her and an unborn child a tenancy in common, though not as to children not then in being; Faloon v. Simshauser, 130 Ill. 649, 22 N. E. 835; Biggs v. McCarty, 86 Ind. 352, 44 Am. Rep. 320,—holding a devise to a woman and her children gave her and her child living at the time of the testator's death, a tenancy in common in the land, but not so as to children born after; Moore v. Gary, 149 Ind. 51, 48 N. E. 633, holding that at common law a devise to one and his children, if there were children living, made them joint tenants with the ancestor; Hall v. Stephens, 65 Mo. 670, 27 Am. Rep. 302, holding a devise to a man and his family vests in him, his wife and children, the estate, as joint tenants; Jones v. Jones, 13 N. J. Eq. 236, holding lands devised to a woman and her children, she having children living at the time of the devise, the children become joint tenants with the mother; Den v. Gifford, 9 N. J. L. 46, on the construction the word "children" as a word of purchase as making the child a joint owner with the ancestor; Moore v. Leach, 50 N. C. (5 Jones L.) 818, holding a devise of lands to a woman and her children gave her and her children a joint estate in the lands; Lewis v. Stancil, 154 N. C. 326, 70 S. E. 621, holding that devise of land to grandson and his children, vests fee in grandson and his children living at time of testator's death, as tenants in common; Graham v. Flower, 13 Serg. & R. 439, holding a devise to a person and her children, and their heirs and assigns in severalty in certain proportions, the children take immediately with their mother; Coursey v. Davis, 46 Pa. 25, 84 Am. Dec. 519, holding that conveyance to married woman and her children exclusively, and their heirs and assigns, to have and to hold to her and to her children exclusively, vests in her life estate with remainder in fee to children as class; Taylor v. Taylor, 63 Pa. 481, 3 Am. Rep. 565, 27 Phila. Leg. Int. 53, holding that where limitation is to parent for life and to his children in remainder, parent is not tenant in tail, whether there are children or not; Porter v. Lancaster, 91 S. C. 300, 74 S. E. 374, holding that deed to wife and issue of her body by grantor, carries fee to wife and such issue living at time of execution of deed, as tenants in common; Hurd v. French, 2 Tenn. Ch. 350, on a grant to a wife and her issue then living as making them all joint tenants in the land; Nickell v. Handly, 10 Gratt. 336 (dissenting opinion), on right of children to take jointly with parent by purchase under devise to parent and child; Fitzpatrick v. Fitzpatrick, 100 Va. 552, 93 Am. St. Rep. 976, 42 S. E. 306, holding that gift to wife and children vests joint estate in wife and children in equal proportions; Graham v. Graham, 4 W. Va. 320 (dissenting opinion), on a devise to a widow and her children as making them all joint tenants in the land; Wills v. Foltz, 61 W. Va. 262, 12 L.R.A.(N.S.) 283, 56 S. E. 473, holding that devise to three daughters "and their children," daughters having children at testator's death, confers upon daughters and their children joint estate in equal proportions; Hunter v. People's Bank, Russell (N. S.) 91, holding that a devise to a daughter and her children, gave the children in being a vested interest in the fund; Scott v. Gohn, 4 Ont. Rep. 457, on the

devise to a widow and children as making the widow and children tenants in common to the exclusion of afterborn children.

Distinguished in Findlay v. Riddle, 3 Binn. 139, 5 Am. Dec. 355, holding a devise to one for life and then to his heirs as tenants in common, or if he leave no issue to others, gives the first only a life estate; Fox v. Dunmon, 4 Phila. 323, 18 Phila. Leg. Int. 229, holding that a devise to sisters and their children gives an estate for life with remainder to the children; Johnson v. Johnson, McMull. Eq. 345, holding that a devise to a daughter and to her children after her gave the children no rights as the immediate devisees or as remaindermen; Mosby v. Paul, 88 Va. 533, 14 S. E. 336, holding that a devise to a daughter and her children did not make the children joint tenants with the mother; Martin v. Martin, 52 W. Va. 281, 44 S. E. 198, holding a devise to one and to his child or children by him begotten in lawful wedlock, or if he should die without leaving any children then to another, does not give the children any interest in the lands as joint tenants; Young v. Denike, 2 Ont. L. Rep. 725; Re Sharon, 12 Ont. L. Rep. 605,—holding that where the gift is not immediate but is to one for life and then to the children the rule in Wilde's Case does not apply.

— Where no children are in esse as giving an estate tail.

Cited in Wiley v. Smith, 3 Ga. 551; Parkman v. Bowdoin, 1 Sumn. 359, Fed. Cas. No. 10,763,—holding a devise to a son and his children, with remainder over in case of death without children, gave him an estate tail if at the time will was made he had no children; Butler v. Ralston, 69 Ga. 485, holding that a devise of land to daughters to be given them upon their marriage and for themselves and their children gives them an estate tail; Reed v. Welborn, 253 Ill. 338, 97 N. E. 669, holding that devise to testator's daughter "and her children" created fee in daughter if she had no children at testator's death; Sagers v. Sagers, 158 Iowa, 729, 43 L.R.A.(N.S.) 562, 138 N. W. 911, holding that absence of heirs specified will cause reverter, at death of life tenant, to heirs of testator of devise to one and heirs of his own body; Nightingale v. Burrell, 15 Pick. 104, holding a devise to a person and his children, where there were no children living when the devise was made, gave an estate tail; Crawford v. Clark, 110 Ga. 729, 36 S. E. 404; Malcolm v. Malcolm, 3 Cush. 472,—on the grant to an ancestor and his children as giving an estate tail where there are no children living when devise was made; Silliman v. Whitaker, 119 N. C. 89, 25 S. E. 742, holding that a devise to a woman and all her children if she shall have any gives her a a fee tail estate, if at the time of the testator's death she has no children, which becomes a fee simple under the statute; Seibert v. Wise, 70 Pa. 147, holding an estate devised to one, and to his heirs, the survivor of them for ever gave the devisee an estate tail if at the time he had no children; Clark v. Baker, 3 Serg. & R. 470, on a devise "to them and to their issue" as creating an estate tail; Bassett v. Hawk, 45 Phila. Leg. Int. 206, 18 Pittsb. L. J. N. S. 319, holding that under devise to son for life and to his heirs, if any, at his death, son dying without heirs, takes fee tail; Addison v. Addison, 9 Rich. Eq. 58, on a devise to one and to his children as giving an estate tail if there are no children living; Doe ex dem. Thomason v. Anderson, 4 Leigh, 118, holding a devise to a daughter and to her heirs forever, but if she should die leaving no child to revert to the testator's estate, gave her an estate tail; Grant v. Fuller, 33 Can. S. C. 34, holding that under will devising land to D. for life "and to her children if any at her death," if no children to testator's son and daughter, at death of D. her children took fee; Jesson

v. Wright, 10 E. R. C. 714, 2 Bligh, 1, 21 Revised Rep. 1, on a devise to a man and his children as giving an estate tail if there were no children living, when devise was made.

Cited in note in 25 E. R. C. 684–686, on gift over in default of issue as defeating an estate tail created by devise to designated person and his issue.

Distinguished in Vanzant v. Morris, 25 Ala. 285, holding that where the time of the taking effect of the bequest is postponed, the fact that the person to whom the property is given, has no children, does not make the word one of limitation; Brown v. Brown, 97 Ga. 531, 33 L.R.A. 816, 25 S. E. 353, holding a deed to a person and to his legal heir or heirs, did not create an estate tail at all; Davis v. Ripley, 194 Ill. 399, 62 N. E. 852; Boehm v. Baldwin, 221 Ill. 59, 77 N. E. 454,—holding under a statute making words of inheritance unnecessary to pass a fee, that a devise to a man and his children, passes a fee where there are no children living; Wheatland v. Dodge, 10 Met. 502, holding that a devise to a man and to his children or grandchildren or if there are none to another, gives him an estate tail where he had children living when devise was made, but no grandchildren; Canedy v. Haskins, 13 Met. 389, 46 Am. Dec. 739, holding that where the devise was to take effect at the testator's death, though the devisee had no issue when the devise was made, he did not take an estate tail; Hubbard v. Selser, 44 Miss. 705, holding that a grant to a man and his children will not be construed as giving an estate tail where such is evidently not the intent of the testator; Ellet v. Paxson, 2 Watts & S. 418, holding a devise to a daughter to be handed down to her children as tenants in common gave her a life estate only.

Estate given by devise to children after life estate to parents.

Cited in Jamison v. McWhorter, 7 Houst. (Del.) 242, 31 Atl. 517, holding that a devise of the benefits of land to a son and after his death to his children, remainder over if he had none, gave the son only a life estate; Miller v. Hurt, 12 Ga. 357, holding that a devise to a person and after his death to his children by his present or any future wife, or if no children, to another, does not give an estate tail; Riggins v. Adair, 105 Ga. 727, 31 S. E. 743, holding that where by a trust deed, property is given to be held for the benefit of a daughter for her life, and for the benefit of her children, or if there are no children for others, she has only a life estate even though she has no children; Cooper v. Mitchell Invest. Co. 133 Ga. 769, 29 L.R.A.(N.S.) 291, 66 S. E. 1090, holding that devise "to my children by my first wife and their children after them" created life estate in daughter having one child, with remainder over; Johnson v. Currin, 10 Pa. 498, on the words denoting an intention to pass an estate tail as passing such an estate; Cote v. Von Bonnhorst, 41 Pa. 243, holding that though the devisee did not have any children at the time of the testator's death she did not take an estate tail if afterward children were born to her if the devise was not immediate; Gill v. Ferguson, 1 Pittsb. 387, 5 Pittsb. L. J. 270, holding that a devise to two children as tenants in common after the termination of the wife's life estate, and then to their issue and to others in case of no issue, gave each one of the children an estate tail as a tenant in common; Chavis v. Chavis, 57 S. C. 173, 35 S. E. 507, holding that if the devise be to one for life and then to his children, the children do not take until after the death of the ancestor.

Intention of testator as governing construction of will.

Cited in Daniel v. Whartenby, 17 Wall. 639, 21 L. ed. 661, holding that in construing wills the intention of the testator must be carried out if not in-

consistent with the rules of law; Sisson v. Seabury, 1 Sumn. 235, Fed. Cas. No. 12,913, holding a devise to a person and to his male children to be equally divided amongst them and their heirs forever, gives the ancestor only a life estate, as such was the testator's intention; Tier v. Pennell, 1 Edw. Ch. 334, holding that the word children does not include grand children except where necessary to construe it as such to put into effect the testator's intention; Williams v. McConico, 36 Ala. 22; Robertson v. Johnston, 24 Ga. 102; Provoost v. Calyer, 62 N. Y. 545; Hoge v. Hoge, 1 Serg. & R. 144; Wells v. Ritter, 3 Whart. 208,—on the intention of the testator as governing the construction of a will; Caldwell v. Ferguson, 2 Yeates, 380, holding that a fee would pass without the words of inheritance if such was the testator's intention; Hauer v. Shitz, 3 Yeates, 205, holding that the intention of the testator in order to override the legal import of words used, must be clearly shown; Steele v. Thompson, 14 Serg. & R. 84 (dissenting opinion), on intention of testator as overriding plain technical words in will; Puller v. Puller, 3 Rand. (Va.) 83, on the intention of the testator as governing the construction of a will; Perrin v. Blake, 10 E. R. C. 689, 4 Burr. 2579, 1 W. Bl. 672, Hargrave, Law Tracts, 489, holding that if the intention of the testator be manifestly to the contrary it will control the legal import of the words used; Cholmondeley v. Clinton, 14 E. R. C. 578, 2 Meriv. 171, 2 Jac. & W. 1, 22 Revised Rep. 83, 16 Revised Rep. 167, 4 Bligh, 1, holding that the intention of the testator must be clear, to control the legal meaning of the words used.

Rule in Wilde's Case as a rule of construction and not of law.

Cited in Peterborough Real Estate Invest. Co. v. Patterson, 13 Ont. Rep. 142 (affirmed in 15 Ont. App. Rep. 751), on the rule in Wilde's Case as being a rule of construction and not a rule of law.

Time of vesting of devises.

Cited in Robinson v. Harris, 73 S. C. 469, 6 L.R.A.(N.S.) 330, 53 S. E. 755, holding that if there be no time fixed in a will for the vesting of devises, they vest at the death of the testator and no afterborn child can take any interest; Hayes v. Martz, 173 Ind. 279, 89 N. E. 303, holding that estate vests upon contingency which may happen, however improbable or uncertain at time of devise; Myers v. Myers, 2 M'Cord, Eq. 214, 16 Am. Dec. 648, holding that when the period of distribution is indefinite only those living at the death of the testator can take.

Disposal of real estate by will.

Cited in Marston v. Norton, 5 N. H. 205, on the power of a married woman to dispose of real estate by will.

Cited in 3 Washburn, Real Prop. 6th ed. 470, on inability to devise land under the statute of uses.

Admissibility of extrinsic evidence to explain a will.

Cited in Brown v. Thorndike, 15 Pick. 388, on the admission of extrinsic evidence to explain a will.

Deeds and grants in frankalmoigne.

Cited in Magill v. Brown, Brightly (Pa.) 347 note, Fed. Cas. No. 8,952, on grants in frankalmoigne being once good by deed and now by crown grant.

10 E. R. C. 782, KING v. BURCHELL, Ambl. 379, 1 Eden, 424, 4 T. R. 296, note.

Construction of will.

Cited in note in 10 E. R. C. 818, as to when remainder is vested.

Limitation of an estate tail, inconsistent with its legal attributes.

Cited in Craig v. Warner, 5 Mackey, 460, 60 Am. Rep. 381, on the effect of a devise inconsistent with the estate tail granted the ancestor; Price v. Taylor, 28 Pa. 95, 70 Am. Dec. 105, holding a limitation to the issue in fee forever goes for nothing as being inconsistent with the lineal descent of the estate tail given; Carter v. M'Michael, 10 Serg. & R. 429, on words annexed to words of limitation and serving to limit the fee as being of no effect; Baughman v. Baughman, 2 Yeates, 410; Buist v. Dawes, 4 Rich. Eq. 421 (dissenting opinion), —on the limitation of an estate tail to a life estate.

Cited in note in 10 E. R. C. 802, on invalidity of condition attempting to fetter right of tenant in tail to enlarge his estate into a fee simple.

Rejection of words repugnant to the estate granted.

Cited in De Peyster v. Michael, 6 N. Y. 467, 57 Am. Dec. 470, holding that a condition annexed to a grant in fee that the grantee shall not alien is void as repugnant to the estate granted; Brant v. Provoost, 2 Johns. Cas. 384, holding that words repugnant to the estate created were to be rejected.

Limitation over to heirs as creating an estate tail.

Referred to as leading case in Marshall v. Grime, 29 L. J. Ch. N. S. 592, 28 Beav. 375, 6 Jur. N. S. 390, 8 Week. Rep. 385, holding estate tail was created by devise in fee to one with condition against alienation and limitation absolutely over to heirs of taker's body.

Cited in Carroll v. Burns, 42 Phila. Leg. Int. 153, holding that devise to daughters for life and after their death to their issue and heirs of issue, vests in daughters an estate tail; Wells v. Ritter, 3 Whart. 208, holding that word "issue" in will was intended to be used as "women singulare" by inserting relative thereto "his" in singular number; Hellem v. Severs, 24 Grant, Ch. (U. C.) 320, holding that words male heirs are words of limitation, and addition of words "and to their heirs and assigns forever" is nugatory; Jones v. Morgan, 1 Bro. Ch. 206, holding a devise to one for life and after his decease to the use of his heirs male of his body, severally, respectively, and in remainder, gives the first an estate tail.

Distinguished in Morgan v. Thomas, L. R. 8 Q. B. Div. 575, 51 L. J. Q. B. N. S. 289, 46 L. T. N. S. 431, 30 Week. Rep. 658, 46 J. P. 523, holding a devise to a son for life and after his death to his issue and their heirs forever, or if none, then over, gave a life estate to the son.

Explained in Woodhouse v. Herrick, 24 L. J. Ch. N. S. 649, 1 Kay & J. 352, 3 Eq. R. 817, 3 Week. Rep. 303, holding that the word issue usually meant heirs of the body, and a grant of remainder to "his issue and their heirs," the issue took as descendants and not as purchasers.

Accuracy of report doubted in Jacobs v. Amyatt, 4 Bro. Ch. 542, 1 Madd. Rep. 376 note, 13 Ves. Jr. 479, note, holding a devise to one to be paid to her at her marriage for her use during her natural life, and then unto the heirs of her body equally share and share alike, or remainder over in case of no issue, gave her an estate for life.

Grant of an estate where the words of limitation are in the singular.

Cited in Osborne v. Shrieve, 3 Mason, 391, Fed. Cas. No. 10,598, holding a devise to a man and to his male heir, and his heirs and assigns forever gave the first an estate tail.

Disapproved in Montgomery v. Montgomery, 3 Jo. & Lot. 47, 8 Ir. Eq. Rep. 740, holding that a devise to the issue male meant all the male heirs of the body and not one son.

Intention of testator as controlling construction of will.

Cited in Den ex dem Howell v. Howell, 20 N. J. L. 411, holding that technical words in a will will be construed according to the expressed intention of the testator; Paxson v. Lefferts, 3 Rawle, 59, holding that the testator's intent, if it be clearly shown, will control the legal meaning of words of designating the kind of estate given; Jesson v. Wright, 10 E. R. C. 714, 2 Bligh, 1, 21 Revised Rep. 1, holding that technical words will give way to the testator's intention if such intention is clearly expressed and incompatible with the technical meaning.

Children as a word of limitation or of purchase.

Cited in Sisson v. Seabury, 1 Sumn. 235, Fed. Cas. No. 12,913, holding that the word children is construed as a word of purchase or of limitation according to the intention of the testator; Parkman v. Bowdoin, 1 Sumn. 359, Fed. Cas. No. 10,763, on the construction of the word children, as a word of limitation or of purchase.

Cited in note in 29 L.R.A.(N.S.) 1088, on rule in Shelley's case.

10 E. R. C. 803, DUNCOMB v. DUNCOMB, 3 Lev. 437.

Vested and contingent remainders distinguished.

Cited in Holcombe v. Tuffts, 7 Ga. 538, holding that it is the present capacity to take which distinguishes a vested estate from a contingent one; Glendenning v. Dickinson, 15 B. C. 354, holding that use of word "then" in will, not as period of time but as synonym for "in event" turns scale as between vested and contingent remainders.

Distinguished in Perrin v. Blake, 10 E. R. C. 689, 4 Burr. 2579, 1 W. Bl. 672, Hargrave Law Tracts, 489, holding that an estate to one for life with the remainder to his heirs of his body, gave him an estate tail in possession and not one in remainder, as there would have been, had there been an intervening life estate.

Right to dower in remainder.

Cited in Moore v. Esty, 5 N. H. 469, holding that where the husband has a freehold estate and a vested remainder in fee in land and there is an intervening vested freehold estate in some other person, the widow is not entitled to dower; Den ex dem. Micheau v. Crawford, 8 N. J. L. 90, on the right of a wife to dower in a contingent remainder.

Cited in note in 29 L.R.A.(N.S.) 1000, on rule in Shelley's case.

Cited in 1 Washburn Real Prop. 6th ed. 169, on right of dower in reversions and remainders.

Merger of estates.

Cited in James v. Morey, 2 Cow. 246, 14 Am. Dec. 475, holding that wherever greater estate and lesser coincide and meet in same person, lesser estate is merged in greater; Doe ex dem. McPherson v. Hunter, 4 U. C. Q. B. 449, to the point that if fee comes to tenant for years or for life particular estate is merged in fee.

10 E. R. C. 804, HOOKER v. HOOKER, 2 Barnard K. B. 200, Lee t. Hardw. 13, 2 Barnard K. B. 232, 379, W. Kelynge, 191.

Merger of life estate with remainder.

Cited in Lyle v. Richards, 9 Serg. & R. 322, on the merging of a life estate and remainder in one person.

Cited in 1 Washburn Real Prop. 6th ed. 156, on merger resulting in giving curtesy.

— Destruction of intervening contingencies.

Cited in Craig v. Warner, 5 Mackey, 460, 60 Am. Rep. 381, holding that where the life estate and the reversion were cast upon one person they were merged and a contingent remainder defeated; Bennett v. Morris, 5 Rawle, 9, holding that where particular estate and contingent remainders are not created by will of ancestor from whom inheritance immediately descends on particular estate, remainder is destroyed; Den ex dem. Micheau v. Crawford, 8 N. J. L. 90, holding that where contingent remainder is given, and contingency consists in uncertainty of person by whom estate is to be taken as well as events disconnected with such person, when contingency happens estate vests in person answering description.

Right of dower in reversions and remainders.

Cited in 1 Washburn Real Prop. 6th ed. 170, 171, on right of dower in reversions and remainders.

10 E. R. C. 821, COLE v. LEVINGSTON, 2 Keble 70, 856, 1 Vent. 224.

Creation of cross remainders by implication.

Cited in Simpson v. Coon, 4 Serg. & R. 368, on the creation of cross-remainders by implication; Ray v. Gould, 15 U. C. Q. B. 131, holding that where land was devised to a daughter and her heirs, and also to a son and to grandson and the share of each to go to the others if they died without issue, they took estate tail with cross remainders by implication.

Cited in note in 10 Eng. Rul. Cas. 834, as to when cross remainders will be implied.

Cited in 2 Washburn Real Prop. 6th ed. 524, as to how cross remainders are created.

10 E. R. C. 822, HOLMES v. MEYNEL, 1 T. Jones, 172, T. Raym. 452.

Construction of will.

Cited in Jackson ex dem. Gatfield v. Strang, 1 Hall, 1, holding that words "if one daughter should die" and in case both should die, should be taken to mean dying without lawful issue, in will by which gift over to mother was provided for; Davis v. Shanks, 9 N. C. (2 Hawks) 117, holding that under will giving estate to son and daughter except that if son and daughter should die before coming of age, estate should go to wife; upon death of son before coming of age estate vested in daughter or in wife.

Cited in note in 23 Eng. Rul. Cas. 67, on invalidity for repugnancy of gift over after absolute gift to a designated person.

Creation of cross remainders by implication.

Cited in Lillibridge v. Adie, 1 Mason, 224, Fed. Cas. No. 8,350, holding a devise to two daughters their heirs and assigns, but in case they should die without issue then remainder over, gave them a fee tail estate and cross remainders by implication; Anderson v. Jackson, 16 Johns, 382, 8 Am. Dec. 330, on the creation of cross-remainders by implication; Carr v. Porter, 1 M'Cord, Eq. 60; Carr v. Green, 2 M'Cord, L. 75,—holding that the words after a devise to two persons, "should they die leaving no lawful issue" creates a cross remainder by implication; Ray v. Gould, 15 U. C. Q. B. 131, holding that under will by which devisees took

estate in tail with cross remainders and one having died without issue his share would go to children of deceased cross remainderman.

Cited in notes in 10 E. R. C. 832, as to when cross remainders will be implied; 25 Eng. Rul. Cas. 707, on effect of gift over on failure of issue of all tenants in common after gift in tail to such tenants.

Distinguished in Picot v. Armistead, 37 N. C. (2 Ired. Eq.) 226, holding that a devise to a wife and children, and if the children died under age and unmarried their share to go to her for life remainder to testator's mother, does not create a cross-remainder by implication.

Disinheriting the heir by implication.

Cited in Hauer v. Shitz, 3 Yeates, 205, holding that an heir shall not be disinherited except by express words or necessary implication.

Remainders void for remoteness.

Cited in Torrance v. Torrance, 4 Md. 11, holding that a devise to daughters and in case they died without leaving any child or children or descendants of such children, then remainder over, the remainder over was void for remoteness.

Testator's intention as controlling construction of his will.

Cited in Stevens v. Underhill, 67 N. H. 68, 36 Atl. 370 (note to dissenting opinion), on the intention of the testator as governing the construction of his will; Den ex dem. Harris v. Mills, 4 N. C. (1 Car. Law Repos.) 541, holding that heir at law is preferred, unless intention of testator, to exclude him, appears exceedingly plain.

10 E. R. C. 826, DOE EX DEM. WATTS v. WAINEWRIGHT, 2 Revised Rep. 634, 5 T. R. 427.

Creation of cross-remainders by implication.

Cited in Doe ex dem. Cooper v. Roe, 7 Houst. (Del.) 488, 31 Atl. 1043; Cudworth v. Thompson, 3 Desauss. Eq. 256, 4 Am. Dec. 617; Wake v. Varah, 25 E. R. C. 712, L. R. 2 Ch. Div. 348, 45 L. J. Ch. N. S. 533, 34 L. T. N. S. 437, 24 Week. Rep. 621,—on the creation of cross remainders by implication.

Cited in note in 10 E. R. C. 835, as to when cross remainders will be implied.

Limitations of cross-remainders on failure of issue of takers.

Distinguished in Edwards v. Alliston, 4 Russ. 78, 6 L. J. Ch. 30, 28 Revised Rep. 9, where there were no words applying the words of cross-remaindership of the original to the accruing shares.

Meaning of the word "other" as used in a will.

Cited in Park's Estate, 4 Pa. Co. Ct. 560, 21 W. N. C. 227, 19 Phila. 7, 45 Phila. Leg. Int. 5, holding that the word survivors referred to the children and not the first taker.

Construction of the word "survivor" as meaning "other."

Cited in Scott v. West, 63 Wis. 529, 25 N. W. 18; Re Winstanley 6 Ont. Rep. 315,—on the word "survivor" being read as "other" in the construction of a will; Smith v. Smith, 157 Ala. 79, 25 L.R.A.(N.S.) 1045, 47 So. 220, holding that under devise to two for life, with remainder to their children, and in default of child of either, to the "survivor" with limitation over on both dying without children, share of one dying without children will vest in child of the other although latter has predeceased him; Stout v. Cook, 77 N. J. Eq. 153, 75 Atl. 583, holding that under will giving daughters life use of certain part of estate, and in case any one of them died without issue directing that her share should become part of estate and interest and profits paid to surviving children, word

"surviving" meant stirpital succession; Williams v. James, 20 Week. Rep. 1010, holding that the word "survivor" in a will was to be read as "other" where the devise was to four children or in case of their death without issue then to the surviving children; Holland v. Allsop, 29 Beav. 498, 7 Jur. N. S. 856, 9 Week. Rep. 683, holding that in gift over upon the death of any class without leaving issue, to the "survivor," the word survivor should be construed as "other" in consequence of the ultimate gift over being only to take effect on the death of "all" the class without issue; Cole v. Sewell, 4 Drury & War. 1, 6 Ir. Eq. Rep. 66, 2 Connor & L. 344, holding that the word "survivor or survivors" should be read as "other or others;" Re Jackson, 14 Ir. Ch. Rep. 472, holding that in a devise to three daughters or if one should die before she was entitled to her share, it was to be divided between the surviving daughters, the word surviving meant other; Taylor v. Beverley, 13 L. J. Ch. N. S. 240, 1 Colly Ch. Cas. 108, 8 Jur. 265, holding under similar circumstances that the word surviving meant other and referred to daughters surviving the deceased daughter, and not one surviving the testator; Browne v. Rainsford, Ir. Rep. 1 Eq. 384, holding same under similar devise, that the word survivor meant the "longest liver" of the daughters; Hurry v. Morgan, L. R. 3 Eq. 152, 36 L. J. Ch. N. S. 105, 15 Week. Rep. 87, holding that a devise to several daughters and then to their children or if any should die under twenty-one years of age, and without issue her share to go to her surviving sisters or their issue, meant that the share of one dying under twenty-one was to go to her other sisters or their issue.

Distinguished in Abbott v. Essex Co. 2 Curt. C. C. 126, Fed. Cas. No. 11, holding that where the words "other survivors" was used the word "survivor" could not be construed as "other;" Dooling v. Hobbs, 5 Harr. (Del.) 405, holding a devise to eight grandsons and if either of them should die leaving issue, for it to descend to the surviving ones, the issue of a deceased grandson did not share with the six grandsons in the share of one dying without issue; Anderson v. Brown, 84 Md. 261, 35 Atl. 937, holding that the word survivor meant the survivors of the children named as devisees, and did not include the issue of a deceased child as a surviving line of heirs; Lucena v. Lucena, L. R. 7 Ch. Div. 255, 47 L. J. Ch. N. S. 203, 37 L. T. N. S. 420, 26 Week. Rep. 254, holding that the word "surviving" meant "other" where the share of one child was to go to the testator's surviving children, and that only surviving brothers and sisters and not their issue; O'Brien v. O'Brien, [1896] 2 Ir. Q. B. & Exch. 459, holding that "surviving" meant "other" in view of a limitation over in case of the death of "all" of the takers, and that "surviving either in person or by living issue" was not meant.

10 E. R. C. 836, HOLLIDAY v. OVERTON, 15 Beav. 480, 21 L. J. Ch. N. S. 769, 16 Jur. 346, aff'd by the Court of Appeal in 16 Jur. 751.

Gift of an estate without words of inheritance as giving life estate only.

Cited in Ahearn v. Ahearn, 1 N. B. Eq. Rep. 53, on the necessity of words of inheritance to pass an estate in fee.

Cited in notes in 10 Eng. Rul. Cas. 843, 844, 845, on necessity of words of inheritance to passing of fee; 10 Eng. Rul. Cas. 862, on necessity that estates limited be of the same quality to have rule in Shelley's case applied.

— Trusts.

Cited in Dengel v. Brown, 1 App. D. C. 423, holding that where the estate was by deed conveyed to a trustee in fee in trust for another, and there are no words

of limitation added to the equitable estate, the cestui que trust takes but a life estate; Tillinghast v. Coggeshall, 7 R. I. 383, on the intention or purpose of the creator of the trust being carried out in construing a trust; Re Winston's Settlement [1894] 1 Ch. 661, 63 L. J. Ch. N. S. 273, 8 Reports, 175, 70 L. T. N. S. 681, 42 Week. Rep. 327, holding that where words of inheritance were omitted from a deed of settlement, in trust for children, the children took only life estates.

Distinguished in Re Tringham, [1904] 2 Ch. 487, 73 L. J. Ch. N. S. 695, 91 L. T. N. S. 370, 20 Times L. R. 657, holding that where the intention of the settlor is clearly shown to be that he intended to convey a fee, it will pass an equitable fee by a deed of trust of real estate, even with words of inheritance; Re Irwin [1904] 2 Ch. 752, 73 L. J. Ch. N. S. 832, 53 Week. Rep. 200, holding that where the settlement was to trustees, omitting the word heirs, the estate was for the life time of the trustees or the survivor of them.

10 E. R. C. 840, YARROW v. KNIGHTLEY, L. R. 8 Ch. Div. 736, 47 L. J. Ch. N. S. 874, 39 L. T. N. S. 238, 26 Week. Rep. 704.

Equitable interests as co-extensive with legal estate devised.

Cited in Johnson v. Safe Deposit & T. Co. 79 Md. 18, 28 Atl. 890, holding that a devise in fee to trustees, in trust for others until they sold the same, was a devise of the equitable estate in fee as co-extensive with the legal estate devised.

Necessity of words of inheritance to pass fee.

Cited in note in 10 E. R. C. 843, on necessity of words of inheritance to passing of fee.

10 E. R. C. 847, DAWSON v. SMALL, L. R. 9 Ch. 651, affirming the decision of the Vice Chancellor, reported in 43 L. J. Ch. N. S. 486, 30 L. T. N. S. 252, 22 Week. Rep. 514.

Indefinite failure of issue under the Wills Act.

Cited in Gambrill v. Forest Grove Lodge, 66 Md. 17, 5 Atl. 548 (dissenting opinion), on a devise in case the devisee should die without heirs, as being within the wills act; Ernst v. Zwicker, 27 Can. S. C. 594, holding a devise over if the first devisee should die without leaving lawful heirs him surviving, was not within the wills act; Re Brown, 29 Ont. Rep. 402, holding that the wills act relating to failure of issue is to be construed strictly and does not apply where the word heirs is used.

Cited in notes in 10 Eng. Rul. Cas. 834, as to when cross remainders will be implied; 10 E. R. C. 854, on construction of words importing an indefinite failure of issue.

10 E. R. C. 855, SILVESTER EX DEM. LAW v. WILSON, 1 Revised Rep. 519, 2 T. R. 444.

Application of rule in Shelley's Case.

Cited in King v. Beck, 12 Ohio, 390, holding a devise to one for life, and after his decease to the heirs of his body, and failing heirs at his decease, then over, is within the rule in Shelley's Case; Milhollen v. Rice, 13 W. Va. 510, holding that where the life estate was in land, and the power of disposal was over the proceeds of the land, the rule in Shelley's case did not apply.

Cited in note in 29 L.R.A.(N.S.) 1031, on rule in Shelley's case.

— Trust estates.

Cited in Carradine v. Carradine, 33 Miss. 698, holding that wherever the whole

beneficial interest in the estate is vested in the first taker and the mere naked legal title only remains in the trustee, the rule in Shelley's case applies; Payne v. Sale, 22 N. C. (2 Dev. & B. Eq.) 455, holding that where the estate devised was equitable and the limitation over was legal, the rule did not apply and the two estates did not unite; Crosby v. Davis, 2 Clark (Pa.) 403, holding that where the limitation to trustees in trust for one for life, with remainder in fee to his heirs, is executed by the statute of uses, the rule applies.

Trustees as taking legal title to estate where necessary to the purposes of trust.

Cited in Judson v. Lyford, 3 Cal. Unrep. 199, 23 Pac. 581, holding that trustee who is to receive rents and apply them to maintenance of cestui que trust, holds legal title; Morton v. Barrett, 22 Me. 257, 39 Am. Dec. 575, holding that where the trustee can not perform the duties imposed upon him by the will without having legal title in the property, he will take the legal title; Upham v. Varney, 15 N. H. 462, holding that the trustees will take a legal estate wherever necessary in order to effect the purposes of the trust; Brewster v. Striker, 1 E. D. Smith, 321, holding that where something is to be done by the trustees which makes it necessary that they take the legal estate, they will have such estate; Roberts v. Roberts, 1 Disney (Ohio) 177, holding that leaving house to wife for life to be managed by executors, vests legal right of possession in executors; Ex parte Gadsden v. Cappedeville, 3 Rich. L. 467, holding that a devise to a trustee and his heirs carries a fee; Scott v. West, 63 Wis. 529, 24 N. W. 161, holding that where the duties imposed upon the executors is such as is imposed upon trustees, a trust estate is created by implication and the executors will take the legal title to the whole estate; Doe ex dem. Snyder v. Masters, 8 U. C. Q. B. 55, (dissenting opinion), on the execution of a trust when the necessity ceased of the legal estate continuing in the grantee; Hooberry v. Harding, 10 Lea, 392 (reversing in part 3 Tenn. Ch. 677); M'Donald v. M'Donald, 34 U. C. Q. B. 369,— on the necessity of the trustees taking a legal estate sufficient to enable him to perform the trust.

Distinguished in McNish v. Guerard, 4 Strobh. Eq. 66, holding that where the land was devised to father as trustee for his children until a certain time to be occupied and used entirely for the maintenance of the children, the legal estate vested in the children.

Execution of uses and trusts by statute of uses.

Cited in Leigh v. Harrison, 69 Miss. 923, 18 L.R.A. 49, 11 So. 604, holding that the statute of uses does not apply where the trustee has a duty or power to perform; New Parish v. Odiorne, 1 N. H. 232, holding that where the devisee as trustee has a discretion as to persons or objects which are to receive the benefit of the devise, the trustee takes the entire legal estate; Ashhurst v. Given, 5 Watts & S. 323, holding that where an estate was given in trust for a son for the purpose that creditors of the son could not deprive him of it, the trust will not be executed; Luther v. Haile, 10 R. I. 291, on the execution of trusts by operation of law; Laurens v. Jenney, 1 Speers, L. 356, holding that a trust will be executed unless the object of creating it would be defeated, but it is not sufficient that there may be something for the trustee to do; Hooberry v. Harding, 3 Tenn. Ch. 677 (reversed in part by 10 Lea, 392), as to what trusts are executed by the statute of uses; Gamble v. Rees, 6 U. C. Q. B. 396, on the distinction between a trust and a use.

10 E. R. C. 864, BROUGHTON v. LANGLEY, 1 Eq. Cas. Abr. 383, Holt, 708, Lut. pt. 1, p. 329, 2 Ld. Raym. 873, 2 Salk. 679.

Execution of a passive trust by the statute of uses.

Cited in Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762, holding that unless there is imposed upon the trustee, some duty in connection with the estate, necessary for the enjoyment of the estate by the beneficiary the legal estate would not vest in the trustee; Carradine v. Carradine, 33 Miss. 698, holding that a trust is executed unless the instrument creating it contemplates some future act of conveyance by the trustee and without which the estate would not vest in the cestui que trust; Hutchins v. Heywood, 50 N. H. 491, on the execution of a passive trust by the statute of uses; Brewster v. Striker, 1 E. D. Smith, 321, holding a devise of land to trustees to lease the same, and keep in repair, and to pay the rents and profits to the cestui que trust created an active trust which was not executed; Wilder v. Ireland, 53 N. C. (8 Jones, L.) 91, on the execution of a use created by a devise; Crosby v. Davis, 2 Clark (Pa.) 403, on the execution of a passive trust by the statute of uses; Ramsey v. Marsh, 2 M'Cord L. 252, 13 Am. Dec. 717, holding a devise of land to one to hold in trust for and to the use of another, conveyed the legal estate to the cestui que use; McNish v. Guerard, 4 Strobh. Eq. 66, holding a conveyance of land to the father in trust to be occupied and used entirely for the maintenance and support of the children, conveyed the legal title to the children; Doe ex dem. Snyder v. Masters, 8 U. C. Q. B. 55, holding that the statute of uses applied where the property was granted in trust as well as for the use of; Jesson v. Wright, 10 E. R. C. 714, 2 Bligh, 1, 21 Revised Rep. 1, on the execution of a limitation by way of a use.

— To permit the use and enjoyment of land.

Referred to as a leading case in Upham v. Varney, 15 N. H. 462, holding that a devise of land to a trustee, that the latter should permit another to occupy the land and receive the income for life, created a use which was executed.

Cited in Hayes v. Tabor, 41 N. H. 521, holding that a devise to one upon the use that he shall permit others to use the same during their life time, created a passive use which was executed; Parks v. Parks, 9 Paige, 107, on a devise of land to one to the use of another, who is to be permitted to enjoy the rent and profit of land as being executed by the statute of uses; Gilkey v. Shepard, 51 Vt. 546, on the distinction between a direction that the trustee pay over the rents and profits, and to permit the life tenant to enjoy the rents and profits.

Distinguished in Pullen v. Rianhard, 1 Whart. 514, holding that where the cestui que trust was a married woman, the trust was not executed though it was given to the trustee to permit her to enjoy the rents and profits.

Creation of a trust or use.

Cited in Tappan's Appeal, 55 N. H. 317, on the creation of a use by the use of the word trust; Jackson ex dem. Salisbury v. Fish, 10 Johns. 456, on the words necessary to create a use; Gamble v. Rees, 6 U. C. Q. B. 396, on the distinction between a use and a trust.

Cited in note in 10 E. R. C. 886, on application of statute of uses to wills.

Cited in 2 Washburn Real Prop. 6th ed. 407, on application of doctrine of uses to devises; 2 Washburn Real Prop. 6th ed. 422, on distinction between executed uses and trusts.

Creation of an estate tail.

Cited in Lenoir v. Rainey, 15 Ala. 667, on the creation of an estate in tail by a devise to a wife to be held in trust for her for life and then to the heirs of her body; Perrin v. Blake, 10 E. R. C. 689, Hargrave Law Tracts, 489, 4 Burr.

257a, 1 W. Bl. 672, on the creation of an estate tail; Romanes v. Smith, 8 Ont. Pr. Rep. 323, holding that under devise of land to executors, "to hold same in trust for use and benefit of son and after his death, in trust for his heirs, until youngest becomes of age" and then to convey to heirs of son, son took only estate for life.

Cited in note in 29 L.R.A.(N.S.) 1034, 1056, on rule in Shelley's case.

10 E. R. C. 871, HARTON v. HARTON, 4 Revised Rep. 537, 7 T. R. 652.

Active trusts as not being executed by statute of uses.

Cited in Crosby v. Davis, 2 Clark (Pa.) 403, holding that where the trustee is or may be called upon to exercise some discretion to do some duty, the trust is not executed; Read v. Read, 8 Rich. Eq. 145, on the execution of passive trusts by the statute of uses; Hooberry v. Harding, 10 Lea, 392 (affirming in part 3 Tenn. Ch. 677), holding that special or active trusts which require some act to be done or some duty performed, are not within the statute of uses; Williston v. White, 11 Vt. 40, holding that where the trustee has an active duty to perform and it will defeat the purposes of the trust, the use will not be executed; New Parish v. Odiorne, 1 N. H. 232, holding a devise of land to one for the benefit of others, where the trustee has a discretion as to the persons or objects which are to receive the benefits of the trust, creates a trust which is not executed; Hooberry v. Harding, 3 Tenn. Ch. 677, holding that special or active trusts which require some act to be done are not within statute of uses; Weir v. Chamley, 1 Ir. Ch. Rep. 295, on the question whether a use was legally executed.

Cited in note in 10 E. R. C. 886, on application of statute of uses to wills.

Cited in 2 Washburn Real Prop. 6th ed. 415, 422, on distinction between executed uses and trusts.

Distinguished in Upham v. Varney, 15 N. H. 462, holding a devise of lands to a trustee, that the latter should permit the testator's son to occupy the land and receive the rents and profits, created a passive use which was executed.

—For the benefit of a married woman.

Cited in Witter v. Dudley, 36 Ala. 135, holding that where by any instrument a separate estate is given to a married woman, and a trustee is appointed, the courts strive to construe it so that the trustee takes the legal estate; Sanderson v. Jones, 6 Fla. 430, 63 Am. Dec. 217 (dissenting opinion); Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762,—on a devise to a trustee for the use of a married woman as not being within the statute of uses; Parks v. Parks, 9 Paige, 107, on a devise to one in trust to pay the rents to a married woman, as creating an active trust, not executed; Bowen v. Chase, 94 U. S. 812, 24 L. ed. 184, holding that where a trust is created for the benefit of a married woman for the purpose of giving her the separate use of lands, it will not be executed; Hawkins v. Luscombe, 2 Swanst. 375, holding that the construction should be in favor of the vesting of the legal estate in the trustees for effecting a limitation to the separate use of a married woman.

Cited in 2 Washburn Real Prop. 6th ed. 424, on trust for protection of married woman as an active trust; 2 Washburn Real Prop. 6th ed. 425, on liberal construction of uses in favor of married woman.

Vesting of legal estate in trustee when necessary for the purposes of the trust.

Cited in Morton v. Barrett, 22 Me. 257, 39 Am. Dec. 575, holding that when

the trustee can not perform the duties imposed upon him by the will without having the legal title, he will be considered as taking the legal title: Gamble v Rees, 6 U. C. Q. B. 396, holding that where it is necessary that the trustee take the legal estate in order to enable him to perform the trusts, he will be considered as taking it; Doe ex dem. Snyder v. Masters, 8 U. C. Q. B. 55 (dissenting opinion), on validity of deed executed by heir of lunatic after his death, when Crown had granted to trustee land, in trust for lunatic.

Cited in 2 Beach Trusts, 924, on legal fee remaining in trustee in case of power in trust; 2 Beach Trusts, 930, on estate of trustee in case of trust to preserve contingent remainders; Underhill Am. Ed. Trusts, 201, on trustees taking some estate where control or discretion is vested in them; Underhill Am. Ed. Trusts, 208, on quantity of estate taken by trustees.

Distinguished in Re Adams & P. Contract [1899] 1 Ch. 554, 68 L. J. Ch. N. S. 259, 80 L. T. N. S. 149, 47 Week. Rep. 326, holding that the purposes of the will did not require the legal estate to vest in the trustees.

—Legal estate once vested, as remaining in the trustee.

Cited in Vangrutten v. Foxwell [1897] A. C. 658, 66 L. J. Q. B. N. S. 745, 77 L. T. N. S. 170, 46 Week. Rep. 426, holding that where there are recurring occasions for the exercise of active duties by the trustees and repeated devises to enable them to perform their duties, the legal estate if once in the trustees is deemed to be vested in them throughout.

Doubted in Brown v. Whiteway, 8 Hare, 145, holding that a devise to trustees and heirs upon diverse trusts in succession some requiring the legal estate to remain in the trustees and some otherwise, the whole legal estate remains in the trustees.

Intention of the testator as affecting the operation of the statute of uses.

Cited in Conner v. Waring, 52 Md. 724, on the intention of the testator to vest the fee in the trustee as taking the trust out of the operation of the statute of uses; Norton v. Leonard, 12 Pick. 152; McNish v. Guerard, 4 Strobh. Eq. 66,—on the testator's intention to create an active trust as taking the trust out of the operation of the statute; Blagrave v. Blagrave, 19 L. J. Exch. N. S. 414, 4 Exch. 550, holding that where it is the intention of the testator that the trustees take a legal estate, the words "to the use of" will not control it; Toler v. Atwood, 20 L. J. Q. B. N. S. 40, 15 Q. B. 929, holding that the trustees will take a legal estate where it is necessary to enable them to carry out the intention of the testator.

Cited in 2 Beach Trusts, 923, on title of trustee as being determined by intention of testator.

Construction of conveyances.

Cited in Foxwell v. Van Grutten, 82 L. T. N. S. 272, 48 Week. Rep. 653, 16 Times L. R. 259, as being a decision probably not yet known to the draftsman when a certain will was drawn, which will should be construed accordingly.

Cited in note in 14 Eng. Rul. Cas. 800, on construing deed so as to take effect if possible.

10 E. R. C. 874, BAKER v. WHITE, 44 L. J. Ch. N. S. 651, L. R. 20 Eq. 166, 33 L. T. N. S. 347, 23 Week. Rep. 670.

Construction of will.

Cited in Seaton v. Lunney, 27 Grant, Ch. (U. C.) 169, to the point that devise of estate to trustees does not operate under statute of uses.

Cited in note in 10 E. R. C. 885, on application of statute of uses to wills.

Containing a mixed devise.

Cited in Re Allsop & J. Contract, 61 L. T. N. S. 213, holding that where by his will the testator devised both freehold estates and copyhold estates in trust for his son with remainder over under certain conditions, the son took a legal estate in tail in the freeholds; Re Brooke, [1894] 1 Ch. 43, 63 L. J. Ch. N. S. 159, 8 Reports, 24, 70 L. T. N. S. 71, 42 Week. Rep. 186, on the construction of a will which included a gift of chattels and of the house in which the chattels were; Re Townsend's Contract [1895] 1 Ch. 716, 64 L. J. Ch. N. S. 334, 13 Reports, 328, 72 L. T. N. S. 321, 43 Week. Rep. 392, on the construction of a devise which includes both freehold and copyhold estates.

10 E. R. C. 888, RE OWEN, L. R. 10 Ch. Div. 166, 48 L. J. Ch. N. S. 248, 27 Week. Rep. 305.

THIRD CIRCUIT COURT
Hilo, Hawaii

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